

Date: January 28, 1997

In Re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 95-0566

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL KIRKPATRICK

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 31, 1995, 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 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 which recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 19, 1995. This case was assigned to the undersigned on November 26, 1996, and a Notice of Hearing was issued on December 4, 1996.

A hearing was held on January 10, 1997. During that hearing, the Government called the Applicant as its only witness, and presented eleven documentary exhibits. The Applicant presented no documentary exhibits, but she testified on her own behalf. Official notice was taken of Title 26, United States Code, Section 7203, and California Revenue and Taxation Code, Section 19701.

The transcript was received on January 27, 1997.

FINDINGS OF FACT

In her Answer to the SOR, Applicant admitted the material facts alleged in SOR subparagraphs 1.a. through 1.f., and those admissions are hereby incorporated herein as findings of fact. The following additional findings of fact are entered as to each paragraph and subparagraph in the SOR:

Applicant is 51 years old. She is married. She has four children. She completed the eleventh grade. She is employed by

a defense contractor as an ----- . She seeks to retain her Department of Defense security clearance in connection with her employment. The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR).

Paragraph 1 (Criterion H- Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she has failed to timely file state and Federal income tax returns for the tax years 1992 through 1994, in violation of Title 26, U.S. Code, Section 7203, and in violation of California Revenue and Taxation Code, Section 19701, both of which are misdemeanor criminal statutes.

Prior to 1992, Applicant and her husband had always timely filed their state and Federal income tax returns. They were wage earners, both long term employees of a defense contractor. Prior to 1992, their income tax returns were not especially complicated, and Applicant always relied upon her husband to prepare and file their joint income tax returns. (Tr., pp. 31, 36-38.)

In approximately 1989, after 17 years of employment with the defense contractor, Applicant's husband lost his job, and he has not been able to obtain employment since then. This created a financial hardship for Applicant and her family. Her husband received severance pay, and in approximately 1990 he invested it, along with their savings, in a huge real estate project, purchasing an apartment project for approximately 1.8 million dollars, with terms which included a balloon payment of \$240,000.00 due in just one year, in approximately 1991. This was soon followed by adverse real estate market and economic conditions, which was financially disastrous for Applicant and her husband. Suddenly, they had very complicated creditor and income tax issues, and evidently Applicant's husband was unable to cope with those issues. (Govt.Ex. 2; Tr., pp. 33-38.)

They were unable to pay the balloon payment when it became due, and they fell behind in payments to other creditors. Therefore, they sought the assistance and advice of a bankruptcy attorney. Following his advice, they filed a Chapter 11 Bankruptcy Petition on November 11, 1992, hoping to reorganize their finances and restructure their loans. (Govt.Exs. 1, 2, 3, and 4.)

Either they were unable to devise a reorganization plan which was acceptable to the Bankruptcy Judge, or they were unable to comply with the terms of an approved reorganization plan, for the Chapter 11 reorganization was subsequently converted to a Chapter 7 liquidation on April 13, 1994. They lost not only their apartment investment, but also their home, to foreclosure. (Govt.Exs. 2 and 3; TR., pp. 31, 33-34.) The converted Chapter 7 Bankruptcy proceeding was completed, and Applicant received a discharge from her debts, in September of 1994. (Tr., p. 31.)

After Applicant learned that her husband had not filed their joint state and federal income tax returns for tax years 1992 and 1993, she and her husband sought the advice and assistance of a professional tax advisor and accountant. He advised them, in essence, that the income tax treatment of their real estate investment would depend upon the outcome of their bankruptcy proceeding, so they would have to wait for the resolution of the bankruptcy proceeding before their income tax returns could be prepared. He also advised them that the 1992, 1993, and 1994 income tax returns would have to be prepared sequentially. Applicant relied upon and followed the advice of her professional tax consultant. (Govt.Exs. 2, 3, and 4; Tr., pp. 27-31, 38-40.)

Applicant received the SOR on September 6, 1995. (Tr., pp. 26, 28, 30.)

In September of 1995, Applicant's professional tax consulting firm completed the preparation of her state and Federal income tax returns for tax years 1992, 1993, and 1994, and those tax returns were all mailed to the taxing authorities on September 12, 1995. (Govt.Exs. 5, 6, 7, 8, 9, 10, and 11; Tr., pp. 26-31.)

Applicant and her husband timely filed their income tax returns for tax year 1995. (Tr., p. 40.)

Mitigation.

Applicant testified and argued credibly to the effect that she is remorseful about this matter, that she intends to be attentive to the timely filing of her tax returns in the future, and that she can be counted upon to follow security regulations and to safeguard classified information in the workplace. (Tr., pp. 34-35, 40-42, 48.)

She is doing very well at work, and she recently received two achievement awards for her contributions to projects which were completed ahead of schedule, with zero defects. (Tr., pp. 42-44.)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines and policies for determining eligibility for access to classified information, and these guidelines and policies must be given consideration in making security clearance determinations. The following adjudicative guidelines and policies are found to be applicable in this case:

Criterion H (Criminal conduct)

(Where the criminal conduct is not a felony under federal law)

Disqualifying Factors

1. Criminal conduct involving:
 - e. Obstruction or corruption of government functions.
2. Criminal conduct punishable by confinement for one year or more.
3. An established pattern of criminal conduct, whether the individual was convicted or not.

Mitigating Factors

2. Extenuating circumstances surrounding the offense.
6. Transitory conditions directly or significantly contributing to the conduct (such as divorce action, death in family, severe provocation) in the absence of subsequent criminal conduct.

Criterion I (Poor judgment)

Criterion I is not supplemented by specific factors in Enclosure 2 of the Directive. However, the general adjudication policies expressed at Paragraph F.3. of the Directive have been considered as to each criterion in this case, to include Criterion I. The F.3. factors are set forth below:

"3. 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 and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age 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 consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future."

In DOHA cases the Government has the initial burden to go forward with persuasive evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficiently persuasive 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 her a security clearance

CONCLUSIONS

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 repeated instances of off-duty criminal conduct which may demonstrate poor judgment or unreliability. Failure to comply with laws pertaining to the timely filing of income tax returns may, for example, suggest that an Applicant can not be counted upon to conscientiously abide by security related laws and rules and regulations which she may regard as cumbersome or inconvenient.

In this case, the Government has met its initial burden of proving by prima facie evidence that the Applicant failed to timely file her Federal and state income tax returns for the tax years 1992 through 1994, that such conduct was in violation of both a Federal misdemeanor statute (Title 26, U.S. Code, Section 7203) and a state misdemeanor statute (California Revenue and Taxation Code, Section 19701), and that such conduct was indicative of poor judgment and unreliability. However, the Applicant has introduced persuasive evidence in rebuttal, explanation, and mitigation which is sufficient to overcome the Government's prima facie case against her.

Prior to 1992, Applicant had relied upon her husband to prepare and file their joint income tax returns in a timely fashion, and he had always done so. They were wage earners, both long term employees of a defense contractor, and their income tax returns were not exceptionally complicated. However, they became involved in a complicated and unsuccessful real estate investment, purchasing an apartment building, which, coupled with her husband's sudden loss of employment, resulted in both financial disaster and in complicated legal and tax issues. Applicant and her husband were unable to cope with these problems, so they sought advice from a bankruptcy attorney and from a professional tax advisor. Circumstances forced them to file a joint petition for relief in the U.S. Bankruptcy Court in 1992. During their bankruptcy proceedings, they were guided by the advice of an attorney.

Their tax accountant advised them that they could not prepare the 1992 or 1993 income tax returns until the bankruptcy proceedings were resolved, and that their 1994 income tax returns could not be prepared until after the returns were prepared for tax years 1992 and 1993. That certainly makes sense. Clearly, the income tax treatment of the investment (depreciation schedules, depreciation recapture, capital gain or loss calculations, availability of certain itemized deductions, etc.) could depend upon the outcome of that legal proceeding. They eventually lost their real estate investment to foreclosure, which created additional, complicated tax issues. The complicated bankruptcy proceedings were not concluded until September 15, 1994.

On September 6, 1995, Applicant received the SOR. On September 12, 1995, approximately one year after the discharge of their debts in the bankruptcy proceeding, and with the assistance of a professional tax advisor, Applicant and her husband belatedly filed all of their joint Federal and state income tax returns for the tax years 1992 through 1994. Although those returns were not filed until five days after Applicant received the SOR, it cannot be reasonably argued that the receipt of the SOR prompted Applicant to file the tax returns. It is clear from the nature of the complicated tax returns themselves (Govt.Exs. 5 through 10) that the professional accounting and tax service must have already had Applicant's pertinent documentation and been working on the preparation of the tax returns for a long time. After all, the tax returns involve losses of \$1,700,000.00 resulting from the foreclosure of the apartment building, plus interest and dividend income, rental income, depreciation schedules, passive activity loss calculations, and itemized deductions.

Applicant and her husband have timely filed their 1995 state and Federal income tax returns.

Clearly, Applicant is not a tax protestor. There were extenuating circumstances surrounding her failure to timely file income tax returns for tax years 1992 through 1994. Those extenuating circumstances were transitory, and are now resolved. There has been no subsequent criminal conduct, and there is little probability that criminal conduct will recur in the future. Applicant appeared to be genuinely remorseful about this matter. It appears that she has gained insight into

the importance of timely filing her income tax returns, and that she will be more attentive to this issue in the future. Based upon an evaluation of all of the evidence in this case, I conclude that she can be counted upon to follow security regulations and to safeguard classified information in the workplace.

On balance, it is concluded that the Government's evidence opposing Applicant's request for a continued security clearance has been overcome by her mitigating and extenuating evidence, and by the application of the Directive's pertinent adjudicative guidelines and policies. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in SOR Paragraphs 1 and 2 and each of their subparagraphs.

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 (Criterion H): For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: For the Applicant.

Subparagraph 1.e.: For the Applicant.

Subparagraph 1.f.: For the Applicant.

Paragraph 2 (Criterion I): For the Applicant.

DECISION

In light of all 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.

Michael Kirkpatrick

Administrative Judge