

DATE: May 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-13613

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's excessive indebtedness has been mitigated. His failure to file income tax returns for tax years 1988, 1990, and 1993 through 2000 has also been mitigated. There is no evidence of a deliberate attempt to conceal information concerning his tax lien on his security clearance application. Clearance is granted.

**STATEMENT OF THE CASE**

On December 12, 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.

The Applicant responded to the SOR in writing on January 21, 2003, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on March 3, 2003. A notice of hearing was issued on March 5, 2003. The hearing was held on March 25, 2003, at which the Government presented twelve exhibits. The Applicant presented thirteen exhibits. The Applicant called six witnesses and testified on his own behalf. One Post-Hearing Exhibit was submitted by the Government. The official transcript (Tr.) was received on April 10, 2003.

**FINDINGS OF FACT**

The Applicant is 54 years old, married and is several credits short of an Associates of Arts Degree. He is employed by a defense contractor as a Senior Engineer and is seeking to retain his Secret security clearance in connection with his employment.

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

SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk to engage in illegal acts to generate funds.

In the early 1980's, the Applicant was self-employed as a successful salesman for a photography company in State 1. He began to experience a series of tragic events that took a devastating toll on his life. In 1985, the Applicant's daughter died of leukemia. In 1987, his remaining daughter was moved to State 2 by her mother without the Applicant's permission. The Applicant became very distraught and depressed. By 1988, new technology made his business obsolete. The loss of business was further aggravated by a severe downturn in the economy in State 1. In order to deal with these losses, the Applicant began to drink excessively, and as a result closed his business in 1989. He was unable to find steady work for several years thereafter. His salary dropped from a six figure income to working part time jobs when he could find them.

In June 1994, the Applicant was evicted from his apartment. That event left him homeless, broke and embarrassed, and unable to pay his taxes. He had to live with friends in order to survive. He became indebted to his landlord for back rent. It was not until December 1998, that the Applicant learned that there was a judgment entered against him by the landlord in the amount of approximately \$5,400.00.

During this period, the Applicant also failed to file his federal income tax returns for tax years 1988, 1990, and 1993 through 2000. As a result, he became indebted to the Internal Revenue Service in the total amount of approximately \$115,000.00 (including accrued interest and penalties) for unpaid employment taxes for the years, 1998, 1990 and 1993 through 2000. The Applicant was financially unable to pay these taxes, and so he failed to file his tax returns. He planned to file them when he obtained full time permanent employment.

In March 1989, the Applicant joined Alcoholics Anonymous. He has been extremely involved the program and has been committed to a sober lifestyle since then.

In 1999, at the age of forty-nine, the Applicant realized that in order to get a stable job, he needed to change his career. He put himself through school, and started a full time career in the computer industry.

In April 2000, the Applicant became employed full time with a defense contractor and in an effort to straighten up his financial affairs, he attempted to contact his landlord to satisfy the judgment that was entered against him. At that time, he learned that the landlord has moved to Yugoslavia with no intent of returning to the United States. He was able to get her e-mail address in Yugoslavia, and has contacted her a number of times in an effort to set up a payment arrangement. Their last conversation left her with the understanding that she was going to get back with him about it. (Applicant's Exhibit D).

About this same time, the Applicant contacted the National Audit Defense Network (NADN) to help him file his past due tax returns, to prepare an offer in compromise, and to set up an installment plan with the Internal Revenue Service in an effort to resolve his back tax indebtedness. The NADN did nothing more than waste the Applicant's time and give him the run around. (Applicant's Exhibits I and M).

In October 2002, the Applicant hired a tax analyst, who happens to be an ex-IRS agent, who within two to three days had negotiated an installment agreement on the Applicant's behalf with the IRS. The installment plan provides that the Applicant pay \$2,000.00 a month toward his back tax indebtedness until it is completely paid off. The Applicant has followed this installment plan and is making regular monthly payments toward his back tax indebtedness since December 2002. (See, Applicant's Exhibits A, B and C).

The tax analyst testified that he is currently in the process of filing the Applicant's back tax returns. He further indicated that once the Applicant's tax returns are filed, the Applicant's tax liability will be substantially reduced. (Tr. pp. 50-51). The arrangement, however, will provide that the Applicant continue to pay \$2,000.00 a month toward his indebtedness in order to pay off his debt sooner.

The Applicant is current on all of his monthly financial obligations. (Tr. p. 131).

