

DATE: December 13, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12494

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Alan Edmunds, Esquire

SYNOPSIS

The Applicant willfully failed to file his Federal tax returns for five years (1999-2003). They were not filed until 2005. This conduct was in violation of a Federal criminal statute. Insufficient mitigation is shown. Clearance is denied.

STATEMENT OF THE CASE

On August 12, 2005, 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 September 26, 2005, and requested a hearing. The case was originally assigned to another Administrative Judge on November 22, 2005. The case was received by the undersigned on July 10, 2006, and a Notice of Hearing was issued that same day.

A hearing was held on July 25, 2006, at which the Government presented six documentary exhibits. Testimony was taken from the Applicant, who called three witnesses and also submitted 18 exhibits. The transcript was received on August 4, 2006.

FINDINGS OF FACT

The Applicant is 73, married and has a Master's degree. He is employed by a defense contractor, and he seeks to obtain a 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 J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Paragraph 2 (Guideline F - Financial concerns). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he is financially overextended and therefore at risk of having to engage in illegal acts to generate funds.

The Applicant has a long history of willfully failing to file his Federal tax returns in a timely fashion. The Applicant's 1999, 2000, 2001, 2002 and 2003 Federal tax returns were not filed until January 2005. (SOR subparagraphs 1.a. through 1.e.) (Applicant's Exhibits N through R.) As a result of his filing these returns late the Applicant had to pay \$73,419.18 in taxes, interest and penalties. These payments were made in February and October 2005. (SOR subparagraphs 2.a. and 2.b.) (Applicant's Exhibit L, Transcript at 63-64.) He does not owe the Federal government any more for back taxes.

The inability of the Applicant to file his tax returns in a timely fashion has been a continuing problem. His 1994, 1995 and 1996 taxes were not filed until December 1998. (Government Exhibits 2 and 3.) The record also shows that his wages were attached to pay for back taxes in the 1980s. (Government Exhibit 2.)

The Applicant understood during this entire period his responsibility to file and pay his taxes in a timely fashion each year. According to the Applicant, these continuing problems occurred because of his wife's interior design business. He stated that his wife consistently got behind in the paperwork necessary to file a timely tax return each year. The Applicant also testified that his wife had some eye problems that made it difficult for her to complete her paperwork. Finally, he stated that his wife hated to do paperwork. (Transcript at 38-39, 47-52.)

In order to prepare the most recent tax returns, the Applicant and his wife hired a tax professional. He submitted that this person would continue to be involved in preparing his tax returns. (Transcript at 39.) The record shows that a different tax preparer did the 1994, 1995 and 1996 returns. (Government Exhibit 3.)

Mitigation.

The Applicant is a respected member of his employer, having worked in the defense industry for over 40 years. Two coworkers testified on the Applicant's behalf. His former supervisor, who has known the Applicant for 16 years, stated about the Applicant, "He's honest. He's reliable. He's thorough. He's a gentleman. He's good." (Transcript at 18.) Another coworker, who has known the Applicant for 25 years, states, "His coworkers hold him in very high esteem. He - - he is probably the - - the most trusted person in our laboratory today." (Transcript at 28.) (See Applicant's Exhibits A, C, D, E and F.) (See also Applicant's Exhibits G through K.)

The Applicant's pastor also testified. He has known the Applicant for 23 years and states about the Applicant, "He's a very solid citizen, the kind of person whom I would rely upon completely." (Transcript at 34.) (See Applicant's Exhibit B.)

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 will be set forth under CONCLUSIONS, below.

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 criminal conduct and acts of financial irresponsibility 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 or 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 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 long history of willfully failing to file his Federal tax returns in a timely fashion, a violation of Federal law (Guideline J); and that he owed the Federal government a considerable amount of money in back taxes (Guideline F).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is

sufficient to overcome the Government's case against him, except in part. Paragraph 2 is found for the Applicant as he has shown evidence that he has paid the Federal government all of the back taxes that he currently owes.

The Applicant's conduct in willfully not filing his Federal tax returns for several years is criminal. Disqualifying conditions 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged); and 2 (A single serious crime or multiple lesser offenses) apply to this case. This conduct has evidently occurred at least twice within the last ten years. The first time concerning three years of tax returns (1994, 1995 and 1996). The second time concerned no less than five years of tax returns (1999, 2000, 2001, 2002 and 2003.)

In mitigation the Applicant states that he is a nice man, respected by his coworkers and that it his primarily his wife's fault. The fact is the Applicant is an educated man, who fully understands his responsibility to file a tax return. For whatever reason, he failed to do what was necessary to file a return until he felt forced to do so. His conduct was recent, not isolated, he was not coerced into not filing a timely return and there is little evidence of successful rehabilitation. The Applicant states that he and his wife have learned their lesson and that this will not happen again. However, he has virtually no track record of filing his returns in a timely fashion.

The Applicant submits that the whole person factors can be used to overcome his intentional failure to file a tax return for five years. I disagree. He is obviously a respected man in his community and at his employer. He has given many years to the defense industry. But his history of intentionally failing to file his tax returns for years is too much for this evidence of good character to surmount.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As set forth above, Paragraph 2 is found for the Applicant.

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: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.

Subparagraph 1.d.: Against the Applicant.

Subparagraph 1.e.: Against the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.b.: For the Applicant.

DECISION

In light of all 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 the Applicant.

Wilford H. Ross

Administrative Judge