

DATE: __August 11, 1997__

In Re:

Applicant for security clearance

ISCR Case No. 97-0233

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On March 28, 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 23, 1997.

The case was received by the undersigned on May 12, 1997. A notice of hearing was issued on May 29, 1997, and the case was heard on June 18, 1997. The Government submitted documentary evidence. Testimony was taken from Applicant. Applicant's post-hearing submission, containing five character statements, a second copy of his Answer, and a one page document with names and telephone numbers, shall be admitted in evidence as Applicant's Exhibit A. The transcript was received on July 3, 1997.

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges criminal conduct. The following Findings of Fact are based on the record and witness credibility. Applicant is 44 years old and employed as an administrative clerk by a defense contractor. He seeks a secret clearance.

Applicant did not file his federal tax returns for the years 1992, 1993, 1994 and 1995. He did not file his state tax returns for the same years. ⁽¹⁾ Applicant knew he had an obligation to file and pay income taxes but several extenuating events commanded Applicant's attention during the period. First, his wife became very ill in March 1991 and the cost of her treatment quickly rose to approximately \$175,000 during the course of the year. (GE #3) Although Applicant's insurance paid for most of the treatment, Applicant's wages were garnisheed for about \$11,000 by one of treating

hospitals. When his wife died in January 1992, Applicant became the sole provider for three minor children. In April 1993, his grandson died and Applicant had to pay for a substantial part of the funeral expenses. In April 1994, Applicant was laid off from his job and rehired by his present employer at a 30% reduction in salary. Finally, Applicant's residence was damaged by two floods.

Applicant testified he contacted the regional federal tax agency in May 1997 to send the appropriate tax forms so that he could file for the years in issue. He discovered the forms he received in late May were the wrong forms because he is required to itemize his deductions. Therefore, he has to request a new set of forms that allow itemization. (TR. 14-16) Although he stated in GE #3 he was going to request the forms from the state and federal agencies in September 1996, he has been trying to collect the proper paperwork between September 1996 and May 1997. (TR. 18)

Applicant is trying to prepare his tax returns because he does not have the money to pay someone to prepare his tax returns. He filed the 1990 and 1996 returns on time, but did file the other returns because of the difficulties he encountered between 1991 and 1994.

Applicant's coworker of four years has found Applicant to be a trustworthy person with much integrity. Four other coworkers, the facility security officer,⁽²⁾ and supervisors complimented Applicant's security consciousness and well-organized habits at work, and the dedication he shows to his family.

Applicant's Exhibit A also contains a one page document, dated April 22, 1997, with names, telephone numbers, and the information sought. Apart from the document's authenticity problems, the document definitely falls short of the documented corroboration described by Applicant in his testimony concerning his efforts to contact the respective tax agencies. (TR. 17; 21-24) However, Applicant's favorable credibility convinces me that Applicant will follow through with his intentions to resolve all present tax problems and dutifully file and pay taxes in the future.

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:

2. a single serious crime or multiple lesser offenses.

Factors for Clearance:

1. the criminal behavior was not recent.
2. the crime was an isolated event.
5. there is clear evidence of successful rehabilitation.

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 Criterion J (criminal conduct) 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

When Applicant willfully failed to file his state and federal income taxes for 1992, 1993, 1994, and 1995, Applicant demonstrated a pattern of criminal conduct that creates doubt about his judgment, reliability and trustworthiness.⁽³⁾ If a security clearance holder displays an irresponsible attitude toward his obligation to file tax returns every year, then the chances are that at some time in the future he will display the same sort of inattentive attitude toward the rules and regulations describing how to safeguard classified information.

Even though the acts of omission did not end until 1995 and were not isolated events, there were clearly traumatic experiences in Applicant's life which explain and also mitigate his failure to file returns for the years in issue. An unexpected medical emergency confronted Applicant in March 1991 when his wife became seriously ill in March 1991. While most of the enormous cost of her treatment was paid by medical insurance, Applicant's wages were garnished for the remaining cost his insurance did not cover. After suffering the loss of his grandson in April 1993, Applicant was laid off from his present job in April 1994 and rehired at a 30% loss in salary. The family deaths, the concomitant emotional as well as economic toll related to the deaths, the decrease in income, and other difficulties of raising three minor children, provide a satisfactory basis to conclude Applicant will comply with all federal and state tax obligations in the future.

Applicant's character evidence, which stresses his devotion to his work as well as his family, coupled with the family medical problems and Applicant's job problems between 1991 and 1994, convinces me Applicant's security clearance should be granted.

FORMAL FINDINGS

After a full review of the specific policy factors set forth in POLICIES, 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): FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

- c. For the Applicant.
- d. For the Applicant.
- e. 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 Applicant.

Paul J. Mason

Administrative Judge

1. Applicant also discovered through his own investigation that he has not filed tax returns for 1991. Even though his failure to file 1991 returns is not alleged in the SOR, the failure to file constitutes additional evidence of a pattern of omission that is significant under criminal conduct. However, the failure to file must be balanced against the extenuating circumstances surrounding his wife's long illness.
2. On page 17 and 24 of the transcript, Applicant described how his facility officer assisted in helping Applicant acquire information from the tax agencies. However, in his character reference, the facility security officer makes no mention of what actions he took in helping Applicant resolve his tax problems.
3. Doubt concerning Applicant's judgment is compounded by his inaction until August 1996 to take any credible action in resolving his tax problems. Conversely, Applicant's efforts in gathering the necessary paperwork and calling the appropriate tax officials since August 1996, represents good judgment by Applicant to finally address his tax responsibilities.