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he violated the misdemeanor provisions of Title 26, United States Code, Section 7203, by failing to file annual income tax returns, as required.

As previously discussed, the Applicant failed to file his 1988, 1990, and 1993 through 2000, Federal Income Tax Returns within the time required. His failure to file his Federal income tax returns was in violation of Title 26, United States Code, Section 7203.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a Questionnaire for National Security Positions (Standard Form 86) dated April 19, 2000. In response to question 36, which asked, "In the last seven years, have you had a lien placed against your property for failing to pay taxes or other debts?" the Applicant answered, "no". The Applicant explained that when he originally filled out the application he marked "yes" with an explanation to this question on his first draft of the application or working papers. (See, Applicant's Exhibit F). The Applicant was then asked by security to clarify information about the tax lien. (See, Applicant's Exhibit G). The Applicant stated that he thought about it, and realized that he had never gotten a tax lien, he did not have an amount to produce, and did not know where it was filed. He then contacted the NADN who were handling his tax matters at the time and asked them the same question. They advised the Applicant to answer the question directly. The Applicant had not received a tax lien and so he answered, "no". The Applicant also indicated on the application that the NADN was in the process of assisting him with his tax issues.

The Applicant states that he did not learn for sure that a federal tax lien was filed against him until November 7, 2002. (See, Applicant's Exhibit E).

#### Mitigation.

Several witnesses testified on behalf of the Applicant, including professional associates, his supervisor, a friend, and his tax analyst, who all indicate that the Applicant is trustworthy, respectful, loyal, honest and a person of high integrity. (See, Tr. pp. 31- 91).

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

#### Guideline F (Financial Considerations)

##### Conditions that could raise a security concern:

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

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

3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);
4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;
6. The individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts.

#### Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Any criminal conduct regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

5. There is clear evidence of successful rehabilitation.

Guideline E (Personal Conduct)

Conditions that could raise a security concern:

None.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

## 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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility, and criminal conduct which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant was, in the past, excessively indebted (Guideline F); and that he violated federal law by failing to file his income tax returns in a timely fashion (Guidelines E and J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The evidence shows that after experiencing some very devastating and tragic events, the Applicant has recently been able to put his life back together. After suffering one daughter's untimely death, his remaining daughter and wife abandoning him, his business downturn and loss of employment to the point of homelessness and poverty, he hit rock bottom. His feelings of depression, that brought on excessive drinking, aggravated his situation even more, which all contributed to his cycle of financial problems. It cannot be ignored that the Applicant was grossly negligent in not filing his income tax returns for tax years 1988, 1990 and 1993 through 2000 in a timely fashion, and for not being aware of his delinquent debts. However, under the circumstances, considering the devastating effect these series of unfortunate events had on him, it is not unreasonable to understand that one might temporarily neglect his responsibilities.

Although it has taken some time for the Applicant to recover and ultimately resolve his financial problems, he has made a good faith effort to handle his financial affairs. Since 1999, when the Applicant completed school and started a new career, he obtained a full time job, set up an installment agreement with the IRS, and is making regular monthly payments toward paying off this debt. He has hired a tax analyst who is in the process of re-filing the Applicant's back taxes, and will soon be completed with this process. He has attempted to pay off his judgment, and is currently still in negotiations with his past landlord to pay off the judgment, which he plans to do immediately. He and his wife are current with all of their other financial obligations and they plan to keep that way. He has also stopped abusing alcohol. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

The Applicant has climbed out of his dark hole of depression and poverty. This conduct shows extraordinary strength and integrity for which he is commended. The evidence also shows that the Applicant did not intentionally conceal on his security clearance application that there was a federal tax lien against his property. The Applicant's first draft of his security clearance application revealed a tax lien. He was then asked to provide more detail, which he did not have and when he inquired, he was wrongfully advised by his tax advisor that he should answer the question directly by stating that he did not have a federal tax lien. There is no evidence in the record to show that the Applicant deliberately concealed it or intentionally provided false information about it. Accordingly, I find for the Applicant under Guidelines E (Personal Conduct) and J (Criminal Conduct).

The Applicant has provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his past financial situation has had on his security worthiness. Accordingly, I find that it is clearly consistent with the national interests to grant the Applicant a security clearance.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations

expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.a.: For the Applicant.

### **DECISION**

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

Darlene Lokey Anderson

Administrative Judge