

DATE: January 26, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0173

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On February 21, 1997, 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 March 12, 1997, and requested a hearing. The case was received by the undersigned on May 12, 1997, and Notices of Hearing was issued on May 30 and June 20, 1997.

Hearings were held on June 20 and June 25, 1997, at which the Government presented 13 documentary exhibits,⁽¹⁾ and called one witness.⁽²⁾ Testimony was taken from the Applicant, who submitted eight exhibits.⁽³⁾ The final transcript was received on August 14, 1997.⁽⁴⁾

FINDINGS OF FACT

The Applicant is 43, single, and has a Bachelor of Science degree in Engineering. He is employed by a defense contractor as an Senior System Engineer, and he seeks to obtain a Secret-level DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a 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 F). It is alleged in this paragraph that the Applicant is ineligible for clearance because he is financially overextended. Each of the allegations in the SOR shall be examined in turn:

1.a. All of the Applicant's alleged indebtedness occurred during the period 1992-93. In 1992, the Applicant moved across the country during his employment with a previous employer. At the time he was married and had a family. In order to increase his take-home pay following receipt of a layoff notice, the Applicant declared himself to be tax-exempt. This resulted in an increased income tax burden. The current amount of this tax debt is approximately \$9,000. The Applicant entered into a payment agreement with the Internal Revenue Service in June of 1997 concerning this debt (Applicant's Exhibit "A"). As of the date of the hearing the Applicant has made three \$250 payments towards this debt (Applicant's Exhibit "G").

1.b. The Applicant was laid-off from his job with this employer later in 1992. At that time he began to receive unemployment benefits from the state Employment Development Department. After several months the Applicant obtained employment with an airline. He continued to wrongfully receive unemployment benefits for several months after his employment began. Eventually, the Employment Development Department discovered the Applicant was employed, and began to bill him for the benefits overpayment.

The Employment Development Department garnished the Applicant's wages at his new employers in 1995 and 1996 in order to recoup this overpayment (Government Exhibits 6, 7 and 9). The Applicant's indebtedness was totally repaid to the Employment Development Department in October 1996 (Applicant's Exhibit "C").

1.c. While employed with the airline, the Applicant obtained ten special passes reserved for employees. The Applicant was required to reimburse the airline \$50 apiece for these passes. He was unable to sell all these passes to friends and was left with an indebtedness of at least \$300 to the airline. The Applicant has been in contact with the airline and is attempting to work out a resolution of this indebtedness. (Transcript at 25-26 and 44-45.)

1.d. The Applicant's wages were garnished twice by the Employment Development Department and twice by the state taxing authority. Both of these debts have been successfully paid off (Applicant's Exhibits "B" and "C").

1.e. Since the Personal Financial Statement (DIS Form 154) (Government Exhibit 3 at 7) was completed on September 30, 1996, the Applicant's financial situation has improved dramatically. His monthly income has increased by \$500. Other than the airline and the IRS, the Applicant has paid off all the "Debts" set forth in Government Exhibit 3. The Applicant owns his car (Applicant's Exhibit "F"). His current financial situation is that he has between \$500 and \$700 a month as a net remainder after payment of his monthly expenses and current debts. (*See*, Transcript at 37-44.)

Paragraph 2 (Criterion J). It is alleged in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

By the end of 1992, the Applicant was getting divorced and was depressed over his financial situation. As a result of this emotional turmoil, he failed to file his 1992 state and Federal income tax returns on time. (Transcript at 59-60.) The Applicant maintains that he has subsequently filed both of his tax returns. (Transcript at 50-52.) After the hearing, he submitted a copy of his 1992 state income tax return (Applicant's Exhibit "E"). He did not submit his Federal 1992 return, but in order to fill out the state return a person must know what his or her Federal adjusted gross income is. (*See*, Applicant's Exhibit "E," at page 1, line 13.) In addition, Applicant's Exhibit "H" appears to be an IRS account summary referring to a Form 1040A being submitted for tax year 1992. Accordingly, I find that the totality of the evidence indicates that the Applicant has filed his state and Federal 1992 income tax returns.

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 F (Financial considerations)

Conditions that could raise a security concern:

- (1) a history of not meeting financial obligations;
- (3) inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns:

- (1) the behavior was not recent;
- (3) the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);
- (6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Criterion J (Criminal activity)

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:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (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 criminal conduct and financial mismanagement 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 granting 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 has had serious financial problems (Criterion F); and that he did not timely file his 1992 state and Federal income tax returns, in violation of the applicable criminal statutes.

The Applicant, on the other hand, has successfully mitigated the Government's case. The record shows that the Applicant has had severe financial difficulties. However, the bulk of the past-due debt was incurred during a period when the Applicant, by his own admission, was depressed over his financial and personal situation. In addition, the Applicant also suffered several bouts of unemployment that made it difficult for him to pay his current living expenses, much less that which was past-due.

The evidence is clear that the Applicant is able to handle his current financial responsibilities. Excluding the Federal tax debt, the Applicant has paid, settled, or otherwise disposed of most of his remaining indebtedness. He has entered into a payment agreement with the IRS, and has made substantial payments towards this debt. Regarding the airline passes, the Applicant admits this indebtedness and is attempting to resolve it. He is current on his monthly expenses and evinces a credible intent not to put himself in a financial situation like this in the future. The Applicant is doing the best that he can, the IRS finds his proposed payment plan acceptable, and I am satisfied that he has mitigated the Government's case against him. Criterion F is found for the Applicant.

Due to personal problems, the Applicant did not submit his state or Federal 1992 income tax returns in a timely fashion. As discussed above, there is sufficient credible evidence to find that the Applicant has subsequently filed these returns. The Applicant maintains that his failure to file tax returns was an aberration that will not happen again. I am convinced that this was an isolated incident, in the remote past, which will not be repeated. The Applicant has mitigated the Government's case against him on this allegation. Criterion J is found for the Applicant.

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.e.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.b.: 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

1. Though not set forth in the transcript, Government Exhibit 13 was formally admitted into evidence by me in open court.
2. Though not set forth in the transcript, the witness (the Applicant) was properly admonished by me before he testified.
3. Applicant's Exhibits "A" through "D" were admitted at the hearing on June 25, 1997. The additional four proposed Applicant exhibits were received on July 8, 1997. They are: "E," an undated state tax return for tax year 1992; "F," state certificate of title for Applicant's automobile; "G," three postal money orders made out to the IRS; and, "H," an apparent IRS printout, undated. The Department Counsel did not object to the additional exhibits and they are admitted.
4. The transcript of the June 25, 1997, hearing indicates on page 37 that part of the reporter's tape is missing. The Administrative Judge was not notified of this until he received the transcript. To the best of my recollection, nothing of import to the case was discussed during the missing portion of the tape.