

Date : July 30, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0151

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

*Pro Se*

**STATEMENT OF THE CASE**

On February 13, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on March 27, 1997, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on May 27, 1997. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on June 2, 1997, and she filed no response.

This case was assigned to the undersigned for resolution on July 22, 1997.

**FINDINGS OF FACT**

The Applicant is 48 years old, and she is employed by a defense contractor. She seeks a DoD security clearance in connection with her employment in the defense industry.

The Government opposes the Applicant's request for a security clearance, on the basis of 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:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she repeatedly violated the misdemeanor provisions of Title 26, United States Code, Section 7203, by failing to file annual federal income tax returns, as required.

As alleged in the SOR, subparagraphs 1.a., 1.b., 1.c., 1.d., and 1.e., the Applicant willfully failed to file her Federal Income Tax Returns for 1989, 1990, 1992, 1993 and 1995, within the time required. Her failure to do so was in violation of the Title 26, United States Code, Section 7203.

(See, Government Exhibit 6 and 7).

The Applicant understands her responsibility to file annual Federal Income Tax Returns, and she is not a tax protestor. The Applicant also understands that she is responsible for paying Federal taxes.

The Applicant attributes her failure to file her returns on the mistaken belief that if she did not owe any money, she was not required to file. The Applicant admits that she was stupid and ignorant, and that in the future if she has questions, she will contact someone who knows the answers. The Applicant also indicated that her husband died in 1989, and he had been the one who took care of filing the annual tax returns. The Applicant states that she is not a criminal, and she now realizes that she must file annual federal tax returns. The Applicant further states that she intends on filing all of the returns that have not been filed when she files her income tax returns for this year. (See, Applicant's Answer to SOR).

As of May 27, 1997, the Applicant had not yet filed the federal income tax returns for the years in question. The Applicant's wilful failure to file her federal income tax returns in question shows poor judgment.

### **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; 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 conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. 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:**

None.

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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 repeated instances of criminal conduct which demonstrates poor judgment or unreliability on the Applicant's part.

In DOHA cases the Government has the initial burden to go forward with *prima facie* evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, 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.

Criminal conduct is defined as violation of federal, state or local law. The Applicant has violated federal law by repeatedly failing to file tax returns for the identified years. Her behavior demonstrates irresponsibility that is unacceptable by a person who seeks a security clearance. Possessing a security clearance places the holder in a fiduciary relationship with the Government. The Government must be able to repose a high degree of trust and confidence in a person to dutifully comply with all security regulations at all times and in all places. Very little confidence can be placed in a person who is not responsible enough to file tax returns.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant failed to timely file her 1989, 1990, 1992, 1993 and 1995, Federal Income Tax Returns in violation of Title 26, United States Code, Section 7203.

The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against her. As of May 27, 1997, the Applicant had not filed any of the Federal income tax returns in question.

It is recognized that the death of the Applicant's husband in 1989 had some impact on the Applicant's initial failure to timely file her federal income tax returns for tax years 1989, and possibly 1990. However, the Applicant has had sufficient time since then to file these returns. Instead, she has continued a pattern of non-filing.

Under the particular facts of this case, the Applicant's poor judgment and irresponsibility in failing to file her federal income tax returns between 1989 and 1995 is inexcusable. The Applicant has known since at least February 1997 that her security clearance was in jeopardy because she had failed to file the federal income tax returns in question, and since then she has done absolutely nothing about it. There is no evidence to show any effort, even minimal, on the Applicant's part to file her returns. There is no evidence that the Applicant is reformed from this aspect of her past misconduct, and because of that, it is likely that she will repeat it in the future. The Applicant fails to satisfy any of the suggested mitigating conditions. For the foregoing reasons, Criterion J is found against the Applicant.

The Applicant's failure to file Federal income tax returns shows a pattern of criminal conduct that is clearly incompatible with the Applicant's security responsibilities. I am not convinced that the Applicant is a reliable, or trustworthy individual who can be relied upon to properly safeguard classified information.

On balance, it is concluded that the Applicant has failed to overcome the Government's *prima facie* case opposing her request for a continued security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 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: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: 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 a security clearance for the Applicant.

DARLENE LOKEY ANDERSON

Administrative Judge