

DATE: December 16, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0446

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Claude R. Heiny, II, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On June 19, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "Defense Industrial Personnel Security Clearance Review Program" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing⁽¹⁾ and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on August 6, 1996, and on October 3, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of twenty exhibits and no witnesses; Applicant relied on his own testimony. In response to the record remaining open for ten days subsequent to the hearing, Applicant submitted 15 pages of printed materials which corroborated his testimony that certain of his financial obligations--delinquent when the SOR was issued--had since been satisfied. A transcript of the proceedings was received on October 16, 1996.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations set forth in the SOR. I have accepted Applicant's admissions and

incorporate them as part of my findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 37 years old and has been continuously employed by the same defense contractor for 17 years, except for a six-month lay-off in 1986. He is seeking to retain the secret clearance which was granted him in conjunction with his duties in 1980. A favorable preliminary determination could not be made because of his financial problems and criminal conduct.

Applicant's history of financial problems and being unable to live within his means began at least ten years ago. He was out of work for six months in 1986 as the result of a lay-off. This event may mark or coincide with the starting point of Applicant's financial problems, but it was not their principal cause. As Applicant perceives it, his problems have been caused by overextending himself financially "due to poor record keeping," and "a habit of not balancing (his) check book." (Govt. Ex. 4, p-2).

It is not clear whether inadequate record keeping/failing to balance his checkbook are the sole cause of Applicant's financial mismanagement for the past ten years. What is clear is that Applicant's financial mismanagement has resulted in his being consistently behind in satisfying one or more of his financial obligations. As a consequence of his falling behind in his obligations, his salary has been garnished five times after creditors had obtained judgments against him (Govt. Exhs. 5,6,7,8,9). The total amount of these garnishments is more than \$6,100.00. Additional evidence of Applicant's financial mismanagement is found in the large number of checks which have been dishonored because of insufficient funds in his checking account (Govt. Exh.10). At the time the SOR was issued, Applicant was indebted to the District Attorney's Office of County X for more than \$6,500.00,⁽²⁾ an amount which represents a portion of the dishonored checks Applicant had written between 1991 and February 1996. Applicant remains indebted to several other merchants because of checks that he had written which were also returned for insufficient funds--but which have not been referred to the District Attorney.

When Applicant filed his Federal Income Tax Return for 1992, he was unable to pay the account balance of \$926.65.⁽³⁾ That amount plus \$210.61 in accrued interest and \$130.95 in accrued penalties remains unpaid (Govt. Exh 11). He explains that he has not made payments on this account because he has been waiting for the IRS to sent him a "form" (Govt. Exh. 2, p-2). Subsequently, Applicant has not filed his Federal Income Tax Returns for tax years 1993 and 1994. His rationale for not filing: "I knew I would be getting a refund and the IRS would only seize the refund." (Govt. Exh. 2, p-4).

Applicant's current annual salary is \$29,832.00 (\$2486.00 monthly).⁽⁴⁾ Applicant has never been married; he has no child support payments; and he lives in his aunt's house rent free (Tr. 57). He testified at his administrative hearing that he has been contributing \$250.00 each month to his elderly parents to cover their living expenses since he began working (Tr. 62). There is no evidence that Applicant has experienced a catastrophic loss which was not covered by insurance or that he has incurred other unforeseen or unforeseeable living expenses. He has identified the six month lay-off in 1986, recent car repairs and expenses, and a former girlfriend's withdrawal of \$400.00 from his checking account in early 1995--after he had loaned her his ATM card--as the events which have contributed to his financial problems in the past, and to his current predicament (Tr. 50, 55, 70). In spite of being delinquent on numerous obligations, Applicant currently spends \$40-50.00 every two weeks in gambling casinos (Tr. 48). In the sworn statement which Applicant signed in January 1996, he admitted that he had spent \$100.00 a week gambling at casinos "two or three times weekly"... "in about 1992 or 1993" (Govt. Exh 3, p-2). He also places occasional five dollar bets on football and basketball games (Tr. 48). Previously, between 1986 and 1990, Applicant had placed bets on sporting events with illegal bookies (Tr. 40).

