

November 8, 1996

In RE:

SSN:

Applicant for security clearance

ISCR OSD Case No. 96-0455

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

Appearances

FOR THE GOVERNMENT

Melvin A. Howry

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On June 19, 1996, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 a clearance should be denied or revoked.

The SOR is attached.

Applicant filed an Answer to the SOR on or about July 25, 1996.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on September 11, 1996. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on September 16, 1996, and submitted nothing in reply. The case was received by the undersigned for resolution on October 22, 1996. The issue raised here is whether the Applicant's criminal conduct militates against the granting of a security clearance.

FINDING OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, and the File of Relevant Material. The Applicant is 34 years of age, and his employer seeks a security clearance on behalf of the Applicant.

Criterion J - Criminal Conduct

1.a., 1.c. and 1.f. The Applicant has wilfully failed to file his Federal Income Tax Returns for tax years 1989, 1990 and 1994 (Government Exhibit (GX) 5 at page 1, and GX 8). This wilful failure to file is a violation of Title 26 U.S.C. Section 7203.

1.b., 1.d., 1.e. and 1.g. The Applicant has also failed to file his state income tax returns for tax years 1989, 1990, 1991

and 1994 (GX 3 at pages 2~3, and GX 5 at page 1). This failure to file is a violation of that state's Revenue and Taxation Code, and constitutes a misdemeanor.

Mitigation.

The Applicant offers little in the way of mitigation, except to aver that "all state and Federal taxes owed are currently being paid." (GX 3 at page 3).

Considering all of the evidence, and in light of the fact that the Applicant has done little, if anything, to file his outstanding income tax returns, the Applicant bears a heavy burden of persuasion in demonstrating her 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.

Conditions that could mitigate security concerns:

None.

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 his 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 yet to file his Federal and state income tax returns for the tax years alleged in the SOR. The Applicant seems to rely upon the claim that "all state and Federal taxes owed are currently being paid." (GX 3 at page 3). This might be true, but the Applicant still must file his outstanding returns. He clearly recognizes his responsibility to file these tax returns. His stated intention, when he executed sworn statements in March and May of 1995, was to do exactly that (GX 6 at page 1, and GX 7 at page 1). There is no evidence that he has done anything, whatsoever, with regard to these sworn stated intentions. I must therefore conclude that the Applicant's continued delinquency, in filing both his state and Federal income tax returns, are of present security significance.

Considering all the evidence, the Applicant has not rebutted the Government's prima facie case regarding his criminal conduct. The Applicant has thus not met the mitigating conditions of Criterion J, and of Section F.3. of the Directive. Accordingly, he has not 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: 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.

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 not clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge

