

DATE: October 14, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR Case No. 97-0251

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On April 3, 1997, 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, amended by Change 3 February 13, 1996, issued a 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on April 30, 1997.

The case was received by the undersigned on June 30, 1997. A notice of hearing was issued on June 27, 1997, and the case was heard on July 24, 1997. The Government and Applicant submitted documentary evidence. [\(U\)](#) Testimony was taken from Applicant. The transcript was received on August 8, 1997.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges criminal conduct. Applicant denied subparagraph 1d, 1f, 1h, 1k, 1m, 1o, 1q, and 1s. He admitted the remaining allegations. Applicant's primary reason for denying the enumerated allegations is that his failure to file income tax returns was not criminal but rather the end result of procrastination over a number of years.

Applicant is 53 years old and is employed as a security guard by a defense contractor. He seeks a secret security clearance.

Applicant failed to file state income tax returns for 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, and 1993. Applicant failed to file federal income tax returns 1986, 1987, 1988, 1990, 1991, 1992, 1993, and 1995. Although Applicant vigorously asserts his failure to file the state and federal returns was not willful (TR. 24), but rather the result of procrastination (GE #2) and having no money to pay taxes (GE #3), Applicant's testimony at other locations of the transcript reflects that his failure to file returns for so many years was willful. Applicant recognized his duty to file tax returns (TR. 25; 27) because his sense of duty caused him to file returns for 1989 and 1994. (TR. 24) Considering Applicant's age and the number of times he did not file over the twelve year period, together with his understanding of his duty to file returns, I find Applicant willfully failed to file his state and federal tax returns. ⁽²⁾

In his sworn statement dated January 13, 1997 (GE #2), Applicant stated he had made an agreement with the Internal Revenue Service (IRS) to make restitution through a repayment plan. He also stated that when he received his workman's compensation award, he would pay the balance owed to the IRS. He also acknowledged that procrastination prevented him from filing and paying his state taxes. Lastly, Applicant stated his intention to pay all taxes. At the hearing, Applicant provided a little more detail about his agreement with the IRS to resolve his tax liability for the tax years identified in the SOR. (TR. 28) In 1993, he entered in an agreement with the IRS to make payments. In 1994, after he started working for a new employer, he started making payments of \$25.00 or \$30.00 a month. But, after a few months, he lost his job and the IRS informed him they would retain and apply his tax returns toward repayment of his overall tax liability.

Applicant's documentary evidence (AE-A) shows tax liability for the years 1987, 1988, 1990, and 1991. What the exhibit does not show are any documented efforts by Applicant toward satisfying his tax liability. Further, there is no evidence supporting Applicant's testimony he made any payments to the IRS or he made any additional attempts to secure the remaining state tax forms to file the state returns for the missing years.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct (Criterion J)

Factors Against Clearance:

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

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under criminal conduct (Criterion J) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The record establishes a strong case of criminal conduct within the ambit of Criterion J. Applicant willfully failed to file state income tax returns for the years 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, and 1993. Applicant willfully failed to file his federal income tax returns for the years 1986, 1987, 1988, 1990, 1991, 1992, 1993, and 1995. Applicant's willful failure to file for the identified years constitutes a violation of the state and federal criminal statutes identified in the SOR. His procrastination claim does not excuse his duty to file tax returns. Even though he did not have the money to pay taxes he still was aware of his duty to file. Having weighed and balanced the evidence as a whole, Applicant's explanations for not filing his returns do not mitigate his repeated and deliberate failure to file his returns. In addition, Applicant has offered no independent evidence to support his claims of having furnished payments to the federal or state tax authorities. Given the lack of any corroborative evidence in mitigation or rehabilitation, Applicant has failed to meet his ultimate burden of persuasion under Criterion J.

FORMAL FINDINGS

Having evaluated the specific policy factors and the general policy factors (whole-person concept), Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (criminal conduct-Criterion F): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.
- g. Against the Applicant.
- h. Against the Applicant.

- i. Against the Applicant.
- j. Against the Applicant.
- k. Against the Applicant.
- l. Against the Applicant.
- m. Against the Applicant.
- n. Against the Applicant.
- o. Against the Applicant.
- p. Against the Applicant.
- q. Against the Applicant.
- r. Against the Applicant.
- s. 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 Applicant.

Paul J. Mason

Administrative Judge

1. Applicant's submitted post-hearing documentary evidence which shall be marked and admitted in evidence as Applicant's Exhibit A (AE A).
2. Applicant's claim he was too busy to file returns (TR. 26) is not credible and does not mitigate his obligation to file and pay federal and state taxes.