

DATE: October 19, 2000

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0205

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

Stephen D. Ink, Esq.

Administrative Judge Wilford H. Ross issued a decision, dated May 26, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge's findings of fact are supported by substantial evidence; and (2) whether the Administrative Judge's favorable 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 March 26, 1999. The SOR was based on Criterion J (Criminal Conduct). A hearing was held on April 13, 2000.

The Administrative Judge issued a written decision, dated May 26, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that decision.

**Appeal Issues**

1. Whether the Administrative Judge's findings of fact are supported by substantial evidence. The Administrative Judge found the following: (a) Applicant requested extensions of time to file his federal income tax returns through 1998; (b) Applicant had a good faith belief that his filing for an extension of his federal income tax returns would automatically provide him with an extension for filing his state income tax returns; (c) Applicant made a good faith effort to file all his outstanding state and federal income tax returns by the end of 1998, but was unable to do so because of the complexity of the returns, severe fluctuations in his income, his travel schedule, and the fact that he is a small-business owner doing his own taxes; (d) in April 1999, Applicant refiled his state income tax returns for tax years 1991 through 1993; (e) in April 1999, Applicant filed his federal tax returns for tax years 1995 through 1997; and (f) Applicant did not willfully

fail to timely file his federal income tax returns for tax years 1995 through 1997. On appeal, Department Counsel contends the record evidence as a whole does not support: (i) the Judge's findings about Applicant's extensions for filing his federal income tax returns for tax years 1995 through 1997; (ii) the Judge's finding that Applicant did not willfully fail to timely file his federal income tax returns for tax years 1995 through 1997; and (iii) the Judge's finding that in April 1999 Applicant refiled his state income tax returns for tax years 1991 through 1993.

On appeal, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a. The presence of conflicting record evidence does not diminish a Judge's fact-finding responsibility. When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. *See also* ISCR Case No. 97-0727 (August 3, 1998) at p. 3 ("The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings.").

Department Counsel's challenge to the Administrative Judge's findings about Applicant requesting extensions of time to file his federal income tax returns is problematic. At the hearing, the Administrative Judge asked Department Counsel whether he agreed that Applicant filed requests for extensions of time through calendar year 1998 to file his federal income tax returns. Department Counsel answered "Yes, sir." (Hearing Transcript at page 98)<sup>(1)</sup>

Department Counsel was not required to agree with the Judge's interpretation of the record evidence. However, once Department Counsel agreed with the Judge's interpretation of the evidence at the hearing, Department Counsel cannot simply repudiate that agreement on appeal and seek to challenge the Judge's finding about Applicant requesting extensions of time through calendar year 1998. By agreeing to the Judge's interpretation of the evidence at the hearing, Department Counsel waived any claim of error with respect to the Judge's finding that Applicant had requested extensions of time through calendar year 1998 to file his federal income tax returns. A party cannot fairly challenge a Judge's finding on appeal after agreeing, at the hearing, with the Judge's interpretation of the record evidence that supports the finding.

Department Counsel also challenges the Administrative Judge's finding that in April 1999, Applicant refiled his state income tax returns for tax years 1991 through 1993. Department Counsel's challenge is persuasive. Implicit in the Judge's finding is a subsidiary finding that Applicant had filed his state income tax returns for tax years 1991 through 1993 and merely was refiled them in April 1999 after a question had been raised about whether they had ever been filed. There is insufficient record evidence to support to the Judge's finding. The Judge specifically relied on Applicant's July 1998 written statement to a government investigator (Government Exhibit 2 at page 2) when making this finding. (Decision at page 2) Yet, that piece of evidence is somewhat ambiguous in nature because it does not specifically indicate whether Applicant was referring to his federal tax returns, his state tax returns, or both. At the hearing, Applicant testified that at the July 1998 interview he "was unclear about anything that happened in '91 and '92 and '93. I still think I may have filed, but I wasn't absolutely certain. In fact, I thought I had filed all the way through '94. In going through those boxes, I found the '94 returns that had not been mailed." (Hearing Transcript at page 70). Furthermore, Applicant specifically told a government investigator in January 1999 (Government Exhibit 3 at pages 1-2) that he had not filed state tax returns for 1991 and 1992 because he believed he was not required to do so and that he intended to file returns for those years "by this summer." In addition, at the hearing, Applicant testified that for the years 1991 through 1993 his frequent travel left him confused about which state he owed taxes to. (Hearing Transcript at page 50). Given the totality of the record evidence in this case, it was arbitrary and capricious for the Judge to rely only on Government Exhibit 2 at page 2 and fail to address the other record evidence that fairly detracted from the weight that reasonably could be given to Government Exhibit 2 at page 2. Finally, the Judge's finding that Applicant refiled his state income tax returns in April 1999 is inconsistent with his conclusion that "the Government has met its initial burden of proving by substantial evidence that the Applicant did not timely file his state tax returns for tax years 1991 through 1993. (Decision at p. 5)

Department Counsel also challenges the Administrative Judge's finding that Applicant did not willfully fail to timely file

his federal income tax returns for tax years 1995 through 1997. This challenge overlaps with other appeal arguments made by Department Counsel and will be discussed later in this decision.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge failed to consider Applicant's failure to file his state tax returns until 1999; (b) the Judge erred by finding Applicant had a good faith belief that filing for an extension of federal income tax return relieved him of the requirement to file for an extension for his state income tax returns; (c) the Judge could not reasonably conclude Applicant met his burden of persuasion to rebut or overcome Department Counsel's *prima facie* case under Criterion J; (d) the Judge erred by concluding Applicant did not willfully fail to timely file his federal income tax returns; (e) the Judge misapplied Criminal Conduct Mitigating Conditions 1, 4, and 6; and (f) the Judge misapplied the factors listed at pages 2-1 and 2-2 of Enclosure 2 of the Directive.

(a) Department Counsel's first argument is a variation of its challenge to the Administrative Judge's finding that Applicant refiled his state tax returns for 1991 through 1993. As discussed earlier in this decision, the Judge erred by finding that Applicant refiled his state tax returns for 1991 through 1993. Furthermore, once the Judge concluded that "the Government has met its initial burden of proving by substantial evidence that the Applicant did not timely file his state tax returns for tax years 1991 through 1993" (Decision at p. 5), the Judge had the obligation to consider the significance of Applicant's conduct in light of the record evidence as a whole. The Judge's failure to do so was arbitrary and capricious.

(b) Department Counsel persuasively argues that the Administrative Judge did not have a rational basis to accept Applicant's cursory claim that he believed filing for an extension to file his federal income tax returns automatically got him an extension for his state tax returns. [\(2\)](#)

The record evidence shows that Applicant received an M.B.A. degree from an American university. It is not plausible for a person who has received an M.B.A. degree to claim to be unaware that the obligation to file state tax returns is separate and independent from the obligation to file federal tax returns, or in the alternative to conclude that such a person would not be knowledgeable enough to be expected to seek proper advice about his or her obligations for filing state income tax returns. *Cf.* DISCR Case No. 87-2107 (October 25, 1990) at p. 9 ("Further, an applicant's prior training, experience, and current position can be relevant to determining what he or she knows or should know about security regulations, practices and procedures."); DISCR Case No. 86-3752 (February 28, 1990) at p. 9 ("A person cannot deliberately or negligently shut his eyes to available facts or fail to make reasonable inquiries to ascertain pertinent facts and then deny having any knowledge of such facts or try to escape the consequences that would flow from having knowledge of such facts.") (citing federal cases).

(c/d) Department Counsel contends the Administrative Judge erred by concluding Department Counsel did not make a *prima facie* case that Applicant willfully failed to timely file his federal income tax returns. As discussed earlier, Department Counsel effectively waived its ability to challenge the Judge's finding that Applicant requested extensions of time to file his federal income tax returns through the end of 1998. However, Applicant's failure to file his outstanding federal tax returns until April 1999 precluded the Judge from concluding Applicant had satisfied his legal obligation to file his federal income tax returns in a timely manner. [\(3\)](#)

Applicant argues that he did not intentionally and willfully fail to file his federal tax returns on time, that Department Counsel relied on circumstantial evidence, and the record evidence does not support a finding that his failure to timely file his federal tax returns was willful in nature. During the proceedings below, Applicant denied that he willfully failed to timely file his federal tax returns. Applicant's statements about his intentions and state of mind are relevant evidence, but they are not binding or conclusive evidence. Rather, those statements, like any other evidence, must be considered and weighed in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0144 (February 11, 2000) at p. 3. Furthermore, an applicant's intent or state of mind can be proven by circumstantial evidence even if the face of denials that the applicant acted with a particular intent or state of mind. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3 (quoting federal case). Accordingly, contrary to Applicant's arguments, willfulness can be proven by circumstantial evidence. Even reading the evidence in a light most favorable to Applicant (the nonappealing party), Applicant was aware that he had the legal obligation to file his federal income tax returns before the extensions of time

expired at the end of 1998 and he failed to do so until April 1999, almost four months later. Under the facts and circumstances of this case, Applicant's failure to meet his known legal obligation to file his federal tax returns until April 1999 is sufficient to demonstrate he acted in a willful manner.

