

Date : August 29, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0252

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esquire

Department Counsel

FOR THE APPLICANT

Howard Dawson, Esquire

STATEMENT OF THE 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, 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 21, 1997. This case was assigned to the undersigned on July 2, 1997, and a Notice of Hearing was issued on July 10, 1997. A hearing was held on August 19, 1997, at which the Government presented three documentary exhibits. The Applicant presented twelve documentary exhibits and called two witnesses to testify on her behalf.

The Applicant also testified on her own behalf.

The official transcript was received on August 29, 1997.

FINDINGS OF FACT

The Applicant is 49 years old, and married. She is employed by a defense contractor as a Computer Programmer/Analyst, and she is applying for a Secret level security clearance in connection with her employment.

The Government opposes the Applicant's request for a security clearance, on the basis of 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:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she repeatedly violated a State's Revised Statute, a felony, and the misdemeanor provisions of Title 26, United States Code, Section 7203, by failing to file annual income tax returns, as required.

As alleged in the SOR, subparagraphs 1.b., 1.d., and 1.f., the Applicant willfully failed to file her State Income Tax Returns for 1993, 1994, and 1995, within the time required. Her failure to do so was in violation of the State's Revised Statutes.

As alleged in the SOR, subparagraphs 1.a., 1.c., and 1.e., the Applicant also failed to timely file her 1993, 1994, and 1995, Federal Income Tax Returns within the time required. Her failure to do so was in violation of Title 26, United States Code, Section 7203.

The Applicant understands her responsibility to file annual State and Federal Income Tax Returns, and she is not a tax protestor. Although the Applicant's husband has in the past been the one to file their income tax returns, the Applicant understands that she is responsible for filing her State and Federal income tax returns, and for paying the required taxes.

Among her excuses for not filing her tax returns on time, the Applicant explained that from 1988 until 1993 she and her husband operated a home based business, a bed and breakfast, which they were forced to close due to a severe business turndown in their town. After moving from their house, they attempted to start the business again, but were unable to get it off the ground. This created a series of financial difficulties for them which resulted in their filing Bankruptcy. They lost two houses, and were forced to move twice. In the course of their moves, things were in boxes, and they had trouble finding the documentation that they needed. (Tr. Pg. 32). From 1987 until 1995, the Applicant's husband was unemployed, and she had a number of temporary jobs.

In addition, the Applicant testified that for tax years 1990, 1991, and 1992, she and her husband used a tax relief strategy called "income averaging". During those years, they did not file their income tax returns until 1993, and they were issued a refund from the taxing authorities. With respect to their 1993, 1994, and 1995 income tax returns, the Applicant was under a good faith, but mistaken belief, that she and her husband could continued to income average. It was only in March 1997, that the Applicant learned from her accountant that income averaging was no longer allowed.

In November 1996, the Applicant was interviewed by the Defense Investigative Service concerning her failure to file her 1993, 1994, and 1995 State and Federal income tax returns. The Applicant stated at that time that she was trying to get them filed by the end of November 1996. (Tr. Pgs. 28-29).

On January 21, 1997, the Applicant provided a sworn statement to the Defense Investigative Service wherein she stated that her husband had been on travel and had not had time to file their tax returns. The Applicant further stated that she was going to file her income tax returns as soon as possible. (Government Exhibit 2). The Applicant testified that within a week of her interview, she forwarded her tax information to her tax accountant to prepare her tax returns. (Tr. Pg. 42).

On March 6, 1997, the day before the Applicant actually filed her income tax returns, the Applicant telephoned the Special Agent who had previously interviewed her to inform him that she was filing the income tax returns in question. The Applicant also sent copies of each of these income tax returns to the investigator. (Tr. Pg. 38).

Applicant's Exhibits D, G and I are copies of all the State income tax returns in question and verifies their filing with the State's Department of Revenue on March 7, 1997.

Applicant's Exhibits C, F and H are copies of the Federal income tax returns in question and verifies their filing with the Internal Revenue Service on March 7, 1997.

The Applicant promises that in the future she will always file her tax returns on time. (Tr. Pg. 68). Although her 1996 tax returns were not in question in this case, the Applicant also offered copies of her 1996 State and Federal income tax returns that she timely filed in early April 1997. (See, Applicant's Exhibits K and L).

Mitigation.

The Applicant's ex-employer testified that the Applicant was an above average employee and her attendance was excellent. She is considered trustworthy and reliable. (Tr. Pgs. 64-66).

A friend of the Applicant testified that the Applicant's failure to file her tax returns is totally out of character for her. She is known to be straight up, and flat footed, and does not take the circuitous way around a problem. (Tr. Pgs. 60-61).

Several letters of reference from friends and co-workers reveal that the Applicant is a person of high integrity who is dependable, honest, and responsible. (See, Applicant's Exhibit A).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; 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 conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on own common sense. 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 J (Criminal Conduct)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:

- (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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 repeated instances of criminal conduct which demonstrates poor judgment or unreliability on the Applicant's part.

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 continued holding 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 interests to grant him or her a security clearance.

Criminal conduct is defined as violation of federal, state or local law. The Applicant has violated both the State and Federal laws by repeatedly failing to file income tax returns for the identified years. Her behavior demonstrates irresponsibility that is unacceptable by a person who seeks a security clearance. Possessing a security clearance places the holder in a fiduciary relationship with the Government. The Government must be able to repose a high degree of trust and confidence in a person to dutifully comply with all security regulations at all times and in all places. Very little confidence can be placed in a person who is not responsible enough to file income tax returns.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant failed to timely file her 1993, 1994, and 1995, State Income Tax Returns as required by the State's Revised Statutes. The Applicant also failed to file her 1993, 1994, and 1995 Federal Income Tax Return in violation of Title 26, United States Code, Section 7203.

The Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him. The Applicant filed all of the income tax returns in question on March 7, 1997, about one month before the Statement of Reasons was issued. The Applicant understands that she must timely file both State and Federal income tax returns in the future, and she is committed to doing so.

Applicant's poor judgment and irresponsibility in failing to file her income tax returns between 1993 and 1995 must be weighed and balanced against the good judgment she has demonstrated in March 1997, by submitting the State and Federal tax returns in question. The Applicant also understands that her security clearance is in jeopardy if she does not timely file her income tax returns in the future. The Applicant credibly testified that although her husband has in the past been the one in the family to file the tax returns, she will now become involved in the process to ensure that the tax returns are always filed on time in the future. The Applicant genuinely regrets not filing her income tax returns, and is ashamed that she has wasted the Government's time in this effort. The Applicant satisfactorily demonstrates that she is reformed from this aspect of her past misconduct, and it likely will not be repeated. She therefore satisfies the suggested mitigating conditions. I am convinced that the Applicant is now a reliable, trustworthy individual who can be relied upon to properly safeguard classified information. Accordingly, the Applicant has met her burden of persuasion under

Criteria J.

On balance, it is concluded that the Applicant has overcome the Government's *prima facie* case opposing her request for a continued security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Subpara. 1.f.: 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.

DARLENE LOKEY ANDERSON

Administrative Judge

August 29, 1997

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On balance, it is concluded that the Applicant has overcome the Government's *prima facie* case opposing her request for a continued security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

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Subpara. 1.a.: For the Applicant.

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Subpara. 1.f.: 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.

DARLENE LOKEY ANDERSON

Administrative Judge