DATE: October 20, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-02816

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Joseph L. Johnson, Esq.

SYNOPSIS

Applicant is 56 years old, married with three children and three grandchildren. He drives a tractor trailer for a trucking company and requires a security clearance to haul military cargo. Applicant resolved his income tax problem. His marijuana conviction occurred 33 years ago. Applicant did not mitigate the financial considerations and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 14, 2004, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on May 10, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on November 16, 2004. On December 15, 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. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on December 27, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 56 years old, married with three adult children and three grandchildren. He and his wife are long-distance truck drivers holding commercial drivers licenses. Applicant drives trucks hauling military shipments. He requires a security clearance to be able to continue this work. (Tr. 11-13; Exhibit 1)

Applicant owed the U.S. Internal Revenue Service (IRS) about $12,994.09 for unpaid 1994 income tax with penalties and interest. Applicant had an accountant in 1994 for his taxes. Applicant paid the $510 owed at the time. The IRS did not receive the check, and over time the $12,994.09 accrued. The IRS later found it owed Applicant money, so the net amount owed by Applicant was $6,234.53. Applicant paid those taxes through a levy imposed on his income by the IRS and the amount owed is paid in full as of September 9, 2002. The IRS released the lien on his income it had when it was paid in full. Applicant admitted he failed to file Federal tax returns for 1993 and 1995 to 2001. He paid the tax through payroll deductions shown on his W-2. He has not filed those tax returns because no IRS authority told him to do so. He got a refund for 2003. Applicant also admitted he owed state taxes at some time, but he has paid them, to his recollection but he had no documentary evidence to support his assertion. (Tr. 20-27, 35-37, 40, 41; Exhibits 2, A-E)

Applicant filed his 2002 federal income tax returns on time. He also filed his 2003 and 2004 federal and state income tax returns. He is a W-2 employee, so the government tax agencies receive his withholding amounts biweekly. He files his returns to obtain tax refunds. His latest federal tax refund was $1286. (Tr. 26-44; Exhibits C-E)

Applicant was arrested in 1971 for distribution of marijuana. He distributed marijuana to earn extra money at that time. He was sentenced to five years in jail, and served 42 months. He was placed on supervised probation for 18 months. Applicant takes periodic drug tests administered by or for his employers. He passes all of them. Since his release from prison in 1974, Applicant has not been in an trouble with the law. He married and raised his family, and became a truck mechanic and driver. (Tr. 14-19; Exhibits 1-3, C-E)

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline F: Financial Considerations: *The Concern*: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Guideline J: Criminal Conduct: *The Concern*: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Regarding the financial considerations security risk, Applicant had unpaid taxes from 1994, and failed to file his income tax returns for 1993 and 1995 to 2001. Disqualifying Condition (DC) E2.A6.1.2.2 (*Deceptive or illegal financial practices such as income tax evasion*) applies.

I conclude no Mitigating Conditions (MC) apply here. Applicant paid the original $510 debt timely, but has not proof of payment of that debt, only his recollection and Exhibit A. If the IRS did not receive his payment timely, a notice would have gone to him more recently than he asserts. Even if his tax debt for 1994 was paid by the levy, he has not filed his tax returns for 1993 and 1995 through 2001, so there is no evidence of what debt Applicant may owe for those tax years. Even though no IRS official told him to file the returns, he has a legal duty to do so. There is clear evidence he has had tax filing or payment problems from 1993 to 2001, including state tax debts for years Applicant could not remember but may include the same years. There is a clear pattern here of income tax evasion or avoidance. Without the proper filings and a calculation by the IRS as to his debt, Applicant cannot show he has mitigated the financial considerations security concerns alleged in the SOR. Therefore, I conclude this security concern against Applicant.

Considering the criminal conduct security concern, Applicant was convicted 33 years ago of marijuana distribution. He apparently paid his 1994 Federal income tax after the IRS took collection and enforcement action. It is an offense to knowingly fail to file an income tax return, and Applicant did not file 1993, and 1995 to 2001 returns. DC E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply.

MC E2.A10.1.3.1 (*The criminal behavior is not recent*) and MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) apply to the marijuana conviction from 33 years ago. He has not had any further marijuana involvement. However, there was a tax violation, because there is a legal requirement to file the returns, even if money is deducted from each paycheck for tax withholding. Applicant admits he has not filed tax returns for 1993 and 1995 through 2001. I would not apply the MC to the failure to file income tax returns allegations. Therefore, I conclude this security concern against Applicant.

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. 10 U.S.C. § 986 (c)(1) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).

As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year. 10 U.S.C. § 986(c)(1) (2004). The waiver provision was also amended. It now provides that an exception to the prohibition on granting a clearance may be authorized "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision 'may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.

ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

I disagree with the Appeal Board's conclusion. The Appeal Board conflated making a recommendation to waive with making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). However, to avoid the possibility of a remand if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would have been had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would have recommended further consideration of this case for a waiver of 10 U.S.C. § 986 pertaining to the allegations in Paragraph 2.a. of the SOR..

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

DECISION

In light of all 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 Applicant. Clearance is denied.

Philip S. Howe

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).