

Date : September 17, 1997

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In RE:

SSN:

Applicant for security clearance

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ISCR Case No. 96-0907

## **DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Martin H. Mogul, Esquire

Department Counsel

#### **FOR THE APPLICANT**

*Pro se*

### **STATEMENT OF THE CASE**

On December 12, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 12, 1996, and requested a hearing. The case was received by the undersigned on April 23, 1997, and a Notice of Hearing was issued on April 28, 1997.

A hearing was held on May 30, 1997, at which the Government presented four documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted nine exhibits. The transcript was received on June 11, 1997.

### **FINDINGS OF FACT**

The Applicant is 42, single and has a Master of Science degree. He is employed by a defense contractor as a structural engineer and manager, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Criterion J) Criminal activity. It is alleged in this paragraph that the Applicant is ineligible for clearance because he has a history or pattern of criminal conduct which creates doubts about his judgment, reliability and trustworthiness.

The Applicant knowingly and wilfully failed to file Federal tax returns for the tax years 1991, 1992, 1993, 1994 and 1995 when due (SOR subparagraphs 1.b., d., f., h. and j.). He also knowingly and willfully failed to file state tax returns for the tax years 1991, 1992, 1993, 1994 and 1995 when due (SOR subparagraphs 1.c., e., g., i. and k.). The Applicant subsequently filed these tax returns as follows: 1993 Federal return on January 25, 1997; 1991 and 1992 Federal returns on January 26, 1997; 1994 and 1995 Federal and state returns on February 9, 1997; and, 1991, 1992 and 1993 state returns on March 9, 1997 (Applicant's Exhibit B). As a result of filing his taxes, the Applicant received refunds of approximately \$23,141. The Applicant has filed his 1996 Federal and state tax returns in a timely fashion (Exhibit C). The Applicant admitted he is at fault for this procrastination in filing his tax returns, and accepted full responsibility at the hearing for their lateness. He is not a tax protestor, and there is no evidence of criminal activity other than his failure to file tax returns. The Applicant evinces a credible intent not to be deficient in filing his tax returns in the future.

The Government presented no evidence to show that the Applicant did not file a state tax return for the year 1990. The Applicant had no independent recollection as to whether he had or had not filed a tax return for that year. (See, Transcript at 74-75.) The Government failed to establish a *prima facie* case with regards to this allegation, 1.a., which will be found for the Applicant.

Mitigation. The Applicant submitted his annual performance reviews from 1985 to date at Applicant's Exhibit H. Since 1989 he has been a manager. He is consistently evaluated as a "Very Good" or "Outstanding" employee by his superiors.

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Criterion J (Criminal conduct)

#### Conditions that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

#### Conditions that could mitigate security concerns:

- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (5) there is clear evidence of successful rehabilitation.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation

- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in a history or pattern or criminal activity that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant had not filed State or Federal income tax returns for a considerable period of time in violation of State and Federal statutes (Criterion J).

The Applicant, on the other hand, has successfully mitigated the Government's case. As stated in Findings of Fact (above), all of the State and Federal income tax returns referenced in the Statement of Reasons have been filed. The Applicant was very open and forthcoming at the hearing concerning his personal responsibility for allowing this situation to get out of hand. He also expresses a credible determination to file his future income tax returns in a timely fashion. The sense of laziness and procrastination which resulted in this situation has been eliminated. Based on his testimony, and his conduct in filing his tax returns, there is clear evidence of successful rehabilitation. This conduct is also cognizable under the General Factors. To wit, the probability the conduct will recur in the future is virtually nil (Factor i.).

On balance, it is concluded that the Applicant has successfully overcome the Government's *prima facie* case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.k.: For the Applicant.

### **DECISION**

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

Wilford H. Ross

Administrative Judge