

DATE: May 24, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0433

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

William A. Beeton, Jr., Esq.

Administrative Judge Claude R. Heiny issued a decision, dated December 13, 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 owed approximately \$115,000 to the Internal Revenue Service; 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 a Statement of Reasons (SOR) dated June 22, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations). A hearing was held on October 27, 1999. The Administrative Judge issued a written decision, dated December 13, 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 Judge's adverse security clearance decision.

Appeal Issues [\(1\)](#)

1. Whether the Administrative Judge erred by finding Applicant owed approximately \$115,000 to the Internal Revenue Service. The Administrative Judge found that Applicant owes the Internal Revenue Service (IRS) approximately \$115,000 for tax years 1989, 1994, 1995, and 1996. Applicant contends the Judge's finding is in error because the record evidence is not sufficient to support that finding. Applicant's contention is not persuasive.

Department Counsel has the burden of presenting evidence to prove controverted SOR allegations. Directive, Additional Procedural Guidance, Item 14. When reviewing a challenge to an Administrative Judge's findings, the Board looks at the record evidence as a whole to determine whether there is substantial evidence to support the challenged findings.

See, e.g., ISCR Case No. 98-0761 (December 27, 1999) at p. 2. In this case, there is sufficient record evidence to allow the Judge to find that Applicant owes the IRS approximately \$115,000.

To the extent that Applicant seeks to use these proceedings to litigate the validity of the IRS notices of levy, he misunderstands the limits of the jurisdiction of the Administrative Judge and this Board. Administrative Judges and this Board have jurisdiction over industrial security clearance cases under Executive Order 10865 and the Directive. Applicant's right to a hearing does not mean that he can litigate in DOHA proceedings the validity of tax matters that are committed by law to the jurisdiction of the IRS and the federal courts. Furthermore, DOHA Judges and this Board must accept the rulings of the federal courts on the validity and legality of the tax laws and IRS practices and procedures. *See* ISCR Case No. 94-1153 (March 26, 1997) at pp. 3, 4.

The record in this case shows that the IRS issued notices of levy indicating that it had determined he owed taxes. A notice of levy is authorized by statute and gives the IRS the right to all property levied on. *United States v. National Bank of Commerce*, 472 U.S. 713, 720-21 (1985). Applicant could have sought relief in federal court if he wished to challenge the validity of the IRS levies. *See, e.g., American Trust v. American Community Mutual Insurance Co.*, 142 F.3d 920, 923 (6th Cir. 1998); *Baddour, Inc. v. United States*, 802 F.2d 801, 807 (5th Cir. 1986).⁽²⁾ Applicant presented no evidence that he sought such relief in federal court. The evidence that Applicant is seeking to negotiate a resolution of this matter with the IRS does not constitute evidence that the notices of levy were improper, illegal, or incorrect.

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

Applicant also argues: (a) the Administrative Judge erred by applying Financial Considerations Disqualifying Conditions 1 and 3; (b) the Judge should have applied Financial Considerations Mitigating Conditions 1 through 6; and (c) there is no nexus between his situation and the security concerns of Criterion F. These arguments raise the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) Financial Considerations Disqualifying Conditions 1⁽³⁾ and 3⁽⁴⁾. Applicant argues the Administrative Judge erred by applying Disqualifying Conditions 1 and 3 because: (i) apart from Applicant's problem with the IRS, there is no evidence that he is not meeting his financial obligations; (ii) the record evidence does not demonstrate that he owes the IRS anything; (iii) he is willing to pay any taxes that are actually due; and (iv) the actions of the IRS have prevented him from resolving his problem with it. These arguments are not persuasive.

As discussed earlier in this decision, the Administrative Judge had sufficient record evidence to find that Applicant owes the IRS approximately \$115,000. Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that the facts and circumstances of Applicant's unsatisfied tax debt fall within the scope of Financial Considerations Disqualifying Conditions 1 and 3. The absence of any other financial problems does not take Applicant's case outside the scope of Criterion F. Furthermore, Applicant's statements about his willingness to pay any taxes that are actually due do not change the evidence that he has an outstanding, unresolved tax debt totaling approximately \$115,000.

(b) Financial Considerations Mitigating Conditions 1 through 6. Applicant contends the Administrative Judge erred by not applying Mitigating Conditions 1 through 6. The Board does not find Applicant's contention to be persuasive.

In the decision below, the Administrative Judge explained why he was not applying Financial Considerations Mitigating Conditions 1 through 6. The Judge's explanations reflect a reasonable interpretation of the record evidence in this case. Applicant's arguments to the contrary are not persuasive and fail to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

(c) Nexus. Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of the 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 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). Department Counsel need not prove Applicant present a "clear and present danger" to security.

See, e.g., ISCR Case No. 99-0068 (November 30, 1999) at p. 6. 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. 99-0473 (May 12, 2000) at p. 3. The facts and circumstances of Applicant's failure to satisfy his significant tax debt provide a rational basis for the Administrative Judge's adverse conclusions about his security eligibility.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's December 13, 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 formal finding for Applicant with respect to SOR 1.b. is not at issue on appeal.
2. The Board rejects Applicant's suggestion that he is being "deprived him of his lawful right to dispute an alleged tax debt." These proceedings do not affect Applicant's right to seek relief in an appropriate forum concerning his dispute with the IRS.
3. "[A] history of not meeting financial obligations"
4. "[I]nability or unwillingness to satisfy debts"