

DATE: June 15, 1999

In Re:

-----

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0529

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Darlene Lokey Anderson issued a decision, dated January 29, 1999, 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 following issues: (1) whether Applicant was denied due process because he was not given adequate notice of the allegations against him; (2) whether the Administrative Judge erred by ignoring Applicant's defenses; (3) whether Department Counsel failed to meet its burden of proving controverted facts; and (4) whether the Administrative Judge erred by making an impermissible "political status determination."

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 6, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated "I wish to have a decision WITHOUT a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to the FORM. The case was then assigned to the Administrative Judge 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 Issues**

1. Whether Applicant was denied due process because he was not given adequate notice of the allegations against him. Applicant contends the allegations against him were obscure, lacked specificity, and deprived him of the opportunity to

make an adequate defense. For the reasons that follow, the Board concludes this contention lacks merit.

An applicant is entitled to receive written notice of the reasons why the government proposes to deny or revoke the applicant's access to classified information, a reasonable opportunity to respond to the allegations, the right to respond to the evidence presented against the applicant, and the right to present evidence on the applicant's behalf.<sup>(1)</sup> A review of the record below shows Applicant was not deprived of any of those rights.

Applicant's reliance on the Supreme Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1875) is misplaced. Because DOHA proceedings are civil in nature, the procedural protections available to defendants in criminal proceedings are not applicable. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 2. Furthermore, an SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment. *See, e.g.*, ISCR Case No. 95-0817 (February 21, 1997) at p. 7.

The SOR issued to Applicant alleged that he engaged in criminal conduct by failing to file state and federal income tax returns for various specified tax years. The SOR is written in language that gave Applicant fair notice of the reasons why the government was proposing to deny or revoke his access to classified information. Applicant's arguments to the contrary are groundless.

2. Whether the Administrative Judge erred by ignoring Applicant's defenses. Applicant contends the Administrative Judge ignored the defenses he raised, and disregarded the Supreme Court decision and other legal authorities he cited in his response to the FORM. For the reasons that follow, this contention lacks merit.

As discussed earlier in this decision, Applicant's reliance on the cited Supreme Court decision is misplaced. The Administrative Judge was not required to apply a Supreme Court decision that has no bearing on these proceedings. Her failure to do so is not arbitrary, capricious, or contrary to law. The same reasoning applies to Applicant's reliance on a federal statute and a federal district court decision that deal with declaratory judgments. The statutory authority of federal courts to issue declaratory judgments, subject to certain restrictions, is legally irrelevant to the adjudication of security clearance cases under the Directive. Because neither the statute nor the court decision cited by Applicant has any relevance to his security clearance case, the Judge was not required to apply either one in making her decision.

One aspect of the Administrative Judge's decision flatly contradicts Applicant's claim that the Judge ignored his defenses. During the proceedings below, Applicant argued that Department Counsel had failed to meet its burden of proof that his conduct constituted criminal conduct. The Judge concluded that, with respect to most of the SOR allegations, the record evidence was insufficient to satisfy Department Counsel's burden of proof. By reaching that conclusion, it is obvious that the Judge took note of Applicant's argument and found it persuasive with respect to most of the SOR allegations.

Finally, there is no merit to Applicant's contention that the Board's decision in DISCR Case No. 92-0446 (May 28, 1993) held that failure to pay income taxes or to file income tax returns is not a basis for denying or revoking an applicant's access to classified information. The Board's decision in that case dealt with Department Counsel's burden of proof in cases alleging failure to file income tax returns. The Board's decision in that case did not address the security significance of a proven failure to file income tax returns. The Board has held on many occasions that failure to file income tax returns can be a basis for an adverse security clearance decision. *See, e.g.*, ISCR Case No. 98-0448 (April 19, 1999) at p. 3; ISCR Case No. 97-0191 (April 28, 1998) at p. 5; ISCR Case No. 97-0176 (January 22, 1998) at p. 3; ISCR Case No. 94-0964 (July 3, 1996) at pp. 5-6; ISCR Case No. 94-0544 (June 24, 1996) at p. 3; ISCR Case No. 94-0954 (October 16, 1995) at pp. 9.

3. Whether Department Counsel failed to meet its burden of proving controverted facts. As discussed earlier in this decision, the Administrative Judge concluded Department Counsel had failed to meet its burden of proof with respect to most of the SOR allegations. Since that favorable conclusion was not cross-appealed by Department Counsel, the Board need not discuss it further to resolve Applicant's appeal. However, Applicant's brief raises the question whether the Judge erred by concluding Department Counsel had satisfied its burden of proof with respect to SOR allegations 1.c. and 1.d.

Considering the record as a whole, the Administrative Judge's findings and conclusions about SOR 1.c. and 1.d. reflect a reasonable interpretation of the record evidence. Applicant's arguments to the contrary lack merit.

4. Whether the Administrative Judge erred by making an impermissible "political status determination." Applicant's argument on this point lacks merit for several reasons. First, Applicant's argument is based, in part, on his reliance on a statute and federal court decision that deal with declaratory judgments by federal courts. As discussed earlier, that legal authority is irrelevant to industrial security clearance proceedings. Second, Applicant's argument is an attempt to use these proceedings to challenge the legality of state and federal income tax laws. Such arguments deal with matters that are within the jurisdiction of appropriate state and federal agencies and courts, not the Defense Office of Hearings and Appeals. *See* ISCR Case No. 94-1153 (March 26, 1997) at p. 4. Third, Applicant's claim that the Administrative Judge "illegally treated [Applicant] as an Alien" is frivolous. The Judge specifically found that Applicant is a United States citizen (Decision at p. 2). To the extent that Applicant's argument seems to contend that his status as a "Citizen" somehow places him outside the coverage of state and federal income tax laws, it resembles various arguments that have been flatly rejected by federal courts in tax cases. *See* ISCR Case No. 94-0954 (October 16, 1995) at pp. 6-7. Fourth, Applicant asserts that he was prejudiced by the Judge calling him a resident of the state he lives and works in. Applicant asserts that the word "resident" is legally synonymous with "alien." Applicant's assertion is frivolous. Applicant was not prejudiced by the Judge referring to him as a resident of the state in which he resides.

### **Conclusion**

There is no presumption of error below, and the appealing party has the burden of demonstrating error that warrants remand or reversal. In this case, Applicant has failed to demonstrate any error by the Administrative Judge. Accordingly, the Board affirms the Judge's January 29, 1999 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. Executive Order 10865, Section 3; Directive, Section D.3. and Additional Procedural Guidance, Items 3-15.