

DATE: April 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15535

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant filed for the protection of bankruptcy in 1994 and again in 2002. Both filings were caused by conditions largely beyond his control. He has filed all of his outstanding federal and state income tax returns, prior to the issuance of the Statement of Reasons. Mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On November 13, 2003, 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 the 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 or about December 23, 2003.

The case was received by the undersigned on February 2, 2004. A notice of hearing was issued on February 12, 2004, and the case was heard on March 22, 2004. The Government submitted documentary evidence. Testimony was taken from the Applicant. The transcript was received on April 6, 2004. The issues raised here are whether the Applicant's past financial difficulties and related personal conduct militate against the granting of a security clearance. [The Applicant admits the underlying factual basis of his two bankruptcy filings, subparagraphs 1.b. and 1.c., but denies that he has not filed his outstanding income tax returns, subparagraphs 1.a. and 2.a.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 47 years of age, and is employed by a defense contractor that seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same,

I make the following additional findings of fact.

Guideline F - Financial Consideration & Guideline E - Personal Conduct

1.b. and 1.c. In June of 1994, the Applicant filed for the protection of a Chapter 7 Bankruptcy (Government Exhibit (GX) 12). This filing was a direct result of a downturn in the real-estate market, as his annual income fell from an average of \$120,000 as a real-estate broker to about \$35,000 (Transcript (TR) at page 27 lines 5~19, at page 28 lines 4~11, at page 28 line 19 to page 29 line 2, and at page 34 lines 4~20). In March of 2002, the Applicant again filed for the protection of a Chapter 7 Bankruptcy (GX 11). This filing was a direct result of a divorce, and of the Applicant being unemployed for six months (TR at page 24 lines 9~15, at page 29 line 3 to page 31 line 11, and at page 34 line 22 to page 35 line 5). At present, the Applicant has no past due indebtedness, and a positive monthly cash flow of about \$500 (TR at page 35 line 24 to page 36 line 10).

1.a. and 2.a. The Applicant did not file his federal and state income tax returns in a timely fashion for tax years 2000, 2001 and 2002 (TR at page 24 line 20 to page 25 line 4, at page 34 lines 4~20, and at page 35 lines 6~23). His former spouse had filed a fraudulent claim against the Applicant for back child support; and as such, she would receive any tax refund he was due for the tax years in issue (*id*). Once her fraudulent claim was dismissed, he filed all of his past due returns (GX 15~17). He filed these returns in September of 2003, prior to the issuance of his SOR in November of 2003. The Applicant has also filed his income tax returns for tax year 2003 (TR at page 33 lines 15~22).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, 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, and 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 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

The Applicant has a "history of not meeting [his] financial obligations," and an "[i]nability . . . to satisfy debts." These are the first and third disqualifying conditions under Financial Considerations. The third mitigating condition is clearly applicable here, however, as his financial difficulties were a result of "conditions . . . largely beyond . . . [his] control (e.g., loss of employment, a business downturn, . . . [and a] divorce . . .)." The Applicant is now gainfully employed, has a positive monthly cash flow of \$500, and has no past due indebtedness. Mitigation is shown; and as such, Guideline F is found for the Applicant.

As to the Applicant's failure to file his income tax returns in a timely fashion, this is a "pattern of . . . rule violations;" and as such, the fifth disqualifying condition is applicable under Personal Conduct. He was trying to protect his tax refunds from the fraudulent claim of his former spouse. Once that fraudulent claim was dismissed, the Applicant filed all of his outstanding income tax returns. It is highly unlikely that he will fail to timely file his returns in the future. In fact, he has already filed his income tax returns for tax year 2003, in a timely fashion. As there is clear evidence of rehabilitation, Guideline E is also found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his past financial difficulties and related personal conduct. The Applicant has thus met the mitigating conditions of Guidelines E and F, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines E and 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.
- c. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For 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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge