

DATE: March 4, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04754

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has resolved his tax liabilities in a way that is acceptable to the Internal Revenue Service. He has reduced his tax indebtedness by \$20,000 during 2003. The cause of the tax liability was directly related to the Applicant's establishing a small business. He has returned to the salaried work force, which enables him to pay his taxes. Possibility of recurrence is nil. Considerable mitigation is shown. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On March 28, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) 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 May 19, 2003, and July 5, 2003, and requested a hearing. The case was received by the undersigned on September 2, 2003, and a Notice of Hearing was issued on September 8, 2003.

A hearing was held on September 24, 2003, at which the Government presented 12 documentary exhibits, and called one witness. Testimony was taken from the Applicant, who called one additional witness and also submitted six hearing exhibits and one post hearing exhibit (Applicant's Exhibit G consists of various financial records). The transcript was received on October 6, 2003.

FINDINGS OF FACT

The Applicant is 47, married and has a Master's degree in Electrical Engineering. He is employed by a defense contractor as an Engineer/Scientist, and he seeks to obtain a Secret-level DoD security clearance in connection with his

employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the 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. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

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

The Applicant has worked in the defense industry since 1982. In 1995, he and a colleague left their employment to start their own company. The Applicant worked full time at this company from 1995 until 2000, when he went to work for another defense contractor as a salaried employee. The company was self-financed, which meant that the Applicant and his partner used their own money to bankroll the company. (Transcript at 33-34.) For the Applicant, this meant taking money out of his 401(k) retirement plan during tax years 1996 through 1999. Each of these withdrawals had tax implications. The Applicant filed tax returns for each of these years. After the 1996 tax year, the Applicant arranged to make payments to the Internal Revenue Service (IRS). (Government Exhibit 9 at 1-2.) During the subsequent three years, the Applicant was unable to make payments on his taxes, and interest and penalties accrued to both the Federal and state taxing authorities. The total amount was approximately \$40,000. The records show that the Applicant is current with his state taxing authority. (Applicant's Exhibit G at 5-6.)

Once the Applicant returned to full employment with the defense industry in 2000, he set about trying to take care of his indebtedness. The Applicant reached a settlement with a credit card company (SOR subparagraph 1.a.). In March 2001 the Applicant paid \$1,541.79, which was accepted as full payment. (Applicant's Exhibit G at 2.) Since that debt was paid off before the issuance of the SOR, this subparagraph is found for the Applicant.

With regards to the 1997, 1998 and 1999 tax years, the Applicant engaged in prolonged negotiations with the IRS to reach an accommodation. On September 3, 2003, the IRS accepted the Applicant's proposal for an installment agreement. (Applicant's Exhibit D.) During the year 2003, the Applicant managed to pay down his tax liability by \$20,000, including the first payment on his installment plan. (Transcript at 86-87; Applicant's Exhibits E, and G at 3-4.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he engaged in conduct which involves questionable judgment, untrustworthiness or unreliability.

The Applicant was seriously delinquent in filing his 2000 Federal and state tax returns. The tax returns were filed sometime after November 30, 2001. (Government Exhibit 12, Applicant's Exhibits E at 2, and G at 5.)

Mitigation.

The Applicant's business partner testified at great length about the Applicant and their business. This person knows the Applicant for 22 years. He describes the Applicant as "one of the most scrupulously honest and upright and ethical people that I have ever met in my life." (Transcript at 29.)

The Applicant was named "Engineer of the Year" in 2002 by his new employer. Several of his co-workers submitted laudatory letters on his behalf. A program manager states, "I find [the Applicant] to be a forthright man of integrity, worthy of the full and fair scrutiny afforded to many of us who have sought security clearance." (Applicant's Exhibit B at 2.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the

world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline F (Financial considerations)

Conditions that could raise a security concern:

(1) a history of not meeting financial obligations;

Conditions that could mitigate security concerns:

(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);

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

Guideline E (Personal conduct)

Conditions that could raise a security concern:

(5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns:

(5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress.

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 factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- 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 guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

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 acts of financial irresponsibility or personal conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge 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. 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

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 granting 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 or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has a significant Federal tax debt that is not resolved (Guideline F); and that he failed to file his 2000 Federal and state tax returns in a timely manner (Guideline E).

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that the genesis of the Applicant's tax problems was directly related to his attempt to found a company with his own funds. For several years the Applicant and his partner attempted to live part of the American dream, using his retirement funds to do it. By his own admission, he used poor judgment in allowing his tax liability to rise as much as it did. By 2000, however, he decided that he needed a regular paycheck and returned to full time employment with a defense contractor. Since that time he has worked diligently to resolve his tax liabilities. After persistent negotiations, he worked out a payment arrangement with the IRS in 2003, and successfully paid off \$20,000 (one half) of his tax liability during that year. While his remaining liability is still high, the Applicant has shown that he can resolve it in a timely fashion that is acceptable to the IRS.

Turning to the Guideline E allegations, the Applicant freely admits that he was not timely in filing his 2000 tax returns. However, the evidence is clear that they have been filed and that the Applicant has learned his lesson and will now no longer be delinquent in taking care of his tax liabilities.

In addition, application of the F.3. factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated to continue making his tax payments in a timely fashion (factor g.), and, under the circumstances of this case, the probability that the Applicant will fail to file or pay his taxes in the future are virtually nil (factor i.).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 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.

Subparagraphs 1.a. through 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.b.: 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.

Wilford H. Ross

Administrative Judge