DATE: July 25, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0447

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John G. Metz, Jr. issued a decision, dated February 3, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed and Department Counsel cross-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 issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Department Counsel's cross-appeal presents the issue of whether the Administrative Judge erred by denying its motion to amend the Statement of Reasons.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) dated June 30, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR, dated July 14, 1999. By letter dated August 20, 1999, DOHA advised Applicant that his answer to the SOR was incomplete and gave him an extension of time to submit an answer to the SOR that was complete. Applicant submitted another answer to the SOR, notarized September 9, 1999.

A File of Relevant Material (FORM) was prepared, and a copy of the FORM was given to Applicant. In the FORM, Department Counsel included a motion to amend the SOR, seeking to amend SOR 1.a. to indicate the amount of the delinquent debt listed in that paragraph was $20,518.00 instead of $7,282.00, and to reflect the debt had not been satisfied as of November 8, 1999 instead of March 4, 1999. Applicant did not submit any response or objection to the FORM.

The case was then assigned to the Administrative Judge for disposition. The Judge issued a written decision, dated February 3, 2000. In the decision, the Judge denied Department Counsel's motion to amend the SOR. The Judge also made findings and conclusions about Applicant's history of financial difficulties, entered formal findings against

Applicant with respect to all the SOR allegations, and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant appealed the Administrative Judge's adverse decision, and Department Counsel filed a timely cross-appeal of the Judge's denial of the motion to amend the SOR.

Appeal Issues

1. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Administrative Judge made findings about Applicant's history of financial difficulties, including his failure to deal with the delinquent debts listed in the SOR. The Judge concluded Applicant's history of financial difficulties raised security concerns under Criterion F, and further concluded that Applicant had failed to demonstrate that he has resolved his financial difficulties or gotten them under control.

On appeal, Applicant does not challenge the Administrative Judge's findings about his history of financial difficulties. However, Applicant asserts: (a) he intends to file for bankruptcy in the future to deal with his financial difficulties; (b) he has never demonstrated any conduct that indicates he is a security risk; (c) his debts do not pose a security problem; (d) his military service and job performance weigh in his favor; and (e) he has never been accused of stealing. Applicant's assertions raise the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

There is no presumption of error below and the appealing party has the burden of raising and demonstrating error. *See, e.g.*, ISCR Case No. 99-0304 (February 9, 2000) at p. 2. Because Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties, the Board need not address the Judge's factual findings.

Applicant's assertion that he intends to deal with his financial problems by filing for bankruptcy does not demonstrate the Administrative Judge erred. It was not arbitrary, capricious, or contrary to law for the Judge to give little or no weight to Applicant's assertion that he intended to file for bankruptcy to deal with his delinquent debts. A promise to take remedial steps in the future is not evidence of reform or rehabilitation. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at p. 3. The Judge properly considered the record evidence of Applicant's failure to take concrete steps to deal with his financial difficulties.

Applicant's references to his military record and his job performance do not demonstrate the Administrative Judge erred. The Judge had to consider the evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See* Directive, Section F.3.; ISCR Case No. 98-0608 (June 27, 2000) at p. 2. Considering the record as a whole, the Judge was not compelled, as a matter of law, to conclude that the negative security implications of Applicant's history of financial difficulties was overcome or outweighed by the favorable evidence of Applicant's military service and his job performance.

Applicant's remaining arguments raise the issue of whether there is a rational nexus between his history of financial difficulties and his security eligibility. For the reasons that follow, the Board concludes the Judge had a rational and legally permissible basis for his adverse conclusions about Applicant's security eligibility.

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 requirements include consideration of a person's judgment, reliability, and sense of his or her obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person may be at risk to fail to properly handle or safeguard classified information. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The 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). Even in the absence of any security violation, the government can deny or revoke access to classified information based on the existence of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or than 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. 99-0462 (May 25,

2000) at pp. 4-5.

A history of financial difficulties raises concerns about an applicant's security eligibility. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6 (discussing security significance of history of financial difficulties). Considering the record as a whole, Applicant's history of financial difficulties, including his failure to resolve them, provides a rational and legally permissible basis for the Administrative Judge's adverse conclusions about Applicant's security eligibility.

2. Whether the Administrative Judge erred by denying Department Counsel's motion to amend the Statement of Reasons. Department Counsel makes several arguments in support of its contention that the Administrative Judge erred by denying its motion to amend the SOR. Specifically, Department Counsel argues: (a) the Judge construed the language of the Directive in a narrow manner that would lead to absurd and inequitable results; (b) the Judge's suggestion that Department Counsel could deal with the situation by withdrawing the SOR and issuing a new one to Applicant (i) would result in undue delay in the resolution of industrial security cases, and (ii) did not take into account the fact that such an approach would unduly limit the prerogatives of the Administrative Judge and the Applicant; (c) the Judge erred by ruling that the motion to amend the SOR would deprive Applicant of procedural protections to which he is entitled under the Directive; (d) there is no basis in the record to support the Judge's concerns that the motion to amend was potentially confusing to Applicant; and (e) the Judge erred by not exercising his discretion to take steps to ensure Applicant was not confused or otherwise failed to understand the implications of the motion to amend the SOR. Department Counsel's arguments are generally persuasive.

The fundamental flaw with the Administrative Judge's reasoning is its restrictive approach to the Directive's provisions concerning SORs. The Judge is correct in noting that the Directive is silent on whether an SOR can be amended in a case which is being decided based on an administrative record without a hearing. However, the silence of the Directive on this particular point is not dispositive of the issue. The Judge's restrictive approach to amending SORs: (a) is contrary to the practical approach taken toward administrative pleading in federal administrative law; (b) fails to construe and apply Items 7 and 17 of the Additional Procedural Guidance in light of other pertinent provisions of the Directive; (c) fails to take into account the anomalous results it could produce in non-hearing cases; and (d) is unwarranted in light of the relatively limited nature of the proposed amendment to the SOR.

(a) It is well-settled that administrative pleadings are not judged by the strict standards of a criminal indictment. *Citizens State Bank of Marshfield, Missouri v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. Civil Aeronautics Board*, 598 F.2d 250, 262 (D.C. Cir. 1979).[(1)] To the contrary, administrative pleadings should be liberally construed and easily amended. *See, e.g., New York State Electricity & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 104 (2d Cir. 1996); *Donovan v. Williams Enterprise, Inc.*, 744 F.2d 170, 177 n.10 (D.C. Cir. 1984); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 826 (9th Cir. 1981). The purpose of an SOR is to give an applicant adequate notice of the allegations against him or her so that the applicant has a reasonable opportunity to respond to them. DISCR Case No. 89-1079 (September 13, 1990) at p. 3. In assessing the sufficiency of an SOR, it is necessary to balance the need for fair notice to an applicant against the need to avoid transforming SOR pleadings into a game of wits in which a minor or technical misstep is decisive. DISCR Case No. 88-2577 (February 22, 1991) at pp. 7-8; DISCR Case No. 89-1529 (February 7, 1991) at p. 6; DISCR Case No. 89-1122 (October 30, 1990) at p. 4. As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. *See, e.g., Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992).

The clear import of the precedents discussed in the preceding paragraph is that form should not be elevated over substance to the detriment of a full and fair adjudication of cases on their merits. The overall purposes of the industrial security program are not well-served by interpreting the Directive in a manner that emphasizes pleading formalities over a full and fair adjudication of cases on the merits. *Cf.* ISCR Case No. 98-0395 (June 24, 1999) at p. 4 n.2 (Directive should be construed broadly in order to effectuate the purposes of the industrial security program); ISCR Case No. 97-0783 (August 7, 1998) at p. 4 (Adjudicative Guideline should not be interpreted in a manner that would operate to detriment of industrial security program or national security). As long as an applicant receives adequate notice of the allegations against him or her and a reasonable opportunity to respond, an Administrative Judge should not take a restrictive approach to SOR amendments. The restrictive approach toward SOR amendments taken by the Judge in this

case is not necessary to ensure that an applicant's rights under the Directive are respected.

It is undeniable that an applicant has the right to receive a fair and impartial adjudication of his case. *See* Directive, Sections D.1. and D.3. However, an applicant's right to a fair and impartial adjudication does not mean that Department Counsel is barred from ever offering current information that is relevant and material to the SOR allegations. Just as an applicant is entitled to offer relevant and material evidence to support a claim of reform, rehabilitation, or changed circumstances, Department Counsel is entitled to offer relevant and material evidence to support a claim that an applicant's situation (as covered by the SOR allegations) has not improved or has even worsened over time.

(b) The Administrative Judge's literal reading of Items 7 and 17 of the Additional Procedural Guidance ignores other relevant provisions of the Directive. Such an approach is fraught with the risk of error. *See, e.g.*, ISCR Case No. 98-0395 (June 24, 1999) at p. 4 (entire language of a Criterion, not merely wording of Disqualifying Conditions or Mitigating Conditions, is relevant to interpreting and construing the Criterion); DISCR Case No. 93-1050 (December 20, 1994) at p. 6 (noting error of focusing on language of one Adjudication Policy factor without regard to another, more relevant provision of Adjudication Policy). The silence of the Directive on the matter of motions to amend the SOR in a non-hearing case does not mean that the Judge could not consider other relevant provisions of the Directive. *See, e.g.*, DOHA Case No. 91-0418 (September 22, 1995) at p. 6 (where Adjudication Policy factor is silent on time periods, the Administrative Judge could consider recency of applicant's conduct under Section F.3. of Directive).[(2)]

