

DATE: November 6, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0744

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

Neil Weinberg, Esq.

Administrative Judge Barry M. Sax issued a decision dated June 15, 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.

The 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 issue: Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 2, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct), Criterion F (Financial Considerations), and Criterion E (Personal Conduct).

A hearing was held on May 14, 1988. The Administrative Judge subsequently issued a written decision dated June 15, 1998 in which he concluded that 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 appeal from that adverse decision.

Appeal Issue

Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law? Applicant raises several objections to the Administrative Judge's decision. Applicant contends that the Administrative Judge improperly applied a per se rule in Applicant's case. Applicant asserts that inadequate weight was given to evidence that supports his case (including character testimony of Applicant's supervisor, improvements in Applicant's financial situation and his military record). Applicant contends that his criminal conduct was less serious than the Administrative Judge concluded because it involved acts of omission rather than overt acts.

Applicant's eligibility for a security clearance had been the subject of a previous DOHA proceeding in 1995. The 1995 case involved allegations under the then existing criteria for financial matters, criminal conduct and poor judgment. The underlying conduct alleged in that proceeding involved failure to file or pay income taxes as required by law. The Administrative Judge in the 1995 case found that Applicant had mitigated the case against him. Applicant contends that the Administrative Judge in the current case is applying a per se rule to deny Applicant a clearance, without regard to the evidence, because he had already been through the system before.

Applicant's contentions regarding the application of a per se rule are unpersuasive. The Administrative Judge has a responsibility to consider the whole person. *See* Directive, Adjudicative Guidelines, Enclosure 2 at pages 2-1 to 2-3. It is entirely appropriate that the Administrative Judge considered the previous adjudication, especially in light of the fact that Applicant's misconduct in the current case is quite similar in nature to the conduct that led to the first case. The Administrative Judge did not, however, limit his analysis to the connection between the two cases. The Administrative Judge also did not suggest that he was applying any per se rule or analysis. Rather, the Administrative Judge evaluated the case in terms of Applicant's overall history of conduct, including Applicant's failure to change or reform his conduct after the 1995 favorable security adjudication. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 4 ("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."). There is no basis for Applicant's contention and it is therefore unpersuasive.

Applicant asserts that insufficient weight was given to evidence which he believes buttresses his case. This evidence includes character testimony, improvements in Applicant's financial situation and Applicant's military record. The character testimony presented by Applicant's supervisor was of limited applicability since the supervisor had only recently been advised of the pertinent issues in the case and could not speak to their substance. The Administrative Judge did refer to improvements in Applicant's tax situation, but was understandably concerned that, in spite of years of notice about his tax situation and its ties to a security clearance, Applicant's most significant strides were made with the assistance of his attorney only days prior to the hearing in the second case. The Administrative Judge did not act unreasonably by considering the facts and circumstances of Applicant's remedial actions. Applicant's military record was neither so outstanding nor so pertinent to the misconduct alleged as to have demanded any special attention by the Administrative Judge. Considering the record as a whole, there is no reason to conclude that the Administrative Judge gave inadequate weight to the Applicant's mitigating evidence. To the contrary, the Administrative Judge acted properly by considering whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at pp. 4-5.

Applicant contends that his criminal conduct (failure to file his income tax returns) is less significant because it involves acts of omission rather than overt acts. Applicant's argument is not persuasive since he had ample notice that he had a problem with filing his tax returns, that such a problem has criminal consequences and that his security clearance could be at risk if he did not file. Furthermore, failure to file tax returns suggests that Applicant has a problem with complying with governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. *See, e.g.*, ISCR Case No. 94-0964 (July 3, 1996) at p. 5 (discussing negative security implications of an applicant's pattern of failing to file federal and state income tax returns).

Applicant has failed to meet his burden under the Directive of demonstrating error. Accordingly the Board affirms the Administrative Judge's June 15, 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

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Administrative Judge

Member, Appeal Board