

DATE: February 3, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0318

DECISION OF ADMINISTRATIVE JUDGE

LOKEY-ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On May 2, 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 29, 1997. This case was assigned to the undersigned on August 7, 1997, and a Notice of Hearing was issued on August 26, 1997.

Due to a conflict in Department Counsel's schedule, this hearing could not be held until October 10, 1997. The Government presented nine documentary exhibits. The Applicant presented two documentary exhibits and testified on his own behalf.

The official transcript was received on October 20, 1997.

FINDINGS OF FACT

The Applicant is 41 years old, and he is a Warehouse Specialist employed by a defense contractor. He seeks a DoD security clearance in connection with his employment in the defense industry.

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 he engaged in a pattern of criminal conduct.

As alleged in the SOR, subparagraphs 1.a., 1.c., 1.e., and 1.g., the Applicant willfully failed to file his Federal Income Tax Returns for 1992, 1993, 1994, and 1995, within the time required. His failure to do so was in violation of the Title 26, United States Code, Section 7203. See, Government Exhibit 3).

As alleged in the SOR, subparagraphs 1.b., 1.d., 1.f., and 1.h., the Applicant failed to file his State Income Tax Returns for 1992, 1993, 1994, and 1995, within the time required. His failure to do so was in violation of Section 19701 of the State's Revenue and Tax Code. (See, Government Exhibit 6).

The Applicant understands his responsibility to file annual Federal and State Income Tax Returns, and he is not a tax protestor. The Applicant also understands that he is responsible for paying Federal and State taxes.

The Applicant attributes his failure to file his 1992 returns on the fact that his wife refused to give him his son's social security number so that he could claim him as a dependant. He did not file his 1993, or 1994, returns due to marital discord. As to his 1995 return, he wanted to file it along with the others. The Applicant admitted that he "ignored his taxes . . . , and just blew it off." (Tr. Pg. 68). The Applicant claims that on May 27, 1997, he filed all of the income tax returns in question. He did not bring copies of the filed returns with him to the hearing, or any proof of them having been filed. The Applicant requested that the record be left open to submit this information post hearing. To accommodate his request, the record was left open for ten days. The Applicant failed to submit any Post Hearing documentary evidence.

On August 18, 1986, the Applicant and an accomplice robbed a postal subcontract station. The Applicant entered the facility, and told the clerk that, "This is a stick up." He taped up the clerk's mouth and arms, and had her lie on the floor in the back room. He then threatened to blow her head off if she came to the front of the store. The Applicant took money orders and a postal machine. The Applicant contends that he was not armed at the time, but led the clerk to believe that he was. (See, Government Exhibit 1).

On August 19, 1986, the Applicant was arrested while trying to cash one of the money orders he had stolen in the robbery. On September 3, 1986, a complaint was filed against the Applicant charging him with Armed Robbery of U.S. Postal Service Contract Station, Theft of a U.S. Postal Money Order, Transmitting a Falsely Stamped U.S. Money Order, Theft of a U.S. Postal Money Order Machine, Conspiracy to Present Falsely Stamped U.S. Money Order, Presenting Falsely Stamped U.S. Money Order, and Possession of Stolen U.S. Postal Money Order, all Federal felonies. The Applicant pled guilty to UnArmed Robbery, and all other counts were dismissed. The Applicant was sentenced to seven years in federal prison. (See, Government Exhibit 1).

On September 17, 1986, a second robbery complaint was filed against the Applicant by the State. The Applicant was charged with Robbery and False Imprisonment, for a robbery alleged to have been committed by the Applicant on May 7, 1986. The Applicant denied that he committed this robbery. The Applicant explained at the hearing that he was found guilty on both counts based upon circumstantial evidence, which connected a likeness and similarity of the robbery committed by the Applicant on August 18, 1986. The Applicant was sentenced to two years in jail to run consecutive with his federal prison sentence. (Government Exhibit 2).

The Applicant was incarcerated from August 1986 through April 1991. He was then on parole for two years.

