

DATE: January 11, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0123

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated October 4, 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 knowingly and willfully falsified material facts about his criminal record and his financial difficulties; and (2) 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 to Applicant a Statement of Reasons (SOR) dated February 24, 1999. The SOR was based on Criterion F (Financial Considerations), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated he wanted to have a decision made without a hearing. A File of Relevant arial (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to it. The case was then assigned to the Administrative Judge for disposition.

The Administrative Judge 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.

Appeal Issues ⁽¹⁾

1. Whether the Administrative Judge erred by finding Applicant knowingly and willfully falsified material facts about his criminal record and his financial difficulties. The Administrative Judge found that Applicant knowingly and

willfully falsified material facts about his criminal record and his financial difficulties when he executed a security questionnaire in April 1998 and in a written statement Applicant gave to a security investigator in September 1998. On appeal, Applicant expresses regret for any mistakes he made on his security application. Making allowances for Applicant's *pro se* status, the Board construes Applicant's reference to "mistakes" as an argument that the Administrative Judge erred by finding he engaged in knowing and willful falsifications.

The record evidence contains statements by Applicant about his intent and state of mind when he completed the security questionnaire in April 1998 and gave a written statement in September 1998. Those statements are relevant and material evidence, but they are not conclusive or binding on the Administrative Judge. The Judge had to consider Applicant's statements in light of the record evidence as a whole and make findings about whether Applicant acted in a knowing and willful manner when he failed to disclose material facts about his criminal record and his financial difficulties. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 2. Considering the record as a whole, the Judge's finding that Applicant knowingly and willfully failed to disclose material facts in April 1998 and September 1998 constitutes a plausible, reasonable interpretation of the record evidence.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant contends the Administrative Judge's decision should be reversed because: (a) his job performance as a defense contractor employee has been good; (b) he has put his mistakes behind him, and he has not engaged in any negative activity in the past five years; (c) he would never willingly do anything to hurt the United States, his company, or any military customer; (d) he is actively working on taking care of his remaining debts; and (e) he should be judged based on his present situation, rather than his past conduct. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. *See, e.g.*, ISCR Case No. 99-0068 (November 30, 1999) at p. 6. Any off-duty conduct that has security implications can be considered in deciding an applicant's security eligibility. *See, e.g.*, ISCR Case No. 97-0440 (November 23, 1998) at p. 5. Accordingly, the record evidence about Applicant's job performance did not preclude the Administrative Judge from making an adverse decision based on Applicant's history of financial difficulties, Applicant's falsifications in April 1998 and September 1998, and Applicant's criminal record. ⁽²⁾

There is no merit to Applicant's contention that he has not engaged in any negative activity in the past five years. Applicant's falsifications occurred in April 1998 and September 1998. Furthermore, Applicant's history of financial difficulties spans a period of several years and, as of the close of the record below, Applicant still had not resolved all of his delinquent debts. Furthermore, under the whole person concept, the Administrative Judge acted properly by considering Applicant's overall history of conduct (including Applicant's conduct that occurred more than five years ago) instead of evaluating it in a piecemeal manner. *See* ISCR Case No. 96-0776 (June 5, 1997) at p. 2 ("The Administrative Judge did not err by considering Applicant's past misconduct. . . . [T]he security eligibility of an applicant cannot be meaningfully assessed by looking only at the applicant's present situation and ignoring the applicant's past conduct. Such a piecemeal approach is not practical and it would be inconsistent with the 'whole person' concept of security clearance determinations.").

The favorable evidence cited by Applicant on appeal does not demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Judge had to consider the record as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at p. 4. Considering the record as a whole, the Judge did not weigh the record evidence in a manner that 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. *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. Given Applicant's falsifications in 1998, his history of financial difficulties, and his criminal record, the Administrative Judge had a rational basis for his adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's October 4, 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. Attached to Applicant's appeal brief are three documents. Two of those documents post-date the Administrative Judge's decision. The third document pre-dates the Judge's decision, but it is dated almost a month after the close of the record below. The three documents constitute new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item 29.

2. The Administrative Judge's formal finding in favor of Applicant with respect to SOR paragraph 3.c. is not at issue on appeal.