

DATE: September 5, 1997

In Re:

Applicant for Security Clearance

ISCR Case No. 97-0176

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esquire

Attorney Adviser

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On February 26, 1997, 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 a 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.

A copy of the SOR is attached to this Decision and included herein by reference.

Applicant answered the SOR on March 24, 1997, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on May 8, 1997. On July 2, 1997, a hearing was convened for the purpose of considering whether it was clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of six exhibits and no witnesses; Applicant relied on his own testimony. A transcript of the proceedings was received on July 23, 1997.

FINDINGS OF FACT

Applicant denied the factual allegation set forth under Criterion J in subparagraph 1.a. of the SOR; he admitted "in part," and denied "in part," the remaining factual allegations set forth under Criterion J in subparagraphs 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 1.j., 1.k., and 1.l. I have accepted Applicant's admissions and incorporate them as part of my findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 47 years old and has been employed by Company X (his current employer) on an intermittent basis since 1979. [\(U\)](#) He is seeking to obtain a secret clearance. A favorable preliminary determination could not be made on

Applicant's security clearance suitability because of criminal conduct, i.e., a willful failure to file his federal income tax returns for tax years 1987, 1991, 1992, 1993, 1994, and 1995, a failure to file his state income tax returns in State A for tax years 1991, 1992, 1993, 1994 and 1995, and his failure to file his state income tax return in State B for tax year 1991.

Applicant's problems with the Internal Revenue Service (IRS) began in about 1991⁽²⁾ after he filed his tax returns for tax years 1986 through 1990.⁽³⁾ He claims that he paid all of the taxes that he owed for each of these years at the time of filing (Tr. 37), but admits that he did not pay the late-filing penalties and interest which had accrued for tax years 1987, 1988 and 1989 (Tr. 37) either at the time of filing, or at any time since. When the IRS attempted to collect the penalties and interest in 1991, Applicant was unable to pay the amounts owing because he was unemployed. In December 1991, the IRS seized Applicant's bank account (Tr. 52) and in February and April 1992, they placed liens on his house (Tr. 36, and Govt. Exh. Nos. 2 and 3). Since 1992 when the liens were placed on his house, Applicant has not contacted the IRS and attempted to negotiate a payment schedule on the indebtedness resulting from penalties and accrued interest.

With respect to his more recent tax returns, Applicant testified that he has not filed his returns--for tax years 1991 to 1995--because he believes the IRS owes him money. He had "changed (his) financial situation to the point where (he) was going to be receiving refunds" (Tr. 33). However, he knows he will not be getting back the refunds that are due to him since he has not resolved his dispute with the IRS over the penalties and interest that have accrued for his 1987, 1988 and 1989 tax years (Tr. 33). Each year on April 15, Applicant has requested a four month extension. Each year the time for filing under the extension came and went, and Applicant did not file his return. From March 1992 to March 1997, Applicant did nothing to resolve his dispute with the IRS (Tr. 58). After he received the SOR, Applicant retained a certified public accountant (CPA) to assist him in resolving his dispute with the IRS about penalties and interest for 1987 - 1989 returns, and to assist him in filing his more recent returns (Tr. 30-34, 37).

Although he is unable to identify any error in the IRS calculations regarding the amount which he owes for penalties and accrued interest (Tr. 54) as a result of filing his returns late for tax years 1987, 1988 and 1989, Applicant expressed hope that the CPA, whom he recently hired, will be able to reduce this amount through negotiation. The only mitigating circumstance Applicant could identify as a possible basis for reducing the amount of his obligation was the mental health counseling he had received for depression in 1988-89 (Tr. 55-56, see also p. 5 of Govt. Exh. No. 1). He believes that because of his depression, the IRS should excuse a portion of the penalties and interest resulting from his late filing of the 1987, 1988 and 1989 returns.

When he was interviewed by the Defense Investigative Service (DIS) in July 1996, and again in January 1997, he admitted that he was having a dispute with the IRS over the penalties and interest due on his returns from 1986-1990. In the sworn statements signed at the time of these interviews, Applicant indicated that he would not be filing his income tax returns for 1991-1995 until that dispute was resolved (Govt. Exh. Nos. 5 and 6).

