

DATE: April 28, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0191

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

Administrative Judge Barry M. Sax issued a decision, dated October 28, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by finding Applicant's conduct was criminal in nature; (2) whether the Administrative Judge erred by finding against Applicant with respect to subparagraphs 1.a. through 1.e. of the Statement of Reasons; (3) whether the Administrative Judge failed to give due consideration to the "whole person" concept and pertinent mitigating factors; (4) whether the Administrative Judge erred by finding there was a nexus between Applicant's conduct and his security eligibility; and (5) whether the Administrative Judge's adverse decision disregarded Defense Office of Hearings and Appeals precedent and policy.

Procedural History

In April 1991, a Statement of Reasons (SOR) was issued to Applicant, alleging, *inter alia*, that he had failed to file his federal income tax returns for 1985-1989 and his state income tax returns for 1986-1989. After a hearing, an Administrative Judge issued a written decision, dated December 26, 1991, in which he concluded Applicant had demonstrated sufficient mitigation and rehabilitation to warrant a favorable security clearance decision.

The Defense Office of Hearings and Appeals issued an SOR dated April 15, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and alleged Applicant willfully failed to file his federal income tax returns for 1985-1988, 1990-1995 and Applicant failed to file his state income tax returns for 1990-1995.

A hearing was held on September 9, 1997. The Administrative Judge subsequently issued a written decision, dated October 28, 1997. In that decision, the Administrative Judge found that Applicant failed to timely file state income tax returns for 1983-1996 and failed to timely file federal income tax returns for 1983-1996. The Judge also found Applicant filed his state and federal income tax returns for 1983-1989 in November 1991, filed his state and federal

income tax returns for 1994-1996 on or about September 18, 1997, but did not file his state and federal income tax returns for 1990-1993. The Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge erred by finding Applicant's conduct was criminal in nature. On appeal, Applicant does not challenge the Administrative Judge's findings about his failure to timely file his state and federal income taxes. However, Applicant contends the Judge erred by finding that Applicant's conduct was criminal under Criterion J. Applicant argues the state and federal tax authorities have chosen to treat Applicant's conduct as a civil matter and the Judge should have given deference to their decision to not treat Applicant's conduct as a criminal matter. Applicant's argument fails to demonstrate the Judge erred.

The mere fact that an applicant has not been criminally charged or convicted does not preclude an Administrative Judge from finding that the applicant engaged in criminal conduct. *See, e.g.*, ISCR Case No. 95-0818 (January 31, 1997) at p. 4. Of course, DOHA proceedings are limited to adjudicating an applicant's security eligibility under Executive Order 10865 and the Directive, and therefore, any finding of criminal conduct in these proceedings has no legal force or effect beyond the adjudication of an applicant's security eligibility. In this case, the Judge had a sufficient basis in fact and law to find that Applicant's conduct was criminal under Criterion J. Moreover, Applicant's conduct is not rendered noncriminal because of its misdemeanor nature or because it was not as serious as other crimes. The fact that Applicant's conduct was not worse does not render the Judge's decision arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge erred by finding against Applicant with respect to subparagraphs 1.a. through 1.e. of the Statement of Reasons. SOR subparagraphs 1.a. through 1.e. dealt with Applicant's conduct that was covered by the April 1991 SOR and adjudicated by another Administrative Judge, who issued a decision on December 26, 1991 concerning that conduct. Applicant contends the Administrative Judge in this case erred by finding against him with respect to SOR subparagraphs 1.a. through 1.e. because those paragraphs involved conduct that was adjudicated favorably in the 1991 security clearance decision and "further prosecution for these events is barred under the concepts of collateral estoppel and *res judicata*." Applicant's argument fails to demonstrate the Judge erred in this case.

Res judicata involves issue preclusion when the same claim or cause of action has been litigated previously. Collateral estoppel involves issue preclusion when a particular issue or fact has been litigated previously even though the previous litigation involved a different claim or cause of action. Given the particulars of Applicant's argument, the Board concludes it falls under the doctrine of *res judicata*, not the doctrine of collateral estoppel.

The doctrine of *res judicata* can be applied to decisions of administrative bodies that have attained finality. *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 107 (1991). However, the doctrine of *res judicata* is not applied as strictly in administrative proceedings as it is in judicial proceedings. DISCR Case No. 86-3543 (April 27, 1989) at p. 3 (citing federal cases). Furthermore, the doctrine of *res judicata* should not be applied in the face of a contrary public policy. *Quinones Candelario v. Postmaster General of United States*, 906 F.2d 798, 801 (1st Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); DISCR Case No. 86-3543 (April 27, 1989) at p. 3 (citing federal cases).

The federal government has a compelling interest in protecting and safeguarding classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Furthermore, no one has a right to a security clearance. 484 U.S. at 528. A favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. DISCR Case No. 86-3543 (April 27, 1989) at p. 3. Accordingly, the doctrine of *res judicata* does not bar an adverse security clearance decision when an applicant has engaged in misconduct subsequent to a favorable security clearance decision. DISCR Case No. 91-1436 (May 3, 1993) at p. 4; DISCR Case No. 91-0775 (August 25, 1992) at p. 3. If an applicant who received a favorable decision based on a finding of reform and rehabilitation subsequently engages in misconduct, it is reasonable for the federal government to decide that the applicant's security eligibility should be reevaluated in light of the applicant's new misconduct. And, in light of the "whole person" concept (Directive, Section F.3), such a reevaluation should consider the applicant's overall history, including the earlier misconduct, not just the most recent instances of the applicant's conduct.

3. Whether the Administrative Judge failed to give due consideration to the "whole person" concept and pertinent mitigating factors. Applicant contends the Administrative Judge failed to consider favorable evidence of Applicant's professional career, job performance, and the absence of any security violations by Applicant. Applicant acknowledges Board precedent that holds there is a rebuttable presumption that a Judge considered all the evidence, but contends the presumption is rebutted in this case. The Board does not find Applicant's contention persuasive.

The absence of security violations does not preclude an adverse security clearance decision based on other security-significant conduct. *See, e.g.*, ISCR Case No. 97-0628 (April 17, 1998) at p. 3. Furthermore, security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 97-0591 (March 25, 1998) at p. 2. Accordingly, neither the absence of security violations by Applicant nor his job performance precluded the Administrative Judge from rendering an adverse decision based on other security-significant conduct by Applicant.

It is not frivolous for Applicant to be concerned about the absence of any discussion by the Administrative Judge of certain favorable information cited by Applicant on appeal. Applicant correctly argues that a Judge must consider all the evidence, not just the evidence that supports his findings. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 2 (Board must consider not only whether there is evidence supporting the Judge's findings, but also whether there is record evidence that fairly detracts from the weight of the evidence supporting those findings). However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 97-0351 (December 22, 1997) at p. 3. There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. Furthermore, a Judge is not required to discuss each and every piece of evidence. *See, e.g.*, ISCR Case No. 97-0606 (April 20, 1998) at p. 3. Considering the record as a whole, the Board concludes the Judge's failure to discuss the specific evidence cited by Applicant does not constitute harmful error. The Judge's decision sets forth sufficient findings and conclusions to enable the Board to discern his reasoning and conclude that his overall analysis is not arbitrary, capricious, or contrary to law.

Finally, the mere presence of mitigating evidence does not compel an Administrative Judge to make a favorable security clearance decision. In making a decision, the Administrative Judge must consider the favorable and unfavorable evidence (Directive, Section F.3) and apply pertinent Adjudicative Guidelines. Furthermore, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 96-0871 (January 29, 1998) at p. 3. Considering the record as a whole, Applicant has failed to demonstrate the Judge acted in an arbitrary or capricious manner in his weighing of the record evidence.

4. Whether the Administrative Judge erred by finding there was a nexus between Applicant's conduct and his security eligibility. Applicant contends the Administrative Judge erred because there is no nexus between his conduct and his ability to properly handle and safeguard classified information. In support of this contention, Applicant argues: (a) his conduct has not been treated as a criminal matter by state and federal tax authorities; (b) he has never committed a security violation; (c) he has no other blemish on his character; (d) he has satisfied his tax obligations and even paid more taxes than he owed; (e) the Judge erred by failing to distinguish between serious criminal conduct and less serious conduct such as Applicant's; and (f) there is no nexus between Applicant's conduct and his ability to safeguard classified information. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Applicant's first and second arguments are variations of other appeal arguments that have been addressed earlier in this decision.

Applicant's third and fourth arguments fail to demonstrate the Administrative Judge erred. As discussed earlier, the Administrative Judge must consider the favorable and unfavorable evidence, apply pertinent Adjudicative Guidelines, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Considering the record as a whole, Applicant has failed to demonstrate the Judge acted in an arbitrary or capricious manner in his weighing of the record evidence, both favorable and unfavorable.

