

DATE: January 21, 1997

In RE:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0153

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On March 15, 1996, 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, [\(1\)](#) issued a 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached.

Applicant filed his Answer to the SOR on April 15, 1996.

The case was received by the undersigned on June 17, 1996. A notice of hearing was issued on July 15, 1996, and the case was heard on August 6, 1996. The Government submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on August 14, 1996.

RULINGS ON PROCEDURE

At the hearing, the Government moved to amend subparagraphs 1a, 1c, 1e, 1g, 1i, 1k, and 1m by adding additional sections of Title 26 of the United States Code. Those sections (which specifically require the filing of a tax return) are 6011 and 6012. The Government also moved to amend subparagraphs 1b, 1d, 1f, 1h, 1j, 1l, and 1m by adding an additional section of the state statutory code. That section (which specifically identifies the time to file a tax return) is 58.1-341. The motion was granted.

FINDINGS OF FACT

The SOR alleges Criterion J, a history of criminal activity creating doubt about a person's judgment, reliability and trustworthiness. I have reviewed the transcript, evaluated witness credibility and examined the exhibits, and issue the following Findings of Fact:

Applicant is 44 years old and employed as an ----- by a defense contractor. He seeks a secret level clearance.

Subparagraphs 1a, 1c, 1e, 1g, 1i, 1k, and 1m allege Applicant's failure to file tax returns for 1987 through 1993. Subparagraphs 1b, 1d, 1f, 1h, 1j, 1l, and 1n allege a failure to file state tax returns for 1987 through 1993. Applicant failed to file state and federal tax returns from 1987 through 1993.⁽²⁾

In his sworn statement of April 6, 1994, Applicant acknowledged his failure to file returns for the years in question. He recalled the Internal Revenue Service (IRS) placed a lien (which was satisfied) against his wages in 1988 for the 1987 taxes he owed.⁽³⁾ He also explained his wife developed a life threatening medical condition which prevented her from working. Extensive and expensive treatment, costing approximately \$12,000, remitted the condition, however, the condition unfortunately returned and she passed away in September 1994.⁽⁴⁾ Applicant noted that he was having his returns prepared for the tax years in question but he could not find the necessary documents for preparation of his 1991 taxes.

On February 17, 1995 (when Applicant signed his second sworn statement), Applicant indicated he was in the same financial condition as he had been when his sworn statement was taken in April 1994. His wife passed in September 1994 and his son was having a difficult time coping with his mother's loss. Applicant indicated he would have the money to take care of the federal and state taxes by the end of July 1995. Applicant planned to file a Chapter 7 bankruptcy in the near future.

In his accompanying statement to his Answer of April 15, 1996, Applicant stated the 1989 return had been filed on April 9, 1996 with the remainder of the returns also being prepared for filing. He requested an extension of 45 days to satisfy his IRS obligations.

Applicant testified his mother, 2 sisters and wife passed away within a year of each other. The emotional stress of these deaths impeded his efforts to resolve his tax problems. (Tr. 24). He does have a copy of documentation showing he paid his 1989 taxes. The IRS provided him with documentation reflecting the lien for his 1987 and 1988 taxes had been satisfied. His preparer had readied returns for 1990, 1991, 1992, and 1993. (Tr. 26). He intends to file and pay his 1995 taxes as soon as he resolves the other years. (Tr. 27).

When asked why he did not file his returns in the early years in question, Applicant explained he was trying to preserve his money for other family obligations but also conceded procrastination (Tr. 29), his first wife's 2 layoffs and costly treatment (Tr. 35), were contributing causes. Now, he is in a better financial situation because he is receiving more overtime and he has also remarried this year. (Tr. 30).

Applicant intends to file his returns in the future because he has learned his lesson. (Tr. 31). He indicated he presently has the money to pay both the taxes and the preparer and is going to pay the taxes and the preparer immediately. (Tr. 27).⁽⁵⁾

POLICIES

Enclosure 2 of the Directive sets forth general policy factors under the whole person concept, and specific policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way 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 case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in

this case are:

Criterion J (Criminal Conduct)

Factors Against Clearance:

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

Factors for Clearance:

None.

