

DATE: January 27, 1998

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In Re:

Applicant for Security Clearance

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ISCR Case No. 97-0419

## **DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **STATEMENT OF THE CASE**

On June 6, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense (DoD) Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) to the Applicant that 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 conduct proceedings and determine whether a clearance should be granted, denied or revoked.

A copy of the SOR is attached to this decision and is included herein by reference.

On August 11, 1997, Applicant responded to the allegations set forth in the SOR. Applicant elected to have the case determined by an Administrative Judge on the written record, i.e., without a hearing. A File of Relevant Material (FORM) was issued by Department Counsel on November 7, 1997. Applicant was notified that he could respond to the FORM within 30 days of his receipt of the FORM. A DOHA memo in the file, dated December 17, 1997, indicates that Applicant did not submit a response to the FORM. This case was assigned to me for resolution on December 17, 1997.

### **FINDINGS OF FACT**

The Government opposes the Applicant's request for a security clearance, based on the allegations set forth in the attached SOR, under Criterion J (Criminal Conduct). After a thorough review of all of the evidence in this case, including Applicant's response to the SOR, and upon due consideration of all of the record evidence, including Applicant's admissions and explanations, and all of the documentary evidence, this Administrative Judge makes the following findings of fact as to the Criterion J allegations in the SOR:

- Applicant is a 54-year-old technical representative employed by a major defense contractor (company A) since 1969. He was previously granted a Secret level security clearance in 1980.
- Applicant has been employed and paying income taxes since he was about 14 years old (Exhibits (Ex) 3 and 5). During his entire period of employment by company A, from 1969 to the present, including 1988-1992, Applicant has had income taxes withheld from his paycheck (Id.).
- During all of his 29 years of employment by company A, Applicant has filed federal income tax returns, except

that he willfully failed to file his federal income tax returns for tax years 1988, 1989, 1990, 1991, and 1992 (Id.).<sup>(1)</sup>

- Applicant's failure to file his federal income tax returns began as a result of the stress of the breakup of his marriage in 1987, and the added costs of the divorce, alimony, child support, private school tuition for his minor daughter, and additional housing expenses (Id.).
- In 1993, the Internal Revenue Service (IRS) filed a tax lien for approximately \$60,000 on Applicant's earning, based on his failure to file federal income tax returns for 1988-1992 (Id.).
- In March 1994, Applicant reached an agreement with the IRS, pertaining to each of the five years when he had not filed his federal returns. Since tax year 1993, Applicant has filed his federal income tax returns each year and, since March 1994, has been making payments of \$120 per month, in addition to current taxes, to cover the amounts due for the five years in question (Ex 3, 5, and 6). The IRS did not take any criminal or civil action against Applicant.

### **POLICIES**

The adjudication process established by DoD Directive 5220.6 is based on the "whole person" concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive, as amended by Change 3, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. In addition, each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an Applicant's conduct; the circumstances or consequences involved; the age of the Applicant; the presence or absence of rehabilitation; the potential for coercion or duress; and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

#### **CRITERION J (CRIMINAL CONDUCT)**

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 include:

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

Conditions that could mitigate security concerns:

- (1) the criminal conduct was not recent;
- (2) the crime was an isolated incident;
- (4) the factors leading to the violation are not likely to recur;
- (5) there is clear evidence of rehabilitation.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6, as amended, identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with

the national interest." In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, an Administrative Judge must make critical judgments as to the credibility of witnesses. Because this case is being decided without a hearing, credibility issues necessarily can be decided only on the written pleadings.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned when available information indicates that an Applicant for a security clearance may be involved in criminal conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

A person who seeks access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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 the Court's rationale, doubts are to be resolved against the Applicant.

