

DATE: January 29, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-02098

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

**APPEARANCES**

**FOR GOVERNMENT**

Matthew E. Malone, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The security concern raised by Applicant's financial problems--culminating in an October 1998 Chapter 13 bankruptcy petition--have been mitigated by his faithful, monthly payments to the bankruptcy court for more than one-half (36 of 60 months) of the required period. Applicant's inconsistent, uncorroborated statements concerning the manner in which he had fulfilled his federal income tax obligations for the past seven years were not sufficient to prove he had willfully failed to file his federal income tax returns. Clearance is granted.

**STATEMENT OF THE CASE**

On May 23, 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 Department of Defense Directive 5220.6, "Defense Industrial Personnel Security Clearance Review Program" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reason (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on June 18, 2001, and asked that his case be decided without a hearing. Applicant received the File of Relevant Material (FORM) consisting of 8 items on July 23, 2001. He filed a response on September 10, 2001. The case was assigned to Administrative Judge Braeman on September 19, 2001 and reassigned to this Administrative Judge on December 12, 2001 because of caseload considerations.

**FINDINGS OF FACT**

The SOR alleges a security concern is raised by Applicant's willfully failure to file his Federal Income Tax Returns for tax years 1992, 1993, 1994, 1995, 1996 and 1997 (in violation of Title 26, United States Code 7203--Guideline J), and

by his financial problems (Guideline F): he had petitioned for Chapter 13 bankruptcy on October 29, 1998. Applicant denied he had willfully failed to file his federal income tax returns, but admitted filing bankruptcy. I accept his admissions, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 51-year-old research scientist who has worked for his current employer, a DoD contractor since April 1999. Previously, he had been granted security clearances (secret) in 1980 and 1985.

Applicant began to experience financial problems as a result of being unemployed for a period of time in 1997. These financial problems caused him to file for bankruptcy under Chapter 13 in October 29, 1998. The bankruptcy petition lists liabilities of more than \$67,000.00 and assets of less than \$26,000.00. A principal component of the indebtedness included in Applicant's bankruptcy petition is his indebtedness (\$11,655.74) to the Internal Revenue Service (IRS) for tax years 1995 through 1997. The bankruptcy court issued a repayment plan for Applicant in December 1998. According to the terms of this plan, Applicant is obligated to pay \$470.00 monthly for 60 months. Applicant states he has been "faithfully maintaining" the payment schedule established by the Bankruptcy Trustee, but has not provided any documentation of his payments.

In his September 1999 signed, sworn statement to the Defense Security Service (DSS), Applicant provided ambiguous information about his past tax returns<sup>(1)</sup>:

During the past seven years I failed to file federal tax returns because of simple procrastination. However, the taxes for those years are included in the bankruptcy settlement

Later in responding to the SOR allegation that he had willfully not filed federal income tax returns for tax years 1992, 1993, 1994, 1995, 1996., and 1997, Applicant denied he had not filed tax returns for the years alleged; he stated he "had to file the returns<sup>(2)</sup> in order to calculate the amount of money (he) owed the IRS..." as part of his bankruptcy agreement. He further asserted he had filed his federal tax returns for 1992 and 1993 and did not owe any money for either year. He did not mention his tax return for 1994, and he did not indicate when he had filed his returns for 1992, 1993, 1995, 1996 and 1997. Applicant repeated his denial--that he had not filed tax returns for seven years--in his response to the File of Relevant Material.

There is no evidence in the file to corroborate Applicant's admission he did not file his federal income tax returns for the years 1992-1997. Corroborating evidence of a delinquent tax obligations is found in the bankruptcy documents which stated Applicant owed more than \$11,000.00 in federal income taxes for years 1995-1997 when he filed his bankruptcy petition in October 1998. There is no evidence in the file, other than Applicant's admission, indicating when the returns for those years, or the other years covered by the SOR allegation, were filed. Applicant's assertion he has made monthly payments of \$470.00 for 36 of the 60 months required by the Chapter 13 Plan (Item 7) has not been challenged.

The file does not include any report of Applicant's character or professional competence.

## POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

## FINANCIAL CONSIDERATIONS

### (Guideline F)

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate

funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts:

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

E2.A6.1.2.1. A history of not meeting financial obligations;

E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

**Conditions that could mitigate security concerns include:**

E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

**CRIMINAL CONDUCT**

**(Guideline J)**

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

**Conditions that could mitigate security concerns include:**

E2.A10.1.2.2. The criminal behavior was not recent.

**Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government established its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubt about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

**CONCLUSION**

Having considered the record evidence in accordance with the appropriate legal precepts and guidelines, this Administrative Judge concludes the Government has established its case with regard to Guideline F. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section 6.3, as well as those referred to in the section dealing with Adjudication Process, both in the Directive.

A security concern is raised by Applicant's Chapter 13 bankruptcy in October 1998. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The security concern raised by Applicant's bankruptcy has been mitigated by his faithfully making \$470.00 monthly payments to the bankruptcy court in satisfaction of his delinquent obligations. His regular payments on this obligation for more than half of the 60 month period required by the Chapter 13 Payment Plan constitutes a "good-faith effort to repay overdue creditors.." (See MC E2.A6.1.3.6.). Guideline F is concluded for Applicant

The Government has failed to satisfy its burden of proof with respect to the allegation Applicant willfully failed to file his federal income tax returns for tax years 1992 to 1997. Except for his admission (that he did not file federal income tax returns for "seven years") in a September 1999 signed, sworn statement which he later retracted--in both his answer to the SOR and in his response to the FORM-- there is no evidence Applicant did not file his federal income tax returns in a timely manner. The evidence submitted by the Government proves only that Applicant made inconsistent and contradictory statements about the manner in which he fulfilled his annual federal income tax obligation; this evidence does not prove he willfully failed to file his federal income tax return for any or all of the years in question. Moreover, the admission--he had not filed federal income tax returns for seven years--is implicitly contradicted by information in the bankruptcy documents which indicate Applicant owed delinquent taxes only for years 1995-1997. Guideline J is concluded for Applicant.

### **FORMAL FINDINGS**

Formal findings as required by Section 3, paragraph 7, of enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Guideline F) FOR THE APPLICANT

Paragraph 1.a. For the applicant

Paragraph 1.b. For the Applicant

Paragraph 2 (Guideline J) FOR THE APPLICANT

Paragraph 2.a. For the Applicant

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. There is no indication the DSS attempted to corroborate Applicant's admission during its investigation of Applicant's background.
2. Here, Applicant is apparently referring to tax years 1995, 1996 and 1997, as those are the tax years which are referenced on the bankruptcy petition.