

DATE: March 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06776

DECISION ON REMAND OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esquire, Chief Department Counsel

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Although the Applicant's past criminal conduct is not recent, he still owes in excess of \$16,500 for a state tax lien. Clearance is denied.

STATEMENT OF THE CASE

On February 26, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which 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 denied or revoked.

Applicant filed an Answer to the SOR on April 3, 2002.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant arial (FORM) on August 18, 2002. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on or about August 27, 2002, and Applicant's response was received on September 30, 2002. **That response consisted of four pages, without any documents attached, although page two of the response avers that two attached documents, each of one page, also existed.** The case was initially received by the undersigned for resolution on November 5, 2002, and a Decision was issued on November 13, 2002.

Applicant appealed my original Decision on the basis that I did not consider his two attachments. The Appeal Board has remanded that Decision with instruction that I,

. . . ascertain the provenance of the two documents . . . and determine whether those documents were part of the Applicant's response to the FORM. The Judge should issue a new decision that specifically explains what findings and conclusions the Judge makes about the provenance of the two documents If the Judge finds the two documents were part of Applicant's response to the FORM, then the Judge must consider them as part of the record evidence in this case.

The two documents referred to by the Appeal Board are, in fact, specifically described at page two of the Applicant's response; and as such, I find were originally attached to the response. For some unexplained reason, however, they did not reach the undersigned when I authored my original Decision. I will consider them now in making my Decision on Remand. The issues raised here are whether the Applicant's past criminal conduct and present financial difficulties militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the File of Relevant Material and Applicant's Response. The Applicant is 46 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct

1.a. From 1982 to 1987, the Applicant wilfully failed to file his state income tax returns (Government Exhibit (GX) 11). These wilful failures to file are in violation of that state's revenue and tax code; and as such, were misdemeanors.

1.b. In January of 1998, the Applicant was arrested for Perjury (GX 6 at page 4). He was fined \$150, and prosecution was deferred for one year (GX 8). In July of 2000, the case against him was dismissed (*id*).

Guideline F - Financial Considerations

2.a. The Applicant was indebted to his former state's franchise tax board in an amount in of \$18,345 (GX 10 at page 5). The Applicant has offered evidence that in 1983 and 1984, \$1,819 of this state tax lien had been satisfied (Attachments 1 and 2 to the Applicant's response).

Mitigation

The Applicant offers little in the way of mitigation save that nearly 20 years ago about 10% of the state tax lien was satisfied (GX 3 and Reply).

POLICIES

Enclosure 2 and Section E2.2. of the 1992 Directive set forth both policy factors and conditions that could raise or mitigate a security concern, and which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Criminal Conduct

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

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

Condition that could mitigate security concerns include:

1. The criminal behavior was not recent;

Financial Considerations

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:

None

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places.

CONCLUSIONS

Considering first the Applicant's past criminal conduct, by not filing his state income tax returns in the mid 1980s, he was subject to possible prosecution for six separate misdemeanor violations. More than four years ago, he was also arrested for Perjury, but prosecution was deferred and the case against him dismissed in July of 2000. I find that the Applicant's past criminal conduct is not recent enough in time so as to be of present security significance. Guideline J is found for the Applicant.

The same can not be said as to his financial situation, however. The Applicant had an outstanding state tax lien in excess of \$18,000 (GX 10 at page 5), and he has offered documentation that in 1983 and 1984 only about 10% of the tax lien had been satisfied. He still owes in excess of \$16,500, which he has not addressed on nearly 20 years. In his answer to the SOR, he blames the state for not applying his "entitled W-2 withholding credits" towards his past due indebtedness. This is not acceptable, as it is the Applicant's responsibility to address his past due indebtedness, not the state of his former residence. This shows extremely poor judgement on Applicant's part; and as such, Guideline F is found against the Applicant.

Considering all the evidence, specifically including the attachments to his response, the Applicant has not rebutted the Government's case regarding his financial difficulties. The Applicant has thus not met the mitigating conditions of Guideline F, and of Section E2.2. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline F.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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.

Richard A. Cefola

Administrative Judge