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Applicant for security clearance

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November 12, 1996

ISCR OSD Case No. 94-1153

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR THE GOVERNMENT FOR THE APPLICANT**

Martin H. Mogul, Esq. -----

Department Counsel Personal Representative

**STATEMENT OF THE CASE**

On March 19, 1996, 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 the attached Statement of Reasons (SOR) to (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 April 18, 1996, and requested a hearing. The case was received by the undersigned on May 3, 1996, and a Notice of Hearing was issued on June 14, 1996.

A hearing was held on August 14, 1996, at which the Government presented four documentary exhibits, and called one witness. Testimony was taken from the Applicant, who called one witness and also submitted eight post-hearing exhibits. The transcript was received on August 27, 1996.

## **FINDINGS OF FACT**

The Applicant is 51, single and has a bachelor of science degree in electrical engineering, and a master of science degree in family relations and child development. He is employed by a defense contractor as a flight manuals engineer, 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 attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Criterion J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in multiple acts of criminal conduct.

The Applicant willfully failed to file his Federal income tax returns for the tax years 1982, 1983, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993 and 1994. In each of these years the Applicant was required by law to file a tax return. This conduct was in violation of Federal law, Title 26, United States Code, Section 7203, which makes it a misdemeanor criminal offense to not file a return when obligated to do so.

The Applicant refuses to file an income tax return because he maintains that he is not a person subject to the dictates of the Internal Revenue Code requiring the filing of a tax return. In fact, the Applicant states, "I firmly believe there is no law that requires me to file a tax return." (Transcript at 43.) He states that he does not intend to file tax returns in the future.

Paragraph 2 (Criterion E - Personal conduct). The Government alleges in this paragraph that the information presented under Criterion J will also support an adverse finding of questionable judgment, untrustworthiness, unreliability and an unwillingness to comply with rules and regulations under Criterion E. Accordingly, the findings entered under Paragraph 1 will also be considered in resolving the issues under Paragraph 2 as well.

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. 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 criterion. 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:

### Criterion J (Criminal conduct)

#### Conditions that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

#### Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

### Criterion E (Personal conduct)

#### Condition that could raise a security concern:

- (5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "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 criteria 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 misdemeanor criminal acts 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 *prima facie* 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 *prima facie* 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 *prima facie* evidence that the Applicant has

repeatedly failed to file his Federal income tax returns, in violation of a misdemeanor criminal statute (Criterion J); and that this evidence indicates questionable judgment, untrustworthiness, unreliability and an unwillingness to comply with rules and regulations under Criterion E.

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him. The Applicant honestly believes, and strenuously argues, that he is not obligated to file income tax returns. The fact is, however, that no court has agreed with the Applicant's arguments.

The nexus between the Applicant's conduct and the holding of a security clearance is simple and direct. Beyond the fact that willfully engaging in criminal conduct shows questionable judgment on his part, the Applicant believes he has the right and ability to determine on his own what laws will apply to him. How can the Government ever be sure that he will always follow security rules if he ever begins to believe that they should not apply to him?

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 Paragraphs 1 and 2 of the 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: Against the Applicant.

Subparagraphs 1.a. through 1.l.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraphs 2.a.: Against 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