On May 25, 1994, a complaint was filed by the State against the Applicant for Injury to Spouse, a felony; Criminal Threat, a felony; and the Use of Force or Violence, a misdemeanor. The Applicant stated that he screamed and grabbed his wife when he learned about her possible miscarriage. The Applicant pled guilty to the Use of Force or Violence, and the other charges were dismissed. The Applicant was placed on probation for three years, fined, required to complete community service, and attend a Domestic Violence Recovery Program. The Applicant failed to complete payment on the fine, a bench warrant was ordered, and his probation was revoked. The Applicant presently remains on probation until at least 1999. (See, Government Exhibit 4).

On October 27, 1995, the Applicant received a citation for Driving With a Suspended License, and having an Expired Registration. The Applicant pled guilty to Unlicensed Driver, and the other charges were dismissed. The Applicant was

placed on probation for three years, and fined \$150.00, plus \$140.00 restitution and administrative fees. He presently remains on probation until at least January 1999. (See, Government Exhibit 9).

Mitigation.

The Applicant's supervisor testified that since the Applicant was hired in June 1991, he has been a good worker, and is well liked in the work place. The Applicant has also been most reliable and trustworthy. He was recommended for an overseas assignment because of his excellent work performance. The Applicant's most recent evaluation reflects a 3 or 4, 4 being the highest rating possible. (Tr. Pgs. 95-102).

A letter of reference from the Head of the Material Management Department, of the medical facility where the Applicant works, indicates that the Applicant has maintained an excellent work record. The Applicant is extremely professional, dedicated to his work, and has made a great contribution to the facility. (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 her 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:

None.

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.

Furthermore, the Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his or her private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

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 interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has engaged in a pattern of criminal conduct (Criterion J). The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him.

Criminal conduct is defined as violation of federal, state or local law. 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 tax returns.

The Applicant has wilfully, and without reasonable excuse, repeatedly failed to file his Federal and State income tax returns for tax years 1992 through 1995, in violation of both Federal and State statutes cited above. The Applicant claims that he filed his income tax returns on May 27, 1997. There is no evidence, other than the Applicant's testimony, to prove that he in fact filed his returns in question. Despite the fact that he was given an additional ten days after the hearing to submit documentary proof of filing, he failed to do so. His behavior demonstrates irresponsibility that is unacceptable by a person who seeks a security clearance.

It is clear that since 1995, the Applicant has made a sincere, honest attempt to reform his criminal conduct. He is commended for his good work on the job, and for becoming a regular, productive member of society. However, when assessing Applicant's current suitability for a security clearance, his history and pattern of criminal conduct cannot be

ignored. The Applicant's criminal record, including two Robbery convictions in 1986, and a conviction for Spousal Abuse in 1994, are serious violations of the law. Admittedly, the Applicant's two convictions for Robbery in 1986, are almost twelve years ago, and are not recent. However, he remains on probation for his Spousal Abuse conviction, and his Unlicensed Driver's conviction. The Applicant's pattern of criminal conduct occurred episodically over a long period of time. These facts lead me to conclude that although Applicant is apparently trying to reform, it is too soon to safely conclude that his criminal conduct will not recur. At this time, I am not convinced that the Applicant is a reliable, or trustworthy individual who can be relied upon to properly safeguard classified information. The Applicant fails to satisfy any of the suggested mitigating conditions. Accordingly, the Applicant has failed to meet his ultimate burden of persuasion under Criterion J (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's *prima facie* case opposing her request for a continued security clearance. Accordingly, the evidence supports a finding against 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: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Subpara. 1.f.: Against the Applicant.

Subpara. 1.g.: Against the Applicant.

Subpara. 1.h.: Against the Applicant.

Subpara. 1.i.: Against the Applicant.

Subpara. 1.j.: Against the Applicant.

Subpara. 1.k.: Against the Applicant.

Subpara. 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 or continue a security clearance for the Applicant.

DARLENE LOKEY ANDERSON

Administrative Judge