

Date: July 8, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 97-0005

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on January 14, 1997. (Copy attached.) The SOR detailed reasons why the Government could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ The SOR consists of allegations based on Criterion J (pattern of criminal activity) in paragraph 1 and Criterion F (financial issues) in paragraph 2. Applicant responded to the allegations set forth in the SOR in a written answer dated January 23, 1997.

On February 20, 1997, Department Counsel prepared a File of Relevant Material (FORM) which was forwarded to Applicant which he received on March 10, 1997; he had 30 days after receipt of the FORM to object to any exhibits or to submit information on his own behalf. He did not respond.

Subsequently, this matter was assigned to me on April 29, 1997, which I received on April 30, 1997. It is my role as administrative judge to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FINDINGS OF FACT

Applicant admitted in his Answer subparagraphs 1.a., 1.b., and subparagraph 2.a. of the factual allegations contained in the SOR. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is a 52-year old (DOB: -----) employee of a temporary agency since January 1996. He works as a -----.

Applicant completed a Questionnaire for National Security Positions on March 20, 1996, where he disclosed he was incarcerated from December 1985 to January 1995.

Applicant was first arrested on September 20, 1979, for knowingly or intentionally possessing a controlled substance, cocaine. After pleading guilty to a charge of possession of marijuana, a misdemeanor, he was placed on probation for one year and ordered to pay costs. On February 18, 1981, he was released from probation, and the case was dismissed as adjudication of guilt had been withheld.

He was arrested again on December 20, 1985. He was indicted and charged with selling cocaine and cocaine conspiracy as well as continuing criminal enterprise and income tax evasion. Applicant explained that a former friend and business associate had disclosed his drug involvement and earnings from drug sales in return for a more lenient sentence. From 1980 to 1985 Applicant had sold 50 kilos of cocaine and made about \$35,000 a week. After he pled guilty to continuing criminal enterprise and income tax evasion, the plea agreement stipulation required him to surrender all personal property. He was sentenced to 16 years in prison and served ten. He was released in December 1994 and was then to serve six years on probation until June 22, 2001. He has abided by all the conditions of his probation.

Also Applicant did not file his state or federal taxes from 1980 to 1984 until he learned that the Federal Bureau of Investigation (FBI) had him under surveillance. Then in 1984 he filed his taxes for the previous four years. While he had been generating substantial income from the sale and distribution of cocaine, he disclosed gambling as the source of his earnings for this period. He paid the Internal Revenue Service \$197,000 in cash and owed them \$53,000 more. After his guilty plea and surrender of personal property, he believed his \$53,000 debt to the IRS would be paid. When he was released from prison he did not know about his tax lien until he obtained a copy of his credit report. He does not have the money to pay the IRS. His credit report of April 23, 1996, reveals a tax lien of \$73,303 with a judgment date of September 1993.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

Criterion J: Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- (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 include:

- (1) the criminal behavior was not recent.

Criterion F - Financial Considerations

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

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

- (1) a history of not meeting financial obligations;
- (2) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
- (3) inability or unwillingness to satisfy debts;
- (5) financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criterion J - Criminal Conduct

The government established its case with regard to criminal conduct, Criterion J, as Applicant has two drug related arrests in 1979 and 1985. Far more serious and still significant is his guilty plea to continuing criminal enterprise and income tax evasion where he was sentenced to 16 years in prison and served ten. While he was released in December 1994, he is still on probation. Consequently, he comes within disqualifying conditions 1 and 2, detailed above. While his 1979 arrest can be mitigated as that criminal behavior is not recent and that case was dismissed, his felony conviction for continuing criminal enterprise and income tax evasion retains its security significance because of the serious nature of his crime where he admitted selling 50 kilos of cocaine and making \$35,000 a week. Applicant has completed his prison term, but he will remain on probation until June 22, 2001. While he attests that he has abided by all the conditions of his probation, he has submitted no independent evidence of his rehabilitation or of his current good character. Consequently, after considering the Adjudicative Process factors and the F.3 factors, I find for the Applicant under subparagraph 1.a. but against him under Paragraph 1 and subparagraph 1.b.

F - Financial Considerations

The government also established its case with regard to financial considerations, Criterion F, as Applicant owes the IRS at least \$73,303 for a tax lien from September 1993. In his answer he did not dispute the government's allegation that he is indebted to IRS in the amount of \$200,000 for tax years 1983 and 1985. I accept his admission as sufficient proof of this fact even though there is no evidence in the FORM file to substantiate that figure. He falls within disqualifying conditions 1, 2, 3, and 5. As discussed above he was convicted of income tax evasion and remains on probation. Applicant attests that he has abided by all the conditions of his probation, but he submitted no independent evidence of his rehabilitation or of his current good character. Consequently, after considering the Adjudicative Process factors and the F.3 factors, I find against him under Paragraph 2 and subparagraph 2.a.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Criterion J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Criterion F: AGAINST APPLICANT

Subparagraph 2.a. Against 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 a security clearance for the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.