As Department Counsel correctly notes, Item 10 of the Additional Procedural Guidance provides authority for the Administrative Judge to rule on questions of procedure, discovery, and evidence, and to conduct all proceedings in a fair and orderly manner. Furthermore, Item 7 of the Additional Procedural Guidance expressly provides that an applicant shall have 30 days from receipt of a FORM to respond, including making objections and submitting information in response to the government's case against the applicant. In addition, Item 17 authorizes the Judge to grant a party additional time to respond to an amendment to the SOR. Finally, the Judge's reasoning fails to give due consideration of the need to conduct a proceeding in a timely manner (Item 10) and to relax technical rules of evidence to permit the development of a full and complete record (Item19).

(c) The Administrative Judge's reasoning is also flawed because it fails to take into consideration the anomalous effects its application could have. As Department Counsel correctly notes, acceptance of the Judge's reasoning would result in the illogical situation that a motion to amend an SOR could be made in a hearing case, but not in a non-hearing case. This could lead to situations in non-hearing cases (but not hearing cases) where: (i) an applicant is barred from seeking to amend the SOR to reflect favorable record evidence; (ii) a Judge is barred from amending the SOR to reflect record evidence that proves relevant and material facts or concessions by a party as to the facts of a case; (iii) the parties could not move to amend an SOR to reflect facts to which the parties agree or stipulate; or (iv) no one could move to amend the SOR to correct a typographical or other minor error. The Board will not sustain an interpretation or construction of the Directive that would lead to such anomalous results. *Cf.* ISCR Case No. 99-0452 (March 21, 2000) at p. 6 (Board will not construe provision of Executive Order 10865 in a manner that could lead to anomalous results).

(d) The Administrative Judge's expressed concern about possible confusion and prejudice to Applicant is unwarranted. The Judge's concern about the possibility of abusive use of amendments to SORs by Department Counsel is premature. It is a well-established principle of administrative law that there is a rebuttable presumption of good faith and regularity on the part of agency officials. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 5 (rebuttable presumption of good faith and regularity by Administrative Judges); DISCR Case No. 89-1397 (September 25, 1991) at p. 5 (applying rebuttable presumption of good faith and regularity in an appeal where applicant asserted erroneous SOR allegation was issued in bad faith); DISCR Case No. 90-0822 (August 30, 1991) at p. 3 (applying rebuttable presumption of good faith and regularity in an appeal where applicant asserted he was unfairly singled out for inquiry and issuance of an SOR). Absent evidence of bad faith or misconduct by Department Counsel, it is premature and unwarranted for a Judge to suggest he or she has to rule in a particular way to avoid possible future abusive practices by Department Counsel.[(3)] If a Judge is faced with evidence of bad faith or misconduct by Department Counsel in a given case, then the Judge can deal with it at that time.

And, in any event, an Administrative Judge has the authority, under Items 10 and 17 of the Additional Procedural Guidance, to deal with a motion to amend the SOR in a manner that reasonably balances the right of the government to

have relevant and material information considered and the right of an applicant to receive fair notice and a reasonable opportunity to respond. In this case, the amendment sought by Department Counsel was clearly relevant and material to an evaluation of Applicant's security eligibility under Criterion F. Significantly, Department Counsel's motion sought to make a relatively limited amendment to SOR 1.a. so that it would reflect more current evidence that Department Counsel had received about the amount of the debt covered by SOR 1.a. and information that the debt remained unsatisfied 8 months after the date listed in the SOR issued to Applicant. Given the relatively limited nature of Department Counsel's motion to amend SOR 1.a., the Judge's concern about possible confusion and prejudice to Applicant was unwarranted. There is no good reason why the Judge could not consider Department Counsel's motion to amend the SOR subject to Applicant's right to make any reasonable objection to the proposed amendment or to respond to the new evidence if Applicant did not object to the proposed amendment.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Department Counsel has met its burden of demonstrating the Administrative Judge erred by denying the motion to amend the SOR. However, given the Board's conclusion that the Judge's February 3, 2000 decision should be affirmed, no useful purpose would be served by remanding the case to the Judge for further proceedings in this case.

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 Board has applied this principle to SORs in DOHA proceedings. *See, e.g.*, ISCR Case No. 99-0382 (May 3, 2000) at p. 3; ISCR Case No. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 94-1213 (January 16, 1996) at p. 6.

2. Furthermore, the silence of the Directive on any particular matter or subject does not preclude an Administrative Judge from considering, as persuasive authority, general principles of administrative law.

3. Acceptance of the Administrative Judge's reasoning on this point would lead to the unwarranted result that a Judge could reject any action by Department Counsel on the basis that it is conceivable that such an action might be used in an unfair or abusive way in the future.