DATE: March 1, 2000

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 99-0109

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

John T. Jones, Esq.

Administrative Judge Joseph Testan issued a decision, dated September 17, 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 concluding he did not have authority to grant Applicant a conditional security clearance; (2) whether the Administrative Judge erred by concluding Applicant's security violations warranted an adverse security clearance decision; and (3) whether the Administrative Judge erred by not considering the value of Applicant's expertise to the national security.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 13, 1999 to Applicant. The SOR was based on Criterion K (Security Violations) and Criterion M (Misuse of Information Technology).

A hearing was held on August 10, 1999. The Administrative Judge issued a written decision, dated September 17, 1999, 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)]

1. Whether the Administrative Judge erred by concluding he did not have authority to grant Applicant a conditional security clearance. During the proceedings below, Applicant presented evidence that: (a) his employer had taken special precautions to remove him from any responsibility for handling classified documents, delegating such responsibility to other persons; and (b) his employer was committed to keeping such special precautions in place as long as he retains a

security clearance. In the decision being appealed, the Administrative Judge noted that evidence and stated "[w]ith the new system in place, I believe that [A]pplicant does not pose a risk, and if I had the authority to base this clearance decision on the condition that this new system remains in place, I would do so, and I would conclude that [A]pplicant should have access to classified information. However, I do not have the authority to place conditions on an applicant's access to classified information."

On appeal, Applicant contends the Administrative Judge erred. In support of this contention, Applicant: (i) argues that provisions of the National Industrial Security Program Operating Manual (NISPOM) which require defense contractors to ensure that classified information is properly handled and safeguarded will ensure that Applicant's employer keeps special precautions in place with respect to him as long as he has a security clearance; (ii) the Department of Defense has the authority under the Federal Acquisition Regulations (FAR) to impose on Applicant's employer a contractual requirement to continue the special security precautions with respect to him; and (iii) the Judge should have relied on a specific provision of the Adjudicative Guidelines to grant Applicant a security clearance on condition that his employer continue the special precautions. For the reasons that follow, the Board concludes Applicant's contention lacks merit.

(i) It is obvious and indisputable that Applicant's employer, as a defense contractor, has obligations to ensure that classified information is properly handled and safeguarded. That fact has no probative value as to Applicant's suitability for a security clearance. Indeed, as this case shows, the security obligations of Applicant's employer did not prevent Applicant from committing several security violations over a period of years.

Furthermore, four of the NISPOM provisions cited by Applicant (Sections 1-200, 1-202, 2-200d, and 5-308) have -- on their face -- no relevance to Applicant's suitability for a security clearance. Applicant's reliance on the first sentence of NISPOM Section 5-100 ("Contractors shall be responsible for safeguarding classified information in their custody or under their control") is misplaced for two reasons. First, as noted in the preceding paragraph, the security obligations of Applicant's employer have no probative value as to Applicant's suitability for a security clearance. Second, Applicant's argument sidesteps the second sentence of NISPOM Section 5-100 ("Individuals are responsible for safeguarding classified information entrusted to them"). Under the industrial security program, an applicant's responsibility for properly handling and safeguarding classified information entrusted to him or her cannot be delegated to other employees of a defense contractor.

(ii) Applicant's argument about the FAR is misplaced. Even assuming for the sake of argument that the Department of Defense (DoD) could use FAR Section 52.204-2 to impose a contractual requirement on Applicant's employer to impose special security precautions with respect to Applicant, it does not follow that the Administrative Judge or this Board would have any authority to do so. Hearing Office Judges and this Board have authority to adjudicate industrial security clearance cases under the Directive. Neither a Hearing Office Judge nor this Board has any authority to take action under the FAR. Nor does a Hearing Office Judge or this Board have any authority to direct other DoD personnel to initiate or take action under the FAR. To accept Applicant's argument, the Board would have to conclude that either: (a) Hearing Office Judges and this Board have the authority to take any action that any DoD official is authorized to take, or (b) Hearing Office Judges and this Board have the authority to order or direct other DoD officials to take actions with respect to matters that fall under their authority. The Board declines to reach either of those untenable conclusions.

Nothing in the Directive, as it is currently written, authorizes an Administrative Judge or this Board to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at pp. 3-4 (no authority to grant clearance on probationary basis); ISCR Case No. 97-0630 (May 28, 1998) at p. 3 (no authority to grant security clearance on condition applicant enroll in alcohol awareness program); DOHA Case No. 96-0228 (April 3, 1997) at p. 3 (no authority to grant or continue security clearance on conditional or probationary basis); ISCR Case No. 96-0311 (December 12, 1996) at p. 3 (no authority to grant security clearance on condition applicant participate in random alcohol or drug testing). Indeed, the Board has specifically rejected a request that an applicant be granted a security clearance on condition that other persons at the applicant's place of employment would exercise physical control and handle storage of any classified document he works with. DISCR Case No. 88-2773 (July 19, 1990) at p. 3. *See also* DISCR Case No. 88-1944 (March 28, 1990) at p. 2 ("The fact that [the applicant's] employer has instituted special security procedures does not eliminate the root of the problem: Applicant's propensity toward careless and negligent handling of classified information. These procedures merely mask the symptoms but do not cure the malady itself. . . . An individual permitted access to classified information must, without outside assistance, exhibit the trustworthiness

and reliability inherent in such a responsibility.").

Finally, nothing in the Directive, as it is currently written, gives an Administrative Judge or this Board the kind of authority that would be necessary to monitor or enforce any conditional or probationary security clearance. The Directive should be construed in a manner that effectuates the purposes of the industrial security program, including the protection of classified information. *See, e.g.*, ISCR Case No. 98-0395 (June 24, 1999) at p. 4 n.2. The protection of classified information would not be served by interpreting the Directive (including the Adjudicative Guidelines) to fashion a conditional or probationary clearance for an applicant when there is no practical way under the current Directive to monitor or enforce the conditions or terms of such a conditional or probationary security clearance.

(iii) Applicant also relies on the following passage from the Adjudicative Guidelines: "If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access." Applicant's reliance on that passage is misplaced. The information of security concern in this case is serious enough to warrant a recommendation of disapproval or revocation. Given Applicant's track record of repeated security violations, a warning would be a toothless countermeasure. Accordingly, the Administrative Judge did not err by choosing not to issue a security clearance with a warning.

2. Whether the Administrative Judge erred by concluding Applicant's security violations warranted an adverse security clearance decision. Applicant does not challenge the Administrative Judge's findings about his security violations in May 1985 (SOR 1.a), December 1990 (SOR 1.b.), May 1992 (SOR 1.c.), February 1994 (SOR 1.d.), and June 1994 (SOR 1.e.).[(2)] Indeed, Applicant indicates he "generally concurs with the findings of fact by the Administrative Judge on each of the reported security violations." However, Applicant contends the Administrative Judge erred by concluding his security violations warranted an adverse security clearance decision. In support of this contention, Applicant argues: (a) the security violations involved were inadvertent, not deliberate; (b) the security violations were caused by his preoccupation with his work, not any cavalier attitude about security; (c) adverse security clearance decisions in other cases were based on more serious security violations; (d) he always cooperated with the investigations of his security violations; (e) there is no likelihood that his security violations will recur or lead to an unauthorized disclosure of classified information; (f) his superiors vouch for his trustworthiness and have implemented special measures to prevent future security violations; and (g) the Judge should have applied Security Violations itigating Condition 1 ("[Actions] were inadvertent") and Security Violations Mitigating Condition 2 ("[Actions] were isolated or infrequent") in conjunction with Applicant's positive security attitude. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge committed harmful error.

The fact that most of Applicant's security violations were not deliberate[(3)] does not make the Administrative Judge's adverse security clearance decision arbitrary, capricious, or contrary to law. The federal government must be able to repose a high degree of trust and confidence in persons granted a security clearance. Evidence that an applicant has failed to properly carry out his or her security responsibilities is highly relevant to making an assessment of that applicant's current security eligibility. *See, e.g.*, ISCR Case No. 96-0457 (December 8, 1997) at p. 4. Failure to properly secure classified documents is not a minor matter, but rather a violation of basic security requirements. *See, e.g.*, DISCR Case No 92-1606 (January 5, 1995) at p. 8. A history of negligent or inadvertent security violations can provide a rational basis for having serious reservations about an applicant's suitability for a security clearance. *See, e.g.*, DISCR Case No. 89-0299 (February 19, 1992)(affirming adverse security clearance decision based on applicant's negligent or careless security violations); DISCR Case No. 89-0062 (October 30, 1991)(same). *See also* DISCR Case No. 88-2773 (January 30, 1990) at p. 5 ("Deliberate *or negligent* security violations provide a very strong nexus for a decision to deny or revoke an applicant's access to classified information.")(italics added). Applicant's history of security violations provided a rational basis for the Judge to have doubts about Applicant's ability to properly handle and safeguard classified information.

The negative security implications of Applicant's history of security violations are not reduced or diminished by the absence of malicious motives on Applicant's part, his cooperation with the investigations of those security violations, or the fact that no compromise of classified information occurred. An applicant who has engaged in a series of careless or negligent security violations does not demonstrate the high degree of judgment and reliability required of persons

granted access to classified information. The federal government need not wait until a compromise of classified information occurs before it can deny or revoke an applicant's security clearance. *See, e.g.*, ISCR Case No. 94-0701 (May 19, 1995) at p. 4 ("[T]he fact that Applicant's multiple security violations were not more serious does not diminish their intrinsic severity or render the Judge's adverse clearance decision arbitrary, capricious, or contrary to law."); DISCR Case No. 90-0239 (February 23, 1994) at p. 7 ("The absence of any compromise of classified information may be a fortunate circumstance, but it does not diminish the seriousness of Applicant's multiple security violations over a period of years."); DISCR Case No. 89-1397 (September 25, 1991) at p. 7 ("Applicant's pattern of negligent or careless security violations is not rendered any less serious or problematic by the purely fortuitous circumstance that none of them resulted in a compromise of national security."); DISCR Case No. 88-2773 (January 30, 1990) at p. 6 ("The compelling interest of the government in protecting classified information [citation omitted] extends to protecting classified information from being deliberately or negligently exposed to risk of compromise and is not limited to waiting until an actual compromise or security disaster occurs.").

The willingness of Applicant's superiors to vouch for his trustworthiness must be considered in light of Applicant's history of security violations. Applicant's personal trustworthiness has not prevented him from being involved in several security violations over a period of years. And, the willingness of Applicant's superiors to implement special security measures is not a substitute for the absence of authority to grant him a conditional or probationary security clearance.

Given the Administrative Judge's own findings, the Judge should have applied Security Violations Mitigating Condition 1 to Applicant's security violations not covered by SOR 1.f. and SOR 1.g. However, the mere presence or absence of an Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of any case. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at pp. 3-4; ISCR Case No. 98-0394 (June 10, 1999) at p. 4. Applicant's overall history of security violations provided a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. Accordingly, the Judge's error with respect to Security Violations Mitigating Condition 1 was harmless.

Considering the record evidence as a whole, the Administrative Judge was not required to apply Security Violations Mitigating Condition 2 in this case. Applicant's overall history of security violations was neither "isolated" nor "infrequent." Applicant's argument to the contrary lacks merit.

3. Whether the Administrative Judge erred by not considering the value of Applicant's expertise to the national security. Applicant contends the Administrative Judge erred by not discussing the record evidence concerning Applicant's expertise concerning a particular defense project or the evidence indicating that an adverse security clearance decision could harm one of the military departments. Applicant also contends that "[s]ome knowledgeable Department [of Defense] officials should exercise the Department's discretion" by weighing the national security benefit of allowing Applicant to retain a security clearance against the risk posed by doing so. Finally, Applicant contends that he was prejudiced in presenting his case because the legal counsel of a military service refused to permit a DoD employee from testifying about the value of Applicant's expertise and the harm to the military service that would result if Applicant were denied a security clearance.

The value of an applicant's expertise to a defense contractor or a military service is not relevant or material to determining the applicant's suitability for a security clearance. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at p. 2 (applicant's value to his defense contractor employer is not a relevant consideration); ISCR Case No. 96-0710 (June 20, 1997) at p. 3 (Administrative Judge erred by relying on applicant's potential to contribute to national security); DISCR Case No. 92-0310 (June 22, 1993) at p. 3 (applicant's contribution to defense effort is not determinative of his or her security suitability). An applicant's expertise (or lack thereof) is not a measure of whether that applicant demonstrates the high degree of judgment, reliability, and trustworthiness that must be reposed in persons entrusted with classified information. Furthermore, an applicant's security violations are not made more or less serious based on whether that applicant has expertise that is valuable to a defense contractor or a military service.

Applicant's argument about the desirability of having some knowledgeable DoD official perform the risk/benefit analysis he proposes is being raised in the wrong forum. Applicant's argument deals with a policy issue that raises questions about whether the Directive should be amended or modified to provide DOHA with authority to conduct the kind of risk/benefit analysis Applicant seeks. DOHA security clearance adjudications are not a proper forum to address questions about whether the Directive should be amended or modified.

Applicant's argument about his failure to obtain the testimony of a DoD employee is not easily disposed of. Under Section 6 of Executive Order 10865, as amended, the head of a department or agency "shall cooperate with the Secretary, the Administrator, or the head of the other department or agency as the case may be, in identifying [officers or employees of the Executive Branch or members of the U.S. armed forces] who have made statements adverse to the applicant and in assisting him in making them available for cross-examination." The absence of any subpoena power for the Administrative Judge or Department Counsel to use is irrelevant. The obligation of DoD officials and the military services to make such persons available for a hearing flows from the plain language of Section 6 of Executive Order 10865. However, in this case, Applicant was not prejudiced because: (a) the DoD employee he wanted to testify was not being sought to testify about the security violations covered by the SOR issued to Applicant; (b) Applicant wanted the DoD employee to testify about matters that were not relevant or material to these proceedings; and (c) Applicant was able to present evidence on the matters he wanted the DoD employee to testify about through other means, including testimony by other witnesses and a letter from the DoD employee in question.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's September 17, 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 findings and conclusions under Criterion M (SOR 2) are not at issue on appeal.

2. The Administrative Judge's formal findings with respect to the security violations covered by SOR 1.f. (May 1998) and SOR 1.g. (May 1998) are not at issue on appeal.

3. The Administrative Judge found that the security violations covered by SOR 1.f. and SOR 1.g. were deliberate.