

DATE: December 27, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0761

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Thomas C. Houck, Esq.

Administrative Judge John G. Metz, Jr., issued a decision, dated June 30, 1999, 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 following issues: (1) whether the Administrative Judge erred by finding Applicant willfully failed to file federal income tax returns for the years 1995, 1996, and 1997; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

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

A hearing was held on April 22, 1999. The Administrative Judge subsequently issued a 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 the Administrative Judge's adverse security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by finding Applicant willfully failed to file federal income tax returns for the years 1995, 1996, and 1997. The Administrative Judge found that Applicant willfully failed to file his federal income tax returns for tax years 1995, 1996, and 1997 when they were due, and that he did not file them until the day before the hearing. Applicant does not challenge the Judge's finding that he did not file his federal income tax returns for tax years 1995, 1996, and 1997 until the day before the hearing. However, Applicant contends the Administrative Judge erred by finding his failure to file those federal income tax returns in a timely manner was willful. In support of that contention, Applicant argues Department Counsel failed to prove beyond a reasonable doubt or by a preponderance of the evidence

that Applicant's failure to timely file his federal income tax returns was willful. For the reasons that follow, the Board concludes Applicant's contention lacks merit.

First, DOHA security clearance adjudications are civil, administrative proceedings. The rules of evidence and burdens of proof associated with criminal proceedings are not applicable in these proceedings. *See Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 119 (D. Conn. 1994) (DoD need not use safeguards afforded criminal defendants in making a security clearance decision "merely because it is based on a determination that [the applicant] engaged in conduct which would have constituted a felony"). *See also* ISCR Case No. 93-0386 (April 21, 1994) at p. 4 (burden of proof in industrial security cases "is lower than that of criminal cases"). The "beyond a reasonable doubt" standard is not applicable in these proceedings.

Second, an Administrative Judge's findings are reviewed under the substantial evidence standard. Directive, Additional Procedural Guidance, Item 32.a. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. *See, e.g., Sprint Spectrum L.P. v. Willroth*, 176 F.3d 630, 638 (2d Cir. 1999); ISCR Case No. 96-0897 (December 9, 1997) at pp. 2-3; ISCR Case No. 90-1054 (July 20, 1992) at p. 4. *Cf. Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (noting use of preponderance of evidence standard would conflict with "clearly consistent with the interests of national security" standard). Since the Judge's findings are reviewed under the substantial evidence standard, Department Counsel is not required to prove controverted allegations by a preponderance of the evidence.

Third, a review of the record leads the Board to reject Applicant's contention that there is no evidence that he intentionally violated a known legal duty when he failed to timely file his federal income tax returns for tax years 1995, 1996, and 1997. It is irrelevant that the evidence does not show Applicant is a tax protestor or tax evader. The record shows: (a) Applicant knew he had the legal duty to file federal income tax returns; and (b) Applicant did not file his federal income tax returns for tax years 1995, 1996, and 1997 until the day before the hearing. Applicant's statements about his state of mind are relevant and material evidence, but they were not binding or conclusive on the Judge. Rather, the Judge had to consider Applicant's statements in light of his assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.,* ISCR Case No. 98-0620 (June 22, 1999) at p. 2. The Judge specifically considered Applicant's stated reasons for why he did not timely file his federal income tax returns and found that Applicant's failure to file was willful in nature. Considering the record as a whole, the Judge had a rational basis to find Applicant's failure to file his federal income tax returns was willful.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) the totality of the facts and circumstances surrounding Applicant's failure to timely file his federal income tax returns support a finding of mitigation; (b) Applicant's remorse and subsequent filing of his federal income tax returns for tax years 1995, 1996, and 1997 support a finding of mitigation; (c) there is no evidence that Applicant has been financially irresponsible or engaged in a criminal failure to pay taxes; (d) Applicant's failure to timely file federal income tax returns will not recur; (e) the Judge's adverse conclusions are not consistent with the whole person concept; and (f) decisions by other Hearing Office Judges in similar cases indicate the Judge should have made a favorable decision in this case. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-0012 (December 1, 1999) at p.2. Apart from that presumption, a review of the decision below shows the Judge specifically considered the evidence Applicant presented concerning his personal situation and state of mind in relation to his failure to file federal income tax returns. A Judge must consider the record as a whole (Directive, Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.,* ISCR Case No. 98-0435 (September 16, 1999) at p. 3. Accordingly, merely because the Judge found Applicant's evidence to be unpersuasive does not mean the Judge simply ignored that evidence. *See, e.g.,* ISCR Case No. 99-0068 (November 30, 1999) at p. 4. Applicant's ability to cite to favorable evidence in the record does not demonstrate the Judge ignored the record evidence or weighed it in a manner that is arbitrary, capricious, or contrary to law. The Judge gave a rational explanation for why he did not conclude Applicant's remedial actions (in connection with the late filing of his federal income tax returns for tax years 1995, 1996, and 1997) demonstrated a track record sufficient to warrant a favorable security clearance decision. Considering the record as a whole, the Judge's findings and conclusions reflect a reasonable, plausible interpretation of the record evidence.