(e) Criminal Conduct Mitigating Conditions 1, 4, and 6. Department Counsel contends the Administrative Judge erred by applying Criminal Conduct Mitigating Conditions 1, 4, and 6. Department Counsel's contention has merit.

The Administrative Judge did not have a rational basis to apply Criminal Conduct Mitigating Condition 1 ("The criminal behavior was not recent"). Applicant failed to file his outstanding federal income tax returns until late April 1999, several months after the extensions he had requested expired. Even under the most favorable reading of the record evidence, Applicant's failure to file his outstanding federal income tax returns until April 1999 militated against applying Criminal Conduct Mitigating Condition 1.

The record evidence in this case does not support the Administrative Judge's application of Criminal Conduct Mitigating Condition 4 ("The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur"). Applicant's excuses for not filing his federal income tax returns were not valid ones, <sup>(4)</sup>

Applicant told federal investigators he would deal with his outstanding tax return problems by certain times and then failed to meet those deadlines, and Applicant's April 1999 filing was four months after the expiration of the extensions he had requested. Given the record in this case, the Judge failed to articulate a plausible reason for applying Criminal Conduct Mitigating Condition 4.

Given the record evidence in this case, the Administrative Judge did not have a sufficient basis to apply Criminal Conduct Mitigating Condition 6 ("There is clear evidence of successful rehabilitation"). Applicant failed to meet deadlines he told federal investigators he intended to meet to resolve his tax problems, and Applicant failed to file his federal tax returns until about four months after the expiration of the extensions of time he requested from the Internal Revenue Service. And, the Judge found Applicant, who claimed to believe he owed no taxes, still owed the IRS for back taxes. The totality of the facts and circumstances of this case do not support the Judge's conclusion that Applicant has demonstrated much in the way of a track record of rehabilitation, let alone "*clear* evidence of successful rehabilitation."

(f) Department Counsel also argues the Administrative Judge erred in considering general factors concerning rehabilitation ("The presence or absence of rehabilitation and other pertinent behavioral changes"), motivation ("The motivation for the conduct"), and likelihood of recurrence ("The likelihood of continuation or recurrence").

Department Counsel's argument about the general factor concerning rehabilitation is a variation of its argument about Criminal Conduct Mitigating Condition 6, which was discussed earlier in this decision.

Department Counsel's argument about the general factor concerning motivation is persuasive. The Administrative Judge misapplied that factor when he focused on Applicant's motivation to timely file tax returns in the future and failed to evaluate Applicant's motivation(s) for not filing his state and federal tax returns for so many years.

Department Counsel's argument about the general factor concerning likelihood of recurrence also is persuasive. Given the record evidence in this case, there is no discernable basis for the Administrative Judge to conclude in summary fashion that "under the circumstances of this case, the probability that the Applicant will fail to file his taxes in a timely fashion are virtually nil." The Judge's conclusion is untenable given: (i) Applicant's history of making various legally unacceptable excuses for not filing his tax returns for years, (ii) Applicant's failure to meet deadlines he set for himself to resolve his tax return problems, and (iii) Applicant's failure to file his federal tax returns before the 1998 expiration of the extensions of time he requested from the Internal Revenue Service.

### **Conclusion**

Department Counsel has met its burden of appeal of demonstrating harmful error below. Considering the record as a whole, correction of the Administrative Judge's errors warrants reversal. Accordingly, pursuant to Item 33.c. of the Additional Procedural Guidance, the Board reverses the Administrative Judge's May 26, 2000 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. Applicant's argument about the significance of Department Counsel's statements at the hearing is more persuasive than Department Counsel's argument on this point.

2. When reviewing an Administrative Judge's credibility determination, the Board is not compelled to accept the Judge's conclusion that a witness' explanation is credible. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. As the Supreme Court has noted, "factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

3. Applicant's car accident analogy (Reply Brief at p. 10) is distinguishable and not persuasive. Applicant's excuses for not filing his tax returns did not involve circumstances that were totally out of his control; nor did those excuses reflect reasonable alternatives to actions Applicant could have taken to deal with his tax return problems. *See* footnote 4 of this decision.

4. *See In re Craddock*, 149 F.3d 1249, 1254-1257 (10th Cir. 1998)(in case involving civil penalties for late filing of federal tax returns, court discussed various federal decisions that rejected as defenses various excuses identical or similar to those Applicant used to explain his failure to file his tax returns for so many years).