

DATE: September 10, 1997

In Re:

Applicant for Security Clearance

ISCR Case No. 97-0249

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Williams S. Fields, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 8, 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 in an undated response, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on May 29, 1997. On July 1, 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 five exhibits and no witnesses; Applicant relied on his own testimony, and four exhibits. Following the hearing, the record remained open for ten days to afford Applicant additional time in which to supplement the record regarding his delinquent tax returns. He submitted six additional exhibits within the allotted time period--none of which were objected to by Department Counsel. A transcript of the proceedings was received on September 3, 1997.

FINDINGS OF FACT

Applicant admitted, without explanation, the factual allegations set forth under Criterion J in subparagraphs 1.a, 1.b., 1.c., 1.d., 1.e., 1.f., 1.g. and 1.h. of the SOR. 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 34 years old and has been employed by his current employer since February 1994. He had served in the U.S. Army for nine and one-half years prior to being discharged from military service in October 1993. He is seeking to retain his secret clearance. A favorable preliminary determination could not be made on Applicant's security clearance suitability because of criminal conduct, i.e., a failure to file state and federal income tax returns for tax years 1992, 1993, 1994 and 1995.

In June 1990, Applicant's infant son was diagnosed with acute lymphocytic leukemia (Applicant's Supplementary Exh. B). For the next four years until the child's death in July 1994, Applicant was preoccupied with caring for his son and attempting to obtain proper medical treatment for him. For tax years 1992 and 1993, he had "thought (his) wife" had done the tax returns while he was "very busy trying to take care of (his) son's situation" (Tr. 33). After he and his wife separated in 1994 (Tr. 34), he was even more preoccupied with his son's medical care. During the first six months of 1994, he quit his job and accompanied his son to a military medical facility located some distance from his home in an attempt to obtain a bone marrow transplant for him (Tr. 39). His efforts were not successful and his son died on July 11, 1994 (Applicant's Supplementary Exh. B).

Applicant has recently taken steps to bring himself into compliance with his federal tax obligation. At his administrative hearing, he presented copies of the front page of his federal tax returns for 1991, 1992, 1993 and 1994. He testified that the federal tax returns for those years had been filed on May 13, 1997 (Tr. 36), and he subsequently provided copies of the second page of those returns. He testified that he intended to file his delinquent state tax returns as soon as his tax preparer had obtained the necessary information (Tr. 40). Applicant estimated that the IRS would owe him money when all of his returns were filed because he had had more money withheld than he owed in taxes (Tr. 37-38).

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,
- (4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
- (5) There is clear evidence of successful rehabilitation.

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 failed to file both his federal and his state income tax returns for tax years 1992, 1993, 1994, and 1995.

Mitigation for Applicant's dereliction is found in the circumstances under which he neglected this important responsibility. During most of the time covered by these tax returns, he was preoccupied attending to the needs of his sick child. His son was originally diagnosed with acute lymphocytic leukemia in June 1990. After undergoing chemotherapy, the disease was in remission for a brief period of time in 1993. However, he was found to have relapsed in January 1994. Applicant's seven year old son died on July 11, 1994 while in the hospital awaiting a bone marrow transplant.

For 1992 and 1993, Applicant was depending on his wife to file their income tax returns. He did not realize until after they separated in 1994 that she had not been filing their returns. More recently, Applicant did not file his 1994 and 1995 tax returns in a timely manner because he had quit his job and was spending all of his time attending to his son's medical needs and attempting to obtain a bone marrow transplant for him.

Additional mitigation is found in the action Applicant has recently taken to bring himself into compliance with the law. At his administrative hearing or within a brief period of time after its conclusion, Applicant had presented credible evidence that he has filed his federal returns for 1992, 1993, 1994 and 1995. He testified that the person he had retained to prepare his federal income tax returns was working on his state income tax returns and would complete them in the near future as soon as he had obtained the necessary information. Applicant's personal circumstances during the years covered by the delinquent tax returns, and his recent efforts to bring himself into compliance are found sufficient to mitigate the misconduct represented by his failure to file his federal and state tax returns in a timely manner. Subparagraph 1.a., 1.b., 1.c., 1.d, 1.e., 1.f, 1.g. and 1.h. of Criterion J are concluded for 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) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. 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 Applicant's security clearance.

John R. Erck

Administrative Judge