

DATE: April 19, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 98-0448

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

#### *Pro Se*

Administrative Judge Elizabeth M. Matchinski issued a decision, dated December 31, 1998, in which she 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 June 26, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, and later indicated that he did not want to have a hearing in his case. A File of Relevant Material (FORM) was prepared. Applicant was given a copy of the FORM, but he did not submit any response to the FORM. The case was then assigned to the Hearing Office for determination.

The Administrative Judge subsequently issued a written decision, in which she 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 Issue**

Applicant does not challenge the Administrative Judge's findings about his failure to file timely federal income tax returns for tax years 1996 and 1997, his failure to file timely state income tax returns for tax years 1996 and 1997, and his deliberately providing false information to his employer by claiming exemptions he was not entitled to claim so that less federal income tax would be withheld from his paycheck. Nor does Applicant challenge the Judge's findings about

his history of financial problems that led to Applicant's misconduct concerning his federal and state income tax obligations. Rather, Applicant: (1) objects to the Judge's characterization of his conduct as a pattern of criminal conduct; (2) asserts his conduct was the result of mistakes made in times of great personal hardship, not the actions of "an unredeemable criminal"; (3) points out that the Internal Revenue Service has not pressed criminal charges against him; (4) denies he had any intent to evade taxes; and (5) challenges the Judge's conclusion that there is a risk of recurrence because Applicant has not resolved his financial problems. The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Even in the absence of a criminal conviction, an Administrative Judge can find that an applicant's conduct constitutes a violation of federal or state law. *See, e.g.*, ISCR Case No. 97-0101 (April 28, 1998) at p. 3. *See also* Directive, Adjudicative Guidelines, Criminal Conduct Disqualifying Condition 1 ("[A]ny criminal conduct, regardless of whether the person was formally charged."). Therefore, the absence of any action by federal or state tax authorities to criminally prosecute Applicant did not preclude the Judge from finding that Applicant engaged in criminal conduct. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to find that Applicant engaged in criminal conduct when he failed to file timely his federal and state income tax returns for tax years 1996 and 1997, and when he claimed exemptions that he was not entitled to claim so that less federal income tax would be withheld from his paycheck. Furthermore, the fact that Applicant's criminal conduct constituted misdemeanor offenses did not preclude the Judge from making an adverse security clearance decision. *See, e.g.*, ISCR Case No. 97-0605 (July 8, 1998) at p. 3.

Applicant notes the Administrative Judge's statement that she was "not persuaded that Applicant had an intent to evade taxes" and argues that she erred by finding he engaged in "a pattern of criminal behavior." Given the totality of the Administrative Judge's decision and the record, her statement about Applicant's lack of intent to evade taxes is not sustainable. Indeed, in the same paragraph, the Administrative Judge referred to "willful filing of fraudulent withholding exemption certificates" by Applicant. In light of the Administrative Judge's ultimate conclusions the statement as to intent, standing alone, is harmless error.

Although the Administrative Judge did not use the word "pattern" to describe Applicant's criminal conduct, she did characterize it as "repeated" criminal conduct. It is untenable for Applicant to argue the Judge erred because his failure to timely file income tax returns for two years is not a pattern of criminal conduct. Applicant's argument ignores his fraudulent exemption claims that resulted in less federal taxes being withheld from his pay for the period 1992-1998. Since Applicant did not engage in a single, isolated act of criminal conduct, the Judge had a rational basis for finding Applicant's criminal conduct was "repeated."

The Administrative Judge found that Applicant's criminal conduct with respect to his federal income taxes was motivated by his desire to deal with persistent financial problems. (As noted earlier, that finding is not challenged on appeal.) Given that finding, it was reasonable for the Judge to consider the evidence that Applicant's financial problems still were not resolved in evaluating whether Applicant was likely to repeat his past criminal conduct. *See* Directive, Section F.3.e. ("[A]bsence or presence of rehabilitation."); Section F.3.f. ("[P]robability that the circumstances or conduct will continue to recur in the future."). Furthermore, the Judge gave a reasoned explanation for her conclusion that Applicant had failed to demonstrate evidence of rehabilitation sufficient to warrant a finding that Applicant was not likely to repeat his past misconduct. The Judge's analysis is based on record evidence and consistent with pertinent provisions of the Directive.

Applicant's appeal arguments reflect his personal disagreement with the Administrative Judge's analysis and conclusions. Applicant's arguments set forth an alternate interpretation of the record evidence, but they do not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 4 ("However, the ability to interpret record evidence in more than one way is not enough to demonstrate the Administrative Judge's interpretation is arbitrary, capricious, or contrary to law.").

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp 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). 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 criminal conduct with respect to his federal and state income tax obligations provides a rational basis for the Administrative Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 5.

## **Conclusion**

Applicant has failed to demonstrate harmful 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