When the DIS questioned Applicant about his finances in September 1995, he stated that he would be turning them over to his father on December 1, 1995. He promised that "all (his) finances" would be corrected by the end of 1995 (Govt. Exh. 4, p-4). Applicant did not have his finances in order by the time specified, and there is no further reference to his turning them over to his father. In the Personal Financial Statement (PFS) which is part of the sworn statement signed by Applicant incident to that interview, he listed his current monthly living expenses as \$334.00.⁽⁵⁾ The \$334.00 includes \$150.00 for rent, which he is no longer paying (Tr. 57), but does not include the \$250.00 amount which

Applicant claims he has been contributing to his parents for the past 17 years (Tr. 62). When the DIS questioned Applicant about his delinquent tax obligations during a subsequent interview, he promised, in a sworn statement signed on March 27, 1996, that he would file his tax returns for 1993 and 1994 on April 13, the date on which he planned to file his tax return for 1995. Applicant has not provided a copy of a tax return for either 1993 or 1994.⁽⁶⁾

As early as 1986, Applicant was counseled by his employer about his financial problems and advised that these problems could jeopardize his employment (Tr. 63). When his financial problems surfaced as an issue during his 1990 background investigation (Govt. Exh. 4, p-3), Applicant promised to get his finances in order. His employer counseled him again about financial responsibility in November 1990 and January 1991 (Tr. 51).

Applicant testified that he has closed his checking accounts as part of his effort to get his finances in order (Tr. 64). He stated that he would be able to pay off the indebtedness from his returned checks in 35 weeks, and that he would be able to pay off his delinquent tax obligation in 16 months (Tr. 52).

Subsequent to his administrative hearing, Applicant has provided evidence that the obligations alleged in the SOR⁽⁷⁾-- for which his salary had been garnished-- have all been satisfied.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

FINANCIAL CONSIDERATIONS

(Criterion F)

Conditions that could raise a security concern and may be disqualifying:

- (1) A history of not meeting financial obligations;
- (3) Inability or unwillingness to satisfy debts;
- (5) Financial problems that are linked to gambling,...or other issues of security concern.

Conditions that could mitigate security concerns:

- (6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

CRIMINAL CONDUCT

(Criterion J)

Conditions that could raise a security concern and may be disqualifying:

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

Conditions that could mitigate security concerns included:

None applicable.

Burden of Proof

The Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria F and J. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion F. The evidence establishes that Applicant has had serious financial problems for at least ten years. In that period of time, Applicant's salary has been subjected to garnishment on at least five occasions after creditors had obtained judgements against him. He has not paid his federal income taxes for 1992. In addition, Applicant has written a large number of checks which have been dishonored because of insufficient funds (Tr. 40). He knew as early as 1991 that a \$40.00⁽⁸⁾ service charge was being added to each check--returned for insufficient funds--that was referred to the District Attorney's office (Tr. 66). Yet he continued to incur this additional, burdensome expense by continuing to write checks without having funds in his account, primarily because he never took the time to balance his check book. As a result of his financial irresponsibility, he now owes the District Attorney more than \$6,000.00 for the dishonored checks he has written during the past five years. And there are additional dishonored checks which Applicant intercepted before they were referred to the District Attorney (Tr. 42).

While Applicant is credited for the progress he has made during the past year in paying off some of his financial obligations which had become delinquent, his efforts are insufficient to mitigate his ten year history of financial mismanagement. Most of the obligations--alleged in the SOR--that Applicant has satisfied during the past year have been satisfied pursuant to garnishment orders after the creditors had obtained judgments against him. His payments during the same time on the other obligations in the SOR--for which his salary has not been garnished--total \$578.00.⁽⁹⁾ Applicant's satisfaction of obligations, primarily through garnishment proceedings, does not provide the kind of evidence of improved financial management that is necessary to allay the concerns that have been raised by his history of financial irresponsibility. His past failure to respond to his employer's counseling on financial responsibility undermines any promise implicit in his current assurances that he "will be able to pay" off his dishonored checks in 35 weeks, and his delinquent taxes in 16 months (Tr. 58). Applicant's testimony that he will "be able to pay" does not mean that he will follow through and exercise the fiscal discipline necessary to assure that his money is not spent on, or committed to, other obligations in the meantime. His previous promises to put his finances in order have yielded temporary results at best.

