

DATE: October 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-01516

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-two year old Applicant was discharged from the US Army in 1992, but through error was overpaid \$15,470. He recognized the error, but spent the overpayment and did not comply with Army's demand for repayment. The debt remains unpaid. He also failed to pay \$3,652 in state income taxes, but the debt is now \$847 and likely will be paid in full. Applicant's irresponsibility toward his large federal debt causes doubt as to his security reliability. Clearance is denied.

STATEMENT OF THE CASE

On May 3, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and DoD Directive 5220.6 (Directive) dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied or revoked.

The Applicant responded to the SOR in an undated Answer, with 4 attachments, in which

he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on August 7, 2001. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on August 13, 2001, but he did not submit a response.

The case was transferred from Administrative Judge C. Heiny to the undersigned on October 1, 2001.

FINDINGS OF FACT

The Applicant is forty-two years old and is employed by a defense contractor as a tester. He seeks to retain a DoD security clearance in connection with his employment in the defense industry.

The Government opposes Applicant's request for a continued security clearance, on the basis of allegations set forth in the attached SOR. The following findings of fact are entered as to each paragraph of the SOR:

Paragraph 1. Guideline F (Financial Considerations). The Government alleges that the Applicant is not eligible for clearance because he is financially overextended due to unpaid debts owed to federal and state governments.

During the period January 1980 to August 1992 Applicant served on active duty in the US Army. After completing twelve years of service Applicant elected to leave the Army and return to civilian life. At the time of his separation from active duty Applicant was entitled to receive mustering-out pay and allowances calculated on his E-4 pay grade. However, the Army paymaster erroneously calculated Applicant's final pay based upon the pay grade of E-5, one grade higher than Applicant had actually achieved. When this error was entered into the calculation of Applicant's final compensation it resulted in an overpayment.

Applicant was paid approximately \$38,000 upon leaving military service. Of this amount, \$15,470 represented an erroneous overpayment. Applicant concedes that when he received the \$38,000 he believed that "this amount appeared to be excessive," and he claims that he "brought this to the attention of a military officer." (FORM, Item 5, p.2.) Applicant does not support this claim with any details, corroboration or other information tending to excuse his failure immediately to report the overpayment directly to the paymaster or his subordinates.

About three months after receiving his discharge and final pay, Applicant was notified by the Defense Finance and Accounting Service (DFAS) that he had been overpaid \$15,470, and re-payment was demanded. By this time Applicant had spent some of the money (amount unknown), and he continued to spend the remainder into the following year. DFAS later offered to accept \$10,000 as a compromise settlement, but Applicant was unwilling (or by then perhaps unable) to pay the reduced amount, even on a monthly basis.

From 1992 to the present Applicant has made sporadic payments toward the debt, but has not established a regular pattern to support a finding that he is making a genuine, good faith effort in this regard. To the contrary, after Applicant left the Army in August 1992, believing he had been overpaid, he continued to spend the overpayment into June 1993 until the entire \$38,000 was exhausted.

During the last nine years Applicant has occasionally diverted his federal income tax refunds toward payment of his debt to DFAS. However, these irregular payments are not part of an agreement with DFAS, and they can not be viewed as a meaningful, effective method of payback. For example, Applicant applied his 1994 tax refund of \$1,109 toward the debt to DFAS, but in tax years 1995 and 1996 he applied toward the debt a combined total of only \$43 in tax refunds.

Due to changing amounts of penalties and interest the precise sum presently owed DFAS by Applicant is not easily calculated. However, it is found from the record that the total amount owed at this time is approximately \$13,000. The record contains no evidence that DFAS or any other federal agency has pursued payment of this debt through garnishment, litigation, or similar avenues of recovery.

In subpara. 1.b. of the SOR the government alleges Applicant is financially overextended as a result of a tax debt to state revenue authorities. The Government alleges and Applicant admits that state authorities secured a Lien of Judgment against Applicant for unpaid taxes owing from tax year 1992. Department Counsel and the Applicant disagree on the amount presently owed, however.

The Applicant's original debt for tax year 1992 was \$2,075. Interest and penalties increased the debt to \$3,652. During tax years 1993 through 1998 Applicant consistently applied his annual tax refund toward the repayment of this debt, and through this method he has reduced the debt to the present amount of \$847. Applicant's payments have been regular and effective toward reducing his state tax debt. He asserts he is on track to repay this debt in its entirety, and evidence of regular payment for six consecutive years supports Applicant's claim.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision found at Section E.2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[GUIDELINE F - FINANCIAL CONSIDERATIONS]: When an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying include:

- (1) A history of not meeting financial obligations.
- (3) Inability or unwillingness to satisfy debts.

Conditions that could mitigate security concerns include:

- (6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Since the protection of national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with national security," or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an Applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the Applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome doubts raised by the Government's case, and ultimately to demonstrate it is clearly consistent with the national interest to grant or continue the Applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under

this Directive include, by necessity, consideration of the possible risk that an Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in significant instances of financial mismanagement or unreliability which demonstrates a lack of trustworthiness on the Applicant's part. In this case the government's SOR alleges two instances of serious financial irresponsibility by Applicant involving unpaid debts to state and federal governments.

Upon consideration of the entire record, I conclude the following as to each allegation set forth in the SOR:

With respect to the federal debt alleged in Paragraph 1.a. (Guideline F), the Government has established its case. Regarding Applicant's financial practices he knowingly accepted an erroneous overpayment from the US Army in the amount of \$15,470 at the time of his separation from active duty in 1992. When the Army recognized its error and demanded a return of the overpayment Applicant ignored the demand and went on to spend all of the unearned windfall, leaving none to return to the Army.

After nine years the Applicant continues to owe the Government approximately \$13,000 of this debt, and has produced no credible evidence or assurance that he will ever make full payment. As noted earlier, federal authorities have taken no formal steps to recover this monetary loss, and it would be an exercise in speculation to determine the Government's motivation for this decision. Notwithstanding the Government's reasoning in this regard it does not change the conclusion that Applicant proved himself untrustworthy in a serious matter by failing or refusing immediately to return federal funds that did not belong to him.

With respect to the state tax debt alleged in Paragraph 1.b. (Guideline F), the Government has also established its case of financial mismanagement on the Applicant's part. Applicant's tax debt is also due in some part to his deliberate failure to file state income tax returns for tax year 1992 (and for several years thereafter as well). As the Government alleges, this demonstrates Applicant's initial failure to satisfy his state tax debt in a responsible manner.

However, Applicant shows that he has made a consistent, sustained effort to repay his state tax debt of approximately \$3,600. Applicant has applied his tax refunds to payment of this debt for six consecutive years in amounts ranging from \$139 to \$958. In this manner Applicant has reduced his debt by about three-fourths, including interest. Applicant is likely to pay the remaining \$847 he owes the state, and he has successfully overcome the Government's case against him as set forth in Paragraph 1.b. of the SOR.

Based upon the above discussion, it is concluded that the Government has produced sufficient credible evidence to support its allegations under Paragraph 1 and subparagraphs 1.a. and 1.b. of the SOR. The Applicant did not present sufficient sufficient evidence in rebuttal, extenuation or mitigation to outweigh the Government's case under subparagraph 1.a., and that portion of the SOR is concluded against the Applicant. However, Applicant's evidence of consistent repayment to the state is sufficient to outweigh the Government's case under subparagraph 1.b., and that portion of the SOR is concluded in favor of the Applicant.

On balance, and after taking the entire record into account, I conclude that Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline F: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Burt Smith

Administrative Judge