

DATE: April 29, 1999

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0188

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Jerome H. Silber issued a decision, dated December 31, 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 February 27, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct), Criterion F (Financial Considerations), and Criterion E (Personal Conduct).

Applicant submitted an answer to the SOR. Applicant elected to have a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who did not submit a response to it. The case was then assigned to the Administrative Judge for determination.

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 adverse decision.

**Administrative Judge's Findings and Conclusions**

The Administrative Judge entered favorable findings for Applicant with respect to Criterion J (SOR 1.a. and SOR 1.b.), and Criterion E (SOR 3.a. through SOR 3.c.).

The Administrative Judge found that Applicant had a history of not meeting his financial obligations. The Judge

concluded that some of Applicant's financial problems (SOR 2.a. through SOR 2.c.) were extenuated or mitigated sufficiently to warrant entry of formal findings in favor of Applicant. However, the Judge concluded Applicant's other financial problems (SOR 2.d. through 2.f.) were not extenuated or mitigated. The Judge found that Applicant knew about his responsibility to make payments for court-ordered restitution and child support, but deliberately did not make such payments even though he and his wife had the money to do so. The Judge entered formal findings against Applicant with respect to SOR 2.d. through SOR 2.f. and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

## Appeal Issues<sup>(1)</sup>

On appeal, Applicant: (1) seeks to explain the facts and circumstances surrounding his failure to make court-ordered child support payments or court-ordered restitution; (2) acknowledges the seriousness of his obligations to make the court-ordered payments; (3) denies he has sought to avoid or run away from his legal obligations; (4) asserts he is taking steps to satisfy his legal obligations; (5) claims loss of his security clearance will interfere with his ability to satisfy his legal obligations; and (6) acknowledges he has made mistakes, but contends his past military service and employment with a defense contractor demonstrate he is not a security risk. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

Applicant's appeal brief contains various statements that go beyond the record evidence and constitute new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item 29. Furthermore, Applicant had the opportunity to submit additional information for consideration by the Administrative Judge, but he failed to use that opportunity when he did not submit a response to the FORM. Applicant cannot fairly contend the Judge's decision is arbitrary, capricious, or contrary to law based on information that he did not submit for consideration by the Judge during the proceedings below.

Most of Applicant's arguments set forth an alternate interpretation of the facts and circumstances surrounding his failure to make payments toward court-ordered restitution and child support. As long as the Administrative Judge's findings and conclusions reflect a reasonable, plausible interpretation of the record evidence, an appealing party's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2. Considering the record as a whole, Applicant's arguments fail to demonstrate the Judge's challenged findings and conclusions do not reflect a reasonable, plausible interpretation of the record evidence.

During the proceedings below and on appeal, Applicant has stated his intention to make payments toward court-ordered restitution and child support. Such stated intentions do not render the Administrative Judge's adverse security clearance decision arbitrary, capricious, or contrary to law. A stated intention to perform acts in the future does not constitute proof of a demonstrated track record of reform and rehabilitation. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 3. Furthermore, considering the record evidence of Applicant's past failure to make payments toward court-ordered restitution and child support, the Judge had to consider Applicant's ability to address and resolve his legal obligations, and make a determination as to whether Applicant was likely to continue or follow through with his recent efforts to address his unsatisfied obligations. *See, e.g.*, Directive, Sections F.3.e. and F.3.f. Considering the record as a whole, the Judge had a rational basis for his finding that Applicant was not likely to be able to resolve his financial problems in the near future.

Applicant's citation of the record evidence on his military service and employment with a defense contractor does not demonstrate the Administrative Judge erred. The Judge must consider the record as a whole, weigh the favorable and unfavorable evidence, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 4. Absent a showing that a Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2. Considering the record as a whole, the Board concludes that the record evidence concerning Applicant's military service and employment with a defense contractor did not require the Judge, as a matter of law, to find in Applicant's favor.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to

classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The federal government need not wait until an applicant actually mishandles or fails to properly safeguard classified information before it can deny or revoke that person's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of 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). All that is necessary is proof of facts and circumstances that indicate that an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 98-0349 (February 3, 1999) at pp. 3-4. Applicant's failure to make payments toward his court-ordered restitution and child support provides a rational basis for the Judge's adverse security clearance decision.

## **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's December 31, 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. The Administrative Judge's favorable formal findings with respect to various SOR paragraphs are not at issue on appeal.