

DATE: January 30, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0606

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On 5 September 1997, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 26 September 1997, Applicant answered the SOR and requested a hearing. DOHA assigned the case to different Administrative Judges on 5 November 1997 and 12 November 1997, but reassigned the case to me on 14 November 1997 because of caseload considerations. I set the case for hearing on 17 November 1997, and issued a notice of hearing on 20 November 1997, setting the case for 8 December 1997. Bad weather along the flight path to the hearing site prevented me from conducting the hearing as scheduled on 8 December 1997. On 22 December 1997, I reset the hearing and issued a notice of hearing setting the case for 6 January 1998.

At the hearing, the Government presented three exhibits--admitted without objection--and no witnesses; Applicant presented eleven exhibits--admitted without objection--and the testimony of one witness, himself. I received the transcript on 14 January 1998.

PROCEDURAL MATTERS

On 8 December 1997--the originally scheduled hearing date--bad weather over my flight path to the hearing site caused me to arrive at the hearing site more than two hours late for the 1:00 p.m. hearing. Applicant, relying on the hearing proceeding more or less on schedule, was booked on a 4:10 p.m. flight to perform temporary duty for his employer.⁽²⁾ When Department Counsel and Applicant learned that I would not arrive at the hearing site until after 3:00 p.m., Department Counsel recommended that Applicant request a continuance, and proceed to catch his flight. I find that counsel to have been the most prudent course of action under the circumstances (Department Counsel having another hearing the next day in a different city with another Administrative Judge). Upon my arrival at the hearing site, I continued the case without going on the record.

At the hearing on 6 January 1998, Department Counsel moved to amend the SOR by amending subparagraphs 1. c., e., and g. to allege the section of the state code which makes failure to file a state income tax return a misdemeanor offense. The state code section alleged in the SOR is the section which imposes the obligation to file a tax return. Applicant did not object to the Government's motion. I granted the motion. Applicant did not desire to amend his answer or have additional time to respond the Government's case.

Also at the hearing on 6 January 1998, Department Counsel requested--and I agreed--that I take official notice of the subject section of the state income tax code. Department Counsel provide me with a copy of the referenced statute. I am also taking official notice of the cited provision of the U.S. which makes it a misdemeanor offense to wilfully fail to file a federal income tax return.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly I incorporate the admissions as findings of fact.

Applicant--a 45-year old employee of a defense contractor--seeks to retain his access to classified information. He has held a security clearance for twenty-five years.

Applicant willfully failed to file his federal income tax returns for 1992, 1994, 1995, and 1996;⁽³⁾ he wilfully failed to file his state income tax returns for 1994, 1995, and 1996.⁽⁴⁾

Applicant got his accountant to prepare his delinquent federal (1991-92, 94-96) and state (1991-96) income tax returns in October 1997. Although Applicant filed the federal returns--which show a net liability of \$1,974.00⁽⁵⁾--he has not made any payments to IRS and has not entered into a payment agreement with IRS, having only contacted IRS the day before the hearing about his overall tax situation. There is no indication of what interest and penalties may be due in addition to the liability reflected in the tax returns. Applicant has not filed the state income tax returns--which show a total liability of \$956.00--because he is not yet prepared to enter into a repayment schedule with the state. Applicant owes taxes for each of his six state tax returns. Applicant's total tax liability, before penalties and interest, in \$2,910.00.

At the hearing on 6 January 1998, Applicant testified that although he knew he was required to file an income tax return, he had come to believe based on his observations of others that if you expected a refund, there was no hurry to file the required income tax return:

I felt by having withholding of single and zero [exemptions] that I had more than enough withholdings to meet my tax requirements, and that I would eventually get around to filing them. And that, if anything, I would get a somewhat of a refund. (Tr. 31).

Applicant filed his tax returns while in the military (Tr. 38), usually receiving a refund. He is single, does not own a home, or have expenses that entitle him to additional exemptions. Thus, while he claimed that he thought his filing status would ensure that he had sufficient taxes withheld, he was not entitled to more exemptions than he was claiming, except possibly one for himself. Applicant now asserts he will file his income taxes from now on.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

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 include:

- (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 include:

None.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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."

CONCLUSIONS

The Government has established its case under Criterion J. Even accepting that the criminal violations are misdemeanors under their respective codes and have not been charged, Applicant's multiple violations of his obligations to file his state and federal income tax returns casts significant doubt on his fitness for access to classified information. Applicant did not have a good faith misunderstanding of his obligation to file his income tax returns. His age, military experience, and knowledge of the world undercut his claim that he did not have to file his returns in a timely fashion. Indeed, he had filed in a timely fashion while in the Navy (and in 1993, when his rough estimates told him he would owe federal tax). Further, his reason for not filing on time is undercut by the fact that there is no corroboration of his claim that he believed there was no hurry to file, and the fact that his calculations were palpably wrong: he owed federal taxes two of the four years alleged (and three of the five for which he provided tax returns) and he owed state taxes on all three of the years alleged (and all six of the years for which he provided tax returns). Applicant cannot pick and chose which laws to obey and which to ignore. While Applicant asserts he would never chose to ignore the laws regarding handling of classified information, that assertion is belied by his conduct regarding the filing of his income tax returns. That obligation is independent of any assessment that Applicant is entitled to a refund in any given year.

None of the mitigating factors apply. The criminal conduct was certainly recent and not isolated; Applicant was not coerced into committing the crime. He voluntarily committed the acts, and I reject as incredible his stated belief that he though he did not have to file his tax returns if he expected to obtain a refund. Applicant has a tax liability for three of the five years of federal returns he submitted at the hearing, and for all six years of state years. This tax liability does not include the inevitable penalties and interest yet to be assessed because of Applicant's failure to file in a timely fashion. Furthermore, there is no clear evidence of successful rehabilitation. While Applicant claims to have filed his federal returns, he has made no payments yet to IRS nor has he arranged a payment schedule; he has yet to file the state returns. Nor is it clear that the factors leading to Applicant's criminal conduct are unlikely to recur.

Applicant's conduct in failing to file his required state and federal income tax returns for several years demonstrates profoundly poor judgment, at a minimum, and suggests that Applicant also lacks the trustworthiness and reliability

required of those with access to classified information. I find Criterion J. against Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: 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 Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. Also believing the hearing would proceed more or less on schedule, I was booked on the same flight because of the flight schedule out of the city.
3. Although not alleged in the SOR, he also failed to file his federal income tax returns for 1987, 1988, 1989, and 1991. He filed the 1987, 1988, and 1989 returns in 1990. On 19 February 1991, IRS placed a tax lien on Applicant for unpaid assessments totaling \$3,562.58 (\$1,289.00 for 1987; \$1,615.76 for 1988; \$657.82 for 1989). I have not considered the unalleged failures to file income tax returns on the merits of the case, but have considered them on the general issue of Applicant's credibility, and the believability of his explanations for failing the income tax returns which are the subject of this case.
4. He also failed to file state income tax returns for 1991, 1992, and 1993, although these failures to file are not alleged in the SOR. As with the unalleged federal tax returns, I have considered these unalleged state tax returns only the issue of Applicant's credibility.
5. Applicant owes for 1991, 1992, and 1994; expects a refund for 1995, 1996.