At his hearing Applicant testified that he had recently filed his 1993 federal income tax return (Tr. 29), and that he had completed his 1993 income tax return for State A (Tr. 28). Applicant has not filed his state tax returns for the other tax years alleged in the SOR because he did not have the necessary information--most of which is taken directly from the federal tax return. Throughout the hearing, Applicant acknowledged that he had not filed his federal and state income tax returns--as alleged--but stressed that his failure to file his tax returns was a misdemeanor rather than a felony (Tr. 25, 33, 70).

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 in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also 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)

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:

- (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:

- (2) The crime was an isolated incident,

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 judgment, 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 that 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 Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion J. Applicant has admitted that he did not file his federal income tax returns for tax years 1991, 1992, 1993, 1994 and 1995. He has also admitted that he did not file his income tax returns for State A for tax years, 1991, 1992, 1993, 1994 and 1995, and that he did not file his 1991 income tax return for State B--where he lived for a period of time in 1991.

Favorable consideration has been given to Applicant's testimony that he had sufficient money withheld to cover his tax obligations for the years 1991 through 1995, and to the fact that Applicant is now making an effort to bring himself into compliance with federal and state income tax laws. He has filed his 1993 federal income tax return and has completed the preparation of his state income tax return (for State A) for the same year. In addition to becoming current on his federal and state income tax returns for 1993, Applicant has retained a CPA to negotiate with the IRS about the penalties and accrued interest for tax years 1987, 1988 and 1989. And he has provided information to the CPA which will enable him (the CPA) to file Applicant's delinquent returns for tax years 1991, 1992, 1994 and 1995.

Favorable consideration has also been given to the other aspects of Applicant's record and financial management. His credit report indicates that he pays his remaining obligations on time. Except for failing to file his federal and state tax

return, his record is unblemished.

Applicant has recently acted to bring himself into compliance with the law. Although his actions are steps in the right direction, his efforts to date are not sufficient to mitigate the years of neglecting his statutory obligation to file federal and state income tax returns. If the IRS had indeed assessed penalties and interest on his 1987, 1988 and 1989 tax returns which were not legally justified, their mistake, with respect to those returns, did not--forever after--absolve Applicant of his obligation to file income tax returns. Not only does he not cite any authority for his self-help approach to his tax problem, he is not even certain that the IRS calculations about what he owes are erroneous. He entertains the hope that the IRS will accept payment of a lesser amount in full satisfaction of his obligation, but he has not even informed the IRS that he was treated for depression in 1988-89. And he has not identified any other basis for why the IRS should forgive a portion of his obligation.

Applicant may have been unemployed and may have been experiencing financial hardship when the IRS initially made their claim; however, he has not proffered evidence that he has been consistently financially distressed and unable to make some minimal payment on his tax indebtedness. He has used his dispute with the IRS as a basis for not filing recent federal and state tax returns, but has not even attempted to resolve his dispute with the IRS in the past five years. The depression which Applicant suffered in 1988-89 may be found to excuse him from timely filing his 1987, 1988 and 1989 tax returns, but it can hardly serve as a basis for excusing his failure to timely file federal and state tax returns for 1991, 1992, 1993, 1994 and 1995. Subparagraphs 1.b., 1.c., 1.d., 1.e., 1.f., 1.i., 1.j., 1.k. and 1.l. of Criterion J are 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. For 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. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant was employed by Company X from 1979 to 1989, and began working for Company X again at an undisclosed date prior to the hearing. He testified that he had held a top secret clearance during his initial period of employment (Tr. 32).
2. Applicant was unable to remember the exact date when he filed his tax returns for 1986, 1987, 1988, and 1989; "it was either the fall of '89 or the spring of '90 (Tr. 38), or in the "fall of 1990 through the spring of 1991" (Tr. 48).
3. Although the SOR alleges that Applicant did not file his return for 1987, Applicant testified that he **did** file his return for that year at the same time that he filed the 1986, 1988 and 1989 returns (Tr. 29-30). There is no evidence in the record to refute Applicant's testimony on this point.