

DATE: January 11, 2005

In re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02138

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez Jr., Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In 1996, Applicant and his wife were convicted of federal tax evasion for tax year 1988. Applicant served eight months in prison as a result of his conviction. His failure to note a civil court action on his security clearance application was not willful. Applicant was not delinquent in paying his debt to the U.S. Government that resulted from his conviction. Clearance is granted.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 3 December 2003, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) of the Directive. Applicant answered the SOR in writing on 9 January 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 11 August 2004. Applicant's hearing was delayed while he was deployed by the Federal Emergency Management Agency to provide support for victims of the Florida hurricanes. On 1 December 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 9 December 2004.

**RULINGS ON PROCEDURE**

Department Counsel moved, without objection from Applicant, to amend the SOR by adding ¶ 1.b alleging Applicant violated 18 U.S.C. § 1001 by knowingly and willfully omitting a civil court action in his answer to question 40 on his security clearance application. I granted the motion.

**FINDINGS OF FACT**

Applicant is 65 years old. He and his wife are employed as truck drivers for a defense contractor. He served as a firefighter for a large metropolitan city for 24 years and was a master sergeant in the U.S. Army Reserve.

In 1995, Applicant and his wife were indicted for conspiracy to defraud the U.S. Government, evading federal income taxes, and structuring financial transactions to avoid reporting requirements. In 1996, after a two-week trial, Applicant and his wife pled guilty to federal income tax evasion for 1988. He was sentenced to eight months in prison, fined more than \$5,000, and placed on supervised probation for three years. Applicant served his time and successfully completed his probation. As a result of his conviction, Applicant and his wife were assessed a penalty of more than \$40,000 on their 1988 federal income taxes. A lien resulting from the assessed penalties was released by the IRS in February 2000.

Applicant completed his security clearance application (SCA) on 18 February 2000. Question 40 asked if, in the previous seven years, Applicant had been a party to any public record civil court actions not listed elsewhere on the form. Applicant answered "no." In her SCA, Applicant's wife listed a civil settlement action in her answer to question 40. Ex. 30 at 7; *see* Ex. 29.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline J--Criminal Conduct**

In the SOR, DOHA alleged Applicant was indicted in 1995 on federal charges of conspiracy to defraud the government, income tax evasion, and structuring financial transactions in order to evade currency reporting requirements from 1986-95 and was convicted of income tax evasion (¶ 1.a). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence the allegation in ¶ 1.a. Applicant committed a serious criminal offense--tax evasion. DC E2.A10.1.2.2. On the other hand, Applicant's criminal behavior was not recent (MC

E2.A10.1.3.1)--having occurred some 16 years ago. And there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6)--Applicant paid his debt to society, complied with all terms of probation, has held steady employment since his release from prison, and has not been in trouble with the law since. I find for Applicant.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant omitted material information from his SCA--whether he had any civil court actions against him not reported elsewhere on the SCA. After carefully considering all of the evidence, including the fact Applicant has never tried to hide his conviction or the financial situation that resulted in his conviction, I am convinced the omission was not willful. I find for Applicant.

### **Guideline F--Financial Considerations**

In the SOR, DOHA alleged Applicant was indebted to the U.S. Government in the amount of \$40,509 which Applicant failed to pay (¶ 2.a). An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established by substantial evidence that Applicant and his wife had a debt to the U.S. Government as a result of their convictions for tax evasion. But Applicant established that the debt was promptly paid. After considering all the evidence in this case, I find for Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline F: FOR APPLICANT

Subparagraph 2.a: For Applicant

### **DECISION**

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

**James A. Young**

**Administrative Judge**

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).