

November 7, 1996

In RE:

SSN:

Applicant for security clearance

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ISCR OSD Case No. 96-0177

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

Stephen Z. Cutler, Esq.

Applicant's Counsel **STATEMENT OF CASE**

On March 28, 1996, the Defense Office of Hearings and Appeals (DOHA), issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The SOR is attached.

Applicant filed an Answer to the SOR on or about May 23, 1996.

The case was received by the undersigned on August 19, 1996. A notice of hearing was issued on September 9, 1996, and the case was heard on October 23, 1996. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant, who also called one witness to testify on his behalf. At the hearing, the Government amended, without objection, the SOR so as to allege a Criterion J Case. The transcript was received on

November 1, 1996. The issue raised here is whether the Applicant's alleged past criminal conduct militates against the granting of a security clearance.

## **FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 41 years of age, has a bachelor's degree in professional aeronautics, and is employed by a defense contractor as a flight test engineer. The Applicant currently has a secret security clearance, and his employer seeks retention of this level clearance on his behalf.

### **Criterion J - Criminal Conduct**

1.a., 1.c. and 1.e. The Applicant has filed, in an untimely fashion, his Federal Income Tax Returns for tax years 1987, 1988 and 1989 (transcript (TR) at page 29 lines 10~14, at page 30 lines 1~5, at page 39 lines 3~5, and Applicant Exhibit (AppX) A).

1.b., 1.d. and 1.f. The Applicant has also filed, again in an untimely fashion, his State Income Tax Returns for tax years 1987, 1988 and 1989 (TR at page 29 lines 12~21, at page 39 lines 3~5, and AppX A).

### **Mitigation.**

The Applicant has now filed all of his outstanding income tax returns, and is current with all of his filings to date.

Considering all of the evidence, but in light of the fact that he filed his returns in an untimely fashion; the Applicant bears the burden of persuasion in demonstrating his suitability for security clearance access.

## **POLICIES**

Enclosure 2 and Section F.3. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern, which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion; however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

### **Criminal Conduct**

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

(1) any criminal conduct, regardless of whether the person was formally charged.

#### **Condition that could mitigate security concerns:**

(4) . . . the factors leading to the violation are not likely to recur.

As set forth in the Directive, "[e]ach 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 consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, 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.

The Government must make out a prima facie case under Criterion J (criminal conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and her ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who has demonstrated a pattern of criminal conduct creates doubt about his judgement, reliability and trustworthiness. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

## **CONCLUSIONS**

The Applicant has filed all of his outstanding, 1987~1989 Federal and State Income Tax Returns. He also clearly had every intention to file these Returns, as is demonstrated by his timely requests for extensions (TR at page 46 line 22 to page 49 line 4, and AppXs C~F). The Applicant and his wife credibly testified at length as to the circumstances that led to his delinquency: his wife was suffering from Chronic Fatigue Syndrome, which was not diagnosed at that time (TR at page 49 line 22 to page 51 line 14, and at page 53 line 3 to page 55 line 11); his very demanding commitment to the National Guard (TR at page 40 lines 2~4, and AppXs G and H); and his working a tremendous amount of overtime as a flight test engineer (TR at page 40 lines 4~6, and AppX I). As he has now come to understand the nuances of wife's illness, and the importance of filing his tax returns in a timely fashion (TR at page 51 lines 15~24); I have little doubt that he will now abide by the requirements the Federal and State Tax Codes, as he has done for tax years 1990~1995. As the Appellant has thus rectified, by filing, any criminal delinquency in a reasonable manner, I conclude that his past criminal conduct is no longer of present security significance.

Considering all the evidence, the Applicant has rebutted the Government's prima facie case regarding his criminal conduct. The Applicant has thus met the mitigating conditions of Criterion J, and of Section F.3. of the Directive. Accordingly, he has thus met his ultimate burden of persuasion under Criterion J.

## **FORMAL FINDINGS**

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

### Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

d. For the Applicant.

e. For the Applicant.

f. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

**DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge