

DATE: December 9, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0568

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 25, 1998, 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 a Statement of Reasons (SOR) to the Applicant, which detailed the 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 a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on September 10, 1998.

The case was received by the undersigned on October 27, 1998. A notice of hearing was issued on October 28, 1998, and the case was heard on November 18, 1998. The Government submitted documentary evidence. Testimony was taken from the Applicant. The transcript was received on November 25, 1998. The record was left open for the receipt of additional documentation, and closed on December 2, 1998. The issue raised here is whether the Applicant's current financial difficulties militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 47 years of age, has a Bachelor's Degree in Mechanical Engineering, and is employed as a consultant. He currently holds no security clearance, but seeks a secret security clearance.

Criterion F - Financial Considerations

1.a.~1.e. and 1.h The Applicant went into business in 1988; and as such, filed his first business related Federal Income Tax Return for that tax year in February of 1989 (Applicant's Exhibit (AppX A)). He filed a Schedule C, claiming a business related loss (Transcript (TR) at page 55 lines 3~7, and AppX A at page 1). The IRS subsequently, in "late

1990," disallowed this offset claim of negative income (TR at page 56 at line 18 to page 57 line 10). Similar disallowed tax returns were also filed for tax years 1989~1992 (Government Exhibits (GXs) 3~6). As a result of IRS's position vis-a-vis these returns, the Applicant has retained the services of a tax attorney (AppX S at pages 4~6), and by the admission of this counsel owes in excess of \$97,000 to the IRS for the tax years at issue (AppX O). Through this counsel's representation, coupled with the funds from a financial backer (AppX S at page 7), the Applicant intends to enter into a settlement agreement with the IRS (AppX S at pages 9~11). Through auspices of the financial backer, the Applicant will also have a positive cash flow (TR at page 78 line 5 to page 80 line 5).

1.f. In order to market the Applicant's product, his company entered into a partnership with a manufacturing company (TR at page 61 line 18 to page 64 line 9). The Applicant avers that there was a "verbal agreement" with the manufacturer by which the manufacturer would "forego claims of preformation expenses" (TR at page 64 lines 10~14). The manufacturer subsequently withdrew from the partnership, and sought preformation expenses from the Applicant (TR at page 68 lines 4~22). As a result, a settlement agreement was entered into between the Applicant and the manufacturer (TR at page 70 lines 2~17, and AppX G). The Applicant avers that the manufacturer failed to comply with the terms of this agreement (TR at page 70 line 18 to page 71 line 19, and at page 75 lines 6~19). Through counsel, the Applicant is currently negotiating with the manufacturer

regarding its \$10,000 judgement against the Applicant, and avers credibly that he will resolve the matter (TR at page 87 lines 16~25).

1.g. The Applicant owes the estate of a financial backer about \$22,000 (TR at page 76 line 16 to page 77 line 21, and AppX P). The Applicant has already paid "over \$15, 000" towards this debt (TR at page 75 lines 20~21), and appears to have every intention of paying the balance (TR at page 67 lines 13~18, at page 74 line 22 to page 75 line 5, and page 87 lines 1~15).

Mitigation

The Applicant appears to be making a good faith effort to satisfy all of his past due indebtedness.

POLICIES

Enclosure 2 and Section F.3. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions 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 his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Financial Considerations

Condition that could raise a security concern:

(3) inability . . . to satisfy debts;

Condition that could mitigate security concerns:

(6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

As set forth in the Directive, "[e]ach clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

a. Nature and seriousness of the conduct and surrounding circumstances.

- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a 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.

The Government must make out a case under Criterion F (financial considerations) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. 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.

CONCLUSIONS

The Applicant's past due indebtedness is the outgrowth of a failed business partnership, and five years of faulty income tax returns relating to that failed partnership. Through the representation of legal counsel and the auspices of a financial backer, the Applicant has clearly initiated a good-faith effort to not only settle his debt with the IRS, but to also satisfy his debts to his former partner and to the estate of his former financial backer. As it appears that the Applicant is clearly on the road to financial stability, I conclude his past financial difficulties are not of present security significance.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his financial difficulties. The Applicant has thus met the mitigating conditions of Criterion F, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Criterion F.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.

f. For the Applicant.

g. For the Applicant.

h. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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.

Richard A. Cefola

Administrative Judge