### CONCLUSIONS

In his response to the SOR, Applicant admitted all of the alleged five criminal violations. Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's written testimony, this Administrative Judge concludes that the Government has established its case as to all SOR allegations. It is a basic tenet of the security clearance process that an individual seeking access to the nation's secrets must demonstrate good judgment, reliability, and trustworthiness in his/her private life, as well as on the job. Applicant's criminal failure to file federal income tax returns for five years demonstrates questionable judgment, unreliability, and untrustworthiness to the extent that, if not refuted, mitigated, or extenuated, establishes unsuitability for access to classified information. The remaining issue to be resolved in this case is whether Applicant has demonstrated mitigation and/or extenuation to the extent that it overcomes the impact of the Government's case against him.

In evaluating the totality of the evidence, it is necessary to determine the circumstances that lead to Applicant's five instances of failing to file his federal income tax returns in the context of Applicant as a "whole person." The record establishes that Applicant is a 54-year-old man, with a 15-year old daughter from a marriage that ended in divorce in 1987 (Ex 4). The only negative evidence in the record is that alleged in the SOR.

Although the criminal violations of 26 U.S.C. 7203 occurred when the five yearly returns were not timely filed, the record evidence establishes that Applicant did have federal income taxes withheld from his paycheck during the five years in which he did not file returns (Ex 3, 4, and 5). His explanation for his failure to file is basically that the increased costs resulting from the failure of his first marriage left him with very little money and that he was afraid to file because he could not afford to pay any more taxes (Ex 2). He claims that "his fear of the [IRS] prevented [him] from trying to work something out" (Ex 2). Applicant claimed in his sworn statement to the Defense Investigative Service (DIS)(Ex 5) that "in most years, the taxes withheld from [his] pay would have been more than enough to cover the taxes for the periods in question" (Ex 5). However, that turned out not to be the case overall, since the 1993 IRS lien was for \$60,000, presumably including interest and penalties (Ex 4).

Since reaching an agreement with the IRS in March 1994, Applicant has made payments of \$120 each month on his unpaid balances for the five missing years (Ex 3). The IRS appears to have found Applicant's efforts at repayment to be acceptable (Ex 6). The record evidence establishes that the last violation of 26 U.S.C. 7203 occurred in April 1993; that Applicant has been making monthly payments to the IRS since March 1994, i.e., almost four years; and that tax returns for subsequent years have been submitted. Thus, Applicant has demonstrated both the interest and ability to make

monthly payments on his past due debt.

In terms of punishment for his violation, Applicant has been subjected to interest and penalties which, on top of the principal amounts will commit him to making payments for some years to come. The security clearance process, however, is not intended to punish but, rather, to predict likely future behavior based on past conduct and the most recent relevant information. In this case, in the context of the specific guidance provisions relating to Criminal Conduct (Directive, Enclosure 2, at 2-20), I conclude that: (1) that the violations were not recent, in that Applicant's last failure to file was almost five years ago; (2) Applicant's failure to file his federal income tax returns for 1988-1992 was an isolated incident or aberration, in that the period involved only five years out of Applicant's taxpaying history of at least three to four decades; (3) Not applicable; (4) the specific circumstances leading to Applicant's failure to file was situational, in the sense that it occurred because of specific circumstances that had not occurred before and seem unlikely to recur; and (5) Applicant's agreement with the IRS; his ongoing history of making monthly payments over a period approaching four years; *and* his making timely filings of his tax returns since 1993 constitute clear evidence of successful rehabilitation.

Applicant's explanations do not contain any indication of denial. In his December 1996 SF 86 (Ex 4), he cited the IRS tax lien, and when asked about the subject by DIS, Applicant provided detailed information (Ex 5). Overall, I conclude that Applicant's clear violation of the income tax laws from 1988 to 1992, although serious, has been mitigated by the passage of time, during which Applicant has demonstrated by his actions his intent to comply with the income tax laws that govern our society. Based on the complete record, I conclude that Applicant has adequately demonstrated that he presently has the good judgment, reliability, and trustworthiness required of someone seeking access to classified information.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

#### 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

### **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.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. During the years covering the period from 1988 - 1992, Applicant was a resident of a state that does not impose its own income taxes.