The Administrative Judge's decision is not made arbitrary, capricious, or contrary to law because Applicant can argue he did not engage in more serious misconduct, such as criminal tax evasion, or that the SOR did not contain allegations of financial irresponsibility under Criterion F. As long as the Judge's findings and conclusions provide a rational basis for his adverse conclusions about Applicant's security eligibility, it is irrelevant that Applicant did not engage in more serious misconduct with respect to his taxes, or that Applicant's conduct did not fall under another Criterion.⁽¹⁾ Cf. ISCR Case No. 97-0016 (December 31, 1997) at p. 3 (nothing in Directive precludes adverse decision based on a single Criterion). Even though Applicant did not engage in other conduct that has more serious negative security significance, the Judge still had to evaluate the security significance of the conduct that Applicant did engage in.

Applicant is correct in arguing that the Administrative Judge must evaluate his case in light of the whole person concept. However, Applicant's appeal arguments fail to show the Judge's adverse conclusions are inconsistent with the whole person concept. To the contrary, a review of the decision below persuades the Board that the Judge's analysis of Applicant's security eligibility reflects a reasonable consideration of the totality of the facts and circumstances surrounding Applicant's failure to file federal income tax returns for tax years 1995, 1996, and 1997, as well as Applicant's subsequent filing of those income tax returns in April 1999.

Applicant's reliance on decisions by Hearing Office Administrative Judges in other cases is misplaced. Decisions of Hearing Office Judges are not binding on their colleagues. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 8 ("Just as a trial judge is not bound by the decisions of another trial judge, a DOHA Administrative Judge is not bound to follow the decisions of his or her colleagues in the Hearing Office. Accordingly, the Judge's decision in this case is not made arbitrary, capricious, or contrary to law merely because [the appealing party] believes that other Judges' decisions in different cases indicate the other Judges might have ruled in [the appealing party's] favor."). The Board will not conclude the Judge erred in this case merely because other Judges have ruled differently in other failure to file income tax return cases. Furthermore, the Board need not distinguish the Hearing Office decisions cited by Applicant, because those decisions are not binding on the Board. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at page 3 note 1.

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). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such 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 required is proof of facts and circumstances that indicate 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. 98-0188 (April 29, 1999) at p. 4.

A failure to file income tax returns provides a rational basis for an adverse security clearance decision. *See* ISCR Case No. 98-0529 (June 15, 1999) at p. 3 (citing earlier Board decisions). The Administrative Judge's findings in this case provide a rational basis for his adverse conclusions about Applicant's judgment and reliability, and those adverse conclusions provide a rational basis for his adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's June 30, 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. The Administrative Judge's comment about "the inevitable penalties and interest" Applicant will face in connection with his unsatisfied tax liability of \$5,000 does not constitute mere speculation. Although a Judge should not engage in speculation, a Judge is not precluded from drawing reasonable, common sense inferences and conclusions based on the record evidence. Given the record evidence about Applicant's outstanding tax liability, the Judge's comment about penalties and interest was not arbitrary, capricious, or contrary to law.