

DATE: June 28, 2000

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0566

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Darlene Lokey-Anderson issued a decision, dated February 22, 2000, in which she 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.

The 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 brief alleged no specific errors with regard to the Administrative Judge's findings and conclusions in the decision below. The case presents the question of whether there is a basis for reopening the record to allow consideration of materials Applicant belatedly submitted in response to the government's File of Relevant Material.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 29, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations) and Criterion E (Personal Conduct). Applicant did not request a hearing. The government submitted a File of Relevant Material (FORM), which contained the government's documentary evidence, to the Applicant on December 28, 1999. Applicant received the FORM on December 30, 1999. No response to the FORM was received from Applicant. Subsequently, the Administrative Judge issued a decision in which she 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 decision.

**Appeal Issue**

Whether there is a basis for reopening the record in this case to allow consideration of matters submitted in response to the government's FORM. On appeal, Applicant states that he is responding to the portion of the Administrative Judge's decision where she indicated Applicant did not respond to the FORM. Applicant maintains that he did submit documents for the Administrative Judge's consideration on January 26, 2000, but that through no fault of his own, the materials failed to reach the Judge. Included with the Applicant's appeal submission is a January 27, 2000 form letter from the United States Postal Service addressed to "Dear Postal Customer." The letter states that some items mailed

from Applicant's zip code area on January 26, 2000 were destroyed in a postal vehicle fire. Applicant assumes that his response to the FORM was among the lost items. Applicant had maintained copies of the materials originally submitted by him, consisting of two letters and a court document, and those copies were submitted as part of his appeal submission.

The deadline for submitting a response to the FORM was January 31, 2000. As no response was received from Applicant, the Administrative Judge cannot be blamed for proceeding to decide the case based on the record before her. Generally, the Board's mandate is to determine if harmful error occurred below. As the Judge committed no error by issuing her decision, the issue presented in this case must be resolved through an evaluation of the reasonableness of Applicant's actions in the face of the possible destruction of the materials he submitted in response to the FORM.

Applicant maintained copies of the material he says he submitted in response to the FORM. However, at the end of January 2000, after receiving information from the Postal Service indicating that his submissions might not reach DOHA, Applicant did nothing. A letter dated December 28, 1999, which was submitted with Applicant's copy of the FORM, contained explicit instructions concerning the deadline for submitting matters. Importantly, it also contained a telephone number which Applicant could use to contact DOHA and attempt to resolve his problem. The case file contains no evidence of any attempts on the part of Applicant to contact DOHA prior to the issuing of the Judge's decision.

Applicant may well have responded to the FORM in a timely manner only to have his efforts dashed by an intervening, extraordinary event beyond his control. However, only Applicant possessed knowledge of the problem. Under the circumstances, Applicant had the obligation to take reasonable steps to inform DOHA of the status of his response to the FORM and bring to its attention any concern he had that his submission might have been destroyed in the postal fire. He failed to do so. Thus, there is no legitimate basis for reopening the record in this case to allow consideration of matters that finally reached DOHA only after the appeal process had begun.

Even if the Board were to conclude Applicant's failure to inform DOHA about the postal fire was excusable, he would not be entitled to any relief. Attached to Applicant's appeal submission are copies of the documents he indicates he submitted for the Administrative Judge's consideration. Those documents pertain to the matters covered by SOR 1.b. and SOR 1.c. The Judge entered formal findings in favor of Applicant with respect to all the Criterion F allegations, which included SOR 1.b. and SOR 1.c. Accordingly, Applicant was not harmed or otherwise prejudiced by the fact that the Judge never received the documents in question. No useful purpose would be served by remanding this case to the Judge for consideration of those documents. Finally, since the documents Applicant wanted the Judge to consider do not have any bearing on the Judge's adverse findings and conclusions under Criterion E (SOR 2), they do not demonstrate any factual or legal error by the Judge in reaching her adverse security clearance decision.

### **Conclusion**

The Applicant has failed to establish a sufficient basis for reopening the record in this case to allow for consideration of additional materials by the Administrative Judge. Accordingly, the Board affirms the Administrative Judge's February 22, 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 B. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board