And there is no mitigation in Applicant's personal circumstances. He is unencumbered by the financial obligations which typically descend on an individual at his age and with his level of income. He has never been married; he has no alimony or child support payments, he does not pay a monthly mortgage-- in fact he does not even pay rent; he lives rent-free in a house owned by his aunt situated next door to his parent's home. The expenses which Applicant has identified as being responsible for his current predicament are routine expenses that every household experiences, and

absorbs--if its finances are minimally managed. Applicant has been unable to identify any extraordinary expense in the past ten years that would explain or justify the financial crisis in which he perpetually finds himself.

While Applicant is commended for his sense of obligation toward his elderly parents, he receives minimal credit for a contribution to their health and well-being. Evidence of the consistent, long-term financial contribution which he described at his hearing--\$250.00 per month since he began working--is less than persuasive. His only reference to a financial contribution to his parents during three interviews with the DIS is a statement in Government Exhibit 3 (p-2) that he "help(s) pay for her (his mother's) medication if needed." He did not mention a contribution to his parents in Government Exhibit 4 which includes a personal financial statement (PFS). The PFS required Applicant to list all of his monthly expenditures. It seems improbable that Applicant would omit a \$250.00 contribution from the PFS since the PFS was taken in conjunction with an exhaustive interview during which Applicant had been asked multiple questions about the status of his financial obligations. Against this background, Applicant's testimony explaining that he had not previously mentioned his contribution to his parents because he had not been asked (Tr.62) is as disingenuous as it is unconvincing. Criterion F is concluded against Applicant.

With respect to Criterion J, Applicant has admitted that he willfully failed to file his Federal Income Tax Returns for tax years 1993 and 1994 in violation of 26 U.S.C. § 7203. Although he promised in his most recent signed, sworn statement to the DIS that he would file his delinquent tax returns on April 13, 1996, he has not provided any evidence that these returns have, in fact, been filed.⁽¹⁰⁾ And Applicant's explanation for failing to satisfy this important obligation in a timely manner does not rise to a "condition" that would mitigate the security concerns raised by his dereliction. His belief that the IRS would confiscate his refund to offset his tax obligation from an earlier year does not excuse his inaction. Criterion J is concluded against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion F) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. For the Applicant

Subparagraph 1.m. Against the Applicant

Subparagraph 1.n. Against the Applicant

Subparagraph 1.o. For the Applicant

Paragraph 2 (Criterion J) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. 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 continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant's answer to the SOR is undated.
2. Applicant testified that the \$6,500.00 amount includes a \$55.00 service charge which is added to the amount for which the dishonored check was drawn (Tr. 47). According to Government Exhibit 10, fifty of Applicant's checks were dishonored and referred to the District Attorney between January 1991 and February 1996.
3. For the 1992 tax year, Applicant's federal income tax was \$4,471.00; he had paid \$3,598.00 of that amount through withholding.
4. In September 1995 when he provided a Personal Financial Statement to DIS, he was earning \$24,000.00 annually, or \$2,000.00 monthly.
5. This amount did not include debt service. At the time the PFS was prepared, Applicant's monthly debt service payments totaled \$1,203.00
6. Applicant was instructed by this Administrative Judge to furnish evidence of the progress he had made in satisfying any or all of the obligations alleged in the SOR (Tr. 60).
7. Subparagraphs 1.b., 1.i., 1.j., 1.l. and 1.o.
8. This service charge had increased to \$55.00 per check by the time of the administrative hearing (Tr. 39)
9. Applicant has proffered evidence of payment of only \$313.00; he is given the benefit of the doubt with respect to the rest.
10. Applicant admitted in his answer to the SOR that these federal tax returns had not been filed, and he has failed to provide evidence that the status of his tax obligations had changed even after being instructed by this Administrative Judge to do so (Tr. 60).