General Policy Factors

Every security clearance decision involves a careful examination of several additional factors comprising the whole person concept. The factors include: (1) the nature and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; (4) the voluntariness of participation; (5) the presence or absence of rehabilitation; (6) other pertinent behavioral changes; (7) the potential for pressure or coercion; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion J (a history of criminal activity raising doubt about a person's judgment, reliability and trustworthiness) 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 his ability to effectively safeguard classified information, with respect to the 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 repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Criterion J is defined as a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness. The Government has established its case under Criterion J. Applicant's intentional failure to file federal and state returns from 1987 through 1993, although he knew had an obligation to file, represents a pattern of criminal activity casting doubt on Applicant's judgment, reliability and trustworthiness.

Applicant has provided several statements, some statements substantiated and other statements unsubstantiated, about satisfying his tax obligations for some of the years in question. First, Applicant believed a federal tax lien, which is at least partially supported by Government Exhibit #4, was placed against his wages in 1988 to satisfy his 1987 taxes. The presence of evidence showing the liens were filed or that certain delinquent taxes were paid, does not extenuate Applicant's practice of deliberately not filing tax returns from 1987 through 1993.

In his sworn statements of April 1994, and February 1995, and his testimony, Applicant blamed his tax problems on the

cost of treatment for his wife and the deaths in his family in 1993 and 1994. Applicant's family illnesses and deaths in 1993, 1994 and 1995 provides some mitigation for not filing tax returns in 1993, 1994 and 1995. However, there is no evidence Applicant's wife was ill in 1987 when he decided to designate all his earnings for family necessities rather than discharge his legal obligation to file his tax returns.

In his sworn statement of April 1994, Applicant indicated he had taken steps to prepare his taxes by providing pertinent documentation to tax preparers for processing. In his sworn statement of February 1995, Applicant announced he had no money to pay the preparers for processing the returns. At the hearing, Applicant claimed he had the money and intended to pay the preparers the cost of processing, and, also to prove his intentions by through documentation. The fact that no documentation was ever received to support his claims of resolving his tax problems for 1987 through 1993 undermines Applicant's credibility and clearly supports the conclusion against granting Applicant access to classified information. Although the SOR addresses the failure to file through 1993, there is no evidence Applicant has filed a tax return even after 1993 or any other evidence of successful rehabilitation.

Considering (1) the 7 year pattern of criminal conduct, (2) Applicant's knowledge of his obligation to file returns and intentional failure to file, and (3) the absence of rehabilitation, the unavoidable conclusion is that Applicant may deliberately avoid his tax filing obligations in the future.

FORMAL FINDINGS

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

Paragraph 1: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.
- g. Against the Applicant.
- h. Against the Applicant.
- i. Against the Applicant.
- j. Against the Applicant.
- k. Against the Applicant.
- l. Against the Applicant.
- m. Against the Applicant.
- n. Against the Applicant.

Factual support for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

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 Applicant.

Paul J. Mason

Administrative Judge

1. Amended by Change 3 dated February 16, 1996.
2. Sections 6011 and 6012 of the Internal Revenue Code (IRC) identify those persons who must file federal tax returns and also obligates them to supply the information required by the forms or regulations. As set forth in Section 7203, any person who willfully fails to file a federal return is guilty of a misdemeanor and faces a fine up to \$25,000, and incarceration up to a year. State revenue Section 58.341 identifies when a state tax return must be filed and 58.348 defines the criminal consequences for failure to file a state return.
3. Government Exhibit #4 indicates liens were filed against Applicant's 1987 and 1988 earnings but there is no indication of complete satisfaction of his 1987 taxes. In addition, payment of taxes through liens does not mitigate Applicant's willful failure to file returns.
4. See sworn statement, February 17, 1995.
5. He also indicated he would supply all documentation from the IRS within 7 days. No documentation was received.