

DATE: April 20, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0606

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge John G. Metz, Jr. issued a decision, dated January 30, 1998, 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

#### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 5, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR and requested a hearing. A hearing was held on January 6, 1998. The Administrative Judge subsequently issued a written decision in which he 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 unfavorable decision.

#### **Appeal Issue**

The Administrative Judge found that Applicant had willfully failed to file his federal income tax returns for the years 1992, 1994, 1995 and 1996 and that he had willfully failed to file his state income tax returns for 1994, 1995 and 1996. The Judge concluded that this pattern of behavior raised security concerns. The Judge also concluded that Applicant had not rebutted the case against him under Criterion J because his conduct was recent and not isolated, because at the time of the hearing Applicant had still not filed his state income tax returns, and because there was no clear evidence of successful rehabilitation.

Applicant makes the following arguments on appeal: (1) he has entered into an agreement with the Internal Revenue Service (IRS) to repay his outstanding tax liabilities; (2) the IRS has made a correction that lowers the amount of tax outstanding to \$1,151.55, which Applicant hopes to pay off by the end of 1998; (3) Applicant held off on filing his state income tax returns on the advice of his tax preparer but plans to have his state taxes resolved by the end of 1998; and (4) the IRS assigns no criminal intent to Applicant in his failure to file since they have not charged him criminally nor have they assessed penalties. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious or contrary to law.

Applicant's first and second arguments are essentially proffers of information which constitute new evidence not contained in the record below. No evidence of a firm repayment agreement exists in the record.<sup>(1)</sup> There is no mention in the record evidence of a correction that caused the IRS to reduce Applicant's overall tax liability. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Accordingly, Applicant's first and second arguments provide no basis on appeal for disturbing the Judge's findings and conclusions.

As part of his third appeal argument Applicant recounts his hearing testimony that he held off on filing his state income tax returns because his tax preparer told him to resolve his federal income tax arrearages first. Upon review of the record as a whole, the Board concludes that both the Judge's finding that the failure to file state income taxes was willful and his conclusion that such failure was unmitigated were reasonable and supported by the evidence regardless of Applicant's testimony that his failure to file state returns prior to the hearing was based on his preparer's advice.

The Judge's failure to specifically comment upon Applicant's purported reliance on the advice of his tax preparer was not error. There is a rebuttable presumption that the Administrative Judge has considered all the evidence in the record unless the Judge specifically states otherwise. ISCR Case No. 97-0289 (January 22, 1998) at p.5. Additionally, there is no requirement that an Administrative Judge mention each and every item of evidence in the case record when rendering his decision. ISCR Case No. 96-0608 (August 28, 1997) at p. 4. An overall reading of the Judge's decision makes clear that the Judge did not find any reasonable excuse for Applicant's failure to file his tax returns, federal or state, when required, despite Applicant's various explanations. Furthermore, Applicant's stated intention to resolve his outstanding tax problems by the end of 1998 does not constitute evidence of actual current rehabilitation that would require the Judge to clear Applicant.

Applicant's fourth appeal argument asserts that the IRS did not regard Applicant as having criminal intent when he failed to file taxes since he has not been charged criminally. The fact that Applicant has not been formally charged with a crime or convicted of a crime fails to undercut the Judge's finding that criminal activity took place. Even in the absence of a criminal conviction the government can prove and the Administrative Judge can conclude that Applicant engaged in criminal conduct. ISCR Case No. 95-0817 (February 21, 1997) at p. 7. There was sufficient evidence in this case to support the Judge's findings and conclusions that Applicant violated the law. There is also ample record evidence to support the Judge's conclusion that the conduct was security-significant and unmitigated. The Judge made specific reference to the fact that the criminal violations in this case were misdemeanors and had not been charged. Nevertheless he concluded that the underlying conduct and the circumstances surrounding it were of sufficient magnitude to cast doubt on Applicant's fitness for access to classified information. Such a conclusion reflects a reasonable and plausible interpretation of the record evidence. Applicant fails to demonstrate that the Judge's conclusion is arbitrary, capricious or contrary to law.

## **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's January 30, 1998 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. While Applicant had contacted the IRS immediately prior to the hearing to resolve his tax difficulties and he had discussed details concerning repayment with them, at the time of the hearing he had not yet reached an agreement with them concerning specific amounts or time for repayment or method of repayment of delinquent taxes. The absence of an agreement was a factor that the Judge reasonably relied on in concluding that Applicant failed to demonstrate evidence of successful rehabilitation.