

DATE: January 17, 1997

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 96-0595

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Carla Conover, Esquire

Department Counsel

FOR THE APPLICANT

*Pro se*

STATEMENT OF THE CASE

On August 27, 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 the attached 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.

Applicant responded to the SOR in writing on September 16, 1996, and requested that his case be decided without a hearing. On October 16, 1996, Department Counsel sent Applicant the Government's File of Relevant Material (FORM), which consisted of six exhibits. Applicant did not object to the admission of any of the exhibits and did not provide any additional information. The case record was closed on December 1, 1996, and the case was assigned to this Administrative Judge on December 10, 1996.

FINDINGS OF FACT

Applicant is a 42 year old employee of a defense contractor. He had been working for his current employer for three years and is applying for a confidential clearance. A favorable preliminary determination could not be made on his application because he has failed to file his state income tax returns for the tax years 1985-1995.

The SOR charges Applicant with a pattern of criminal activity under Criterion J because of his failure to file state income tax returns for 11 consecutive years. Applicant had admitted, without explanation, all of the factual allegations. Along with admitting that he has not filed his state income tax returns for State A, Applicant pleads for a "grace period"

to finish his state tax returns.

The facts of this case are straightforward and simple. Applicant moved to State A from another state sometime during 1985. He did not file a state income tax return for 1985, and he has not filed a return for any of the succeeding years. Applicant has not provided an explanation for his long-term neglect of this important responsibility.

When Applicant was interviewed by the Defense Investigative Service (DIS) on May 21, 1996, he stated that he intended to contact the Department of Taxation by the "end of May 96," and that he hoped to begin filing the necessary returns by "June or July 96." During the same interview, Applicant admitted that he had been substantially behind in filing his federal income tax returns when he finally contacted the IRS in 1995. He had not filed a federal tax return since 1978. Since then the IRS has helped him bring his tax returns up to date. With the help of the IRS, Applicant has filed his federal income tax returns back to 1984. <sup>(1)</sup> Since December 1995, he has been making monthly payments on the "approximately \$3000.00 to \$4000.00" he owes in back taxes for the years 1984 to 1995.

Applicant now asks for a "grace period" so that he may finish his state income tax returns. He claims that "it won't take much longer" because he has "most of the paper work already."

In addition to failing to file his federal and state income tax returns in a timely manner, Applicant has been involved in other incidents of misconduct which are duly recorded in his 11 page signed, sworn statement. Because of the time that has passed since these incidents occurred, Applicant's prior misconduct has not been alleged and will not be considered in reaching a decision about his current security clearance eligibility.

Appellant is proud to be an American and proud to work for the U.S. Navy. He is afraid of losing his job, and worried about the consequences to the five children whom he is helping to support.

### **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 also in the context of the factors set forth in the Adjudicative Process section of Enclosure 2 of the Directive. Deviations from these guidelines should not frequently be made and must be carefully explained and documented. In that vein, the government not only has the burden of proving any controverted facts alleged in the SOR, it also must 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.

### **CRIMINAL CONDUCT**

#### **(Criterion J)**

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

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

**Conditions that could mitigate security concerns include:**

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 judgement, 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 the 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 Criterion J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in the Adjudicative Process section of Enclosure 2.

The Government has met its burden with respect to Criterion J. The evidence establishes that Applicant has failed to file his state income tax returns for 11 consecutive years. He has been aware of this dereliction since at least May 1996 when he informed the DIS of his plans for correcting the problem and bringing himself into compliance. In a signed, sworn statement to the DIS, Applicant indicated that he intended to contact the state department of taxation by the end of that month (May 1996), and that he would begin making payments by June or July 1996. When the record in this case closed six months later, Applicant did not proffer any evidence that he had even contacted the state department of taxation. Nor has he proffered any other evidence which would prove that he is now closer to filing his state income tax returns for the past 11 years--than he was at the time of the DIS interview in May 1996.

There is no evidence that Applicant's neglect of this important responsibility has been or should be mitigated by circumstances unique to his personal situation. Applicant's failure to file his state income tax returns is a recent, continuing, and unexplained violation of the laws of State A. His failure to file his state income tax returns can not be considered an isolated incident because it follows so closely on the heels of his failure to file his federal income tax returns--for an *even longer* period of time. There is no evidence that someone has coerced Applicant not to file his state income tax returns, or that his neglect of this responsibility was somehow involuntary. Finally, there is no evidence of rehabilitation, because there is no evidence that Applicant has done anything to bring himself into compliance with the law.

While Applicant is credited with making significant strides away from the reckless and irresponsible lifestyle which is reported in his signed, sworn statement to the DIS, his long-term, uncorrected and unexplained dereliction of an important civic responsibility--filing state income tax returns--does not permit an affirmative finding that he is an acceptable security risk. 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 J:: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. 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 grant or continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant has not provided any information on the status of his federal income tax returns for the years 1978 - 1983.