Applicant's remaining two arguments also fail to demonstrate the Administrative Judge erred. Security clearance decisions are not an exact science, but rather involve predictive judgments about a person's security eligibility based on consideration of that person's conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29

(1988). Direct or objective evidence of a nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). Of course, in making a security clearance decision, the Judge needs to consider particular facts and circumstances of each case, including the nature and seriousness of the applicant's conduct. Directive, Section F.3; Adjudicative Guidelines (general factors for adjudicators to consider). Applicant's conduct in this case, failing to timely file state and federal income tax returns, provides a rational basis for the Administrative Judge to have doubts about Applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 97-0176 (January 22, 1998) at p. 3. Furthermore, the Judge had a rational basis for having doubts about whether Applicant would follow through with his current promises of reform and rehabilitation. The record evidence shows that Applicant was cleared in December 1991 by another Judge on the basis that he had demonstrated reform and rehabilitation, yet Applicant repeated his conduct for several years after receiving that favorable decision. The Judge's analysis was not arbitrary, capricious, or contrary to law. *See* Directive, Section F.3.e. ("Absence or presence of rehabilitation"); Section F.3.f. ("Probability that the circumstances or conduct will continue or recur in the future").

5. Whether the Administrative Judge's adverse decision disregarded Defense Office of Hearings and Appeals precedent and policy. Applicant contends the Administrative Judge's decision should not be affirmed because: (a) it is contrary to decisions by Administrative Judges in other cases involving similar conduct; and (b) the Appeal Board has affirmed favorable security clearance decisions where applicants have engaged in more serious misconduct.

Applicant's first argument overlooks an important point: the mere fact that an applicant in a given case was cleared does not translate into a general policy that all other applicants who engaged in similar conduct must be cleared. Conversely, the mere fact that an applicant in a given case was not cleared does not translate into a general policy that all other applicants who engaged in similar conduct cannot be cleared. Within the parameters of the Directive, the Judge must weigh the evidence (both favorable and unfavorable), evaluate an applicant's situation in light of the particular facts of each case, and apply pertinent Adjudicative Guidelines. Depending on the record evidence, a particular kind of conduct may differ in degree of seriousness due to the presence of aggravating or extenuating circumstances, or the presence or absence of evidence of reform and rehabilitation. Accordingly, the fact that a Judge does not engage in mechanical adjudication (whether favorable or unfavorable) with respect to a particular kind of conduct does not indicate the Judge is acting in a manner that is arbitrary, capricious, or contrary to law.

For the reasons set forth in footnote 1 of this decision, Applicant's reliance on Administrative Judge decisions in other cases is misplaced. The Judge in this case was not bound to follow decisions made by his colleagues in other DOHA cases. The mere fact that Judges have rendered favorable security clearance decisions in other cases involving failure to file income tax returns does not, by itself, render the Judge's decision in this case arbitrary, capricious, or contrary to law. Moreover, the four favorable decisions cited by Applicant are distinguishable from this case in one significant detail: unlike the four cited cases, Applicant's failure to file income tax returns was repeated for several years *after* Applicant had persuaded a Judge in 1991 that he had demonstrated reform and rehabilitation sufficient to warrant a favorable clearance decision. None of the four favorable decisions cited by Applicant involved a repeat of security-significant conduct after an earlier favorable adjudication.

Applicant's citation of some Board decisions in the last part of his brief also fails to demonstrate the Administrative Judge erred in this case. The Board decisions cited by Applicant are distinguishable. They involved significantly greater passages of time between the applicants' security-significant conduct and the security clearance hearing than occurred in this case. And, unlike Applicant's situation, none of the cited Board decisions involved an applicant repeating security-significant conduct after receiving a favorable security clearance decision. Accordingly, the particular findings of extenuation, mitigation or changed circumstances that the Board allowed to stand on appeal in the cited cases were not undermined or undercut by subsequent security-significant conduct by the applicants in the cited decisions. As discussed earlier in this decision, Applicant's repeat of his conduct for several years after receiving a favorable decision in December 1991 provided a rational basis for the Judge's doubts about the likelihood that Applicant would actually follow through with his current promises of reform and rehabilitation.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's October 28, 1997 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant cites various Administrative Judge decisions to support his appeal arguments. Although such decisions may be cited as persuasive authority, they are not binding on the Board. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 2. Moreover, just as one trial judge is not bound by decisions of other trial judges, the Administrative Judge in this case was not bound to follow decisions made by his colleagues in other DOHA cases.