

SYNOPSIS

Applicant has a history of federal filing failures covering tax years 1993 through 1996, as well as federal tax liens resulting from unpaid tax assessments by federal and state tax authorities for the years in question. Besides his failure to file timely federal and state tax returns, Applicant has accumulated large tax accruals for the tax years in question, which he has failed to address in any documented ways, and a 1999 state judgment that was discharged by the garnishment of Applicant's wages. Applicant fails to mitigate security concerns associated with his failures to file federal tax returns and resulting federal tax liens and a state judgment covering unresolved federal and state tax assessments. Allegations of Applicant's falsifying his security clearance application are unsubstantiated. Clearance is denied.

STATEMENT OF THE CASE

On July 28, 2005, 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 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 21, 2006, and requested a hearing. The case was assigned to me on December 19, 2006, and was scheduled for hearing on April 25, 2007. The hearing was rescheduled for April 24, 2007. A hearing was convened on April 24, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of 16 exhibits; Applicant relied on two witnesses (including himself) and four exhibits. The transcript (R.T.) was received on May 2, 2007.

PROCEDURAL ISSUES

_____ In advance of the scheduled hearing (on April 17, 2007), Department counsel moved by written motion to amend sub-paragraph 1.a of the SOR to substitute "the State of Georgia" for the "Internal Revenue Service" and amend sub-paragraph 1.c of the SOR to delete the reference in the sub-paragraph to the lien not being paid as of July 10, 2005, and add the phrase "the lien was released on July 19, 2005." For good cause shown, Department Counsel's motion was granted. Based on insufficient evidence to admit or deny the amendment changes, Applicant denied the allegations as amended (R.T., at 22-25).

Prior to the close of the hearing, Department Counsel moved to amend the SOR to conform to the evidence. Specifically, Department Counsel asked to add a new sub-paragraph 2.b to allege Applicant failed to file federal tax returns for at least tax years 1993 through 1996 (R.T., at 135-36). For good cause shown, Department Counsel's motion was granted. Based on insufficient information to admit or deny the amended allegations, Applicant denied the allegations contained in new sub-paragraph 2.b of the SOR.

_____ Before the close of the hearing, Applicant requested leave to keep the record open to permit him the opportunity to supplement the record with (a) a signed letter from his accountant (admitted provisionally as exhibit D) and copies of any filed tax returns not previously documented, (b) documentation of release of his tax liens, and (c) character references. For good cause shown, Applicant was granted seven additional days to supplement the record. The Government, in turn was allowed three days to respond.

Within the seven-day time period, Applicant furnished one character reference (a letter from his former wife) and requested additional, unspecified time to provide the letter from his accountant and additional character references. Some three weeks later (on May 21, 2007) he furnished an additional character reference from his human resources manager, which was not objected to and was accepted as exhibit E.

Over Department Counsel's objection, and for good cause shown, Applicant was granted additional time (to and including May 30, 2007) to supplement the record. The Government, in turn was allowed three days to respond. Within this time period, Applicant did not submit any tax returns, any correspondence from his accountant, documentation of the release of any of the liens filed against him, or payment information regarding any of his creditors within this time period. He did furnish a letter from his human resources manager, which was admitted, over Department Counsel's timeliness objection, as exhibit F. Applicant did not supplement the record with any other submissions, and the record closed on May 30, 2007.

SUMMARY OF PLEADINGS

Under Guideline F, Applicant is alleged to have incurred (a) federal tax liens in 2004, 2002 and 1999 in amounts exceeding \$66,000.00 and (b) a judgment in December 1999, upon which his wages were garnished in the approximate amount of \$5,104.00 between January and August 2000. Under Guideline E, Applicant is alleged to have falsified the security clearance application (SF-86) he completed in June 2000 by omitting the federal tax lien he incurred in May 1999.

_____ For his response to the SOR, Applicant admitted the federal tax liens filed against him, but contested their validity and accuracy and claimed pending challenges to each of the liens and underlying tax assessments. He admitted the state judgment entered against him in 1999 and the satisfaction of the judgment through garnishment of his wages. He denied falsifying his SF-86, claiming the lack of knowledge of any tax lien against him until so informed by the DoD.

STATEMENT OF FACTS

_____ Applicant is a 52 year-old operations technician for a defense contractor (currently activated by Air Force) who seeks to retain his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant married in December 1980, and his wife bore him two children (a son and daughter) during their 14-year marriage. Since his divorce in 1994, he has not remarried. He continued to provide care for his wife and children after the divorce, and resides in State A.

Between 1993 and 1999, Applicant failed to file federal tax returns and state tax returns that are linked to the federal returns (*see* exs. 8 and 13; R.T., at 114-17, 122-24). He attributes his filing failures to his extensive work commitments that did not afford him sufficient time to prepare his federal and state returns. Since 1994, his employers have regularly withheld portions of his wages for taxes (R.T., at 117-18). Because his employers have withheld monies from his wages, he doesn't believe he owes the IRS or State G any money for any of the covered years.

When Applicant did not file federal tax returns for the 1993-1996 tax years, the IRS filed returns for him, based on his estimates of his earnings for the years in question. And when Applicant did not make any arrangements to pay the determined taxes owing for these years (including accrued interest and penalties), the IRS filed liens against his property interests in his home state to cover the amounts computed to be owing (*see* exs. 5 through 7). Specifically, the IRS filed a tax lien in May 1999 for \$30,635.00, which covered taxes assessed for tax years 1993 through 1995 (*see* ex. 7), and one in July 2002 for \$14,446.76, covering taxes assessed for 1996 (*see* ex. 6). State G, in turn, filed a state tax lien in February 2004, covering assessed state taxes of \$21,239.00. With accrued interest and penalties assessed on the principal federal tax balance for the 1993-1996 period, accrued principal, interest and penalties for the years in question now exceed \$66,000.00.

The IRS released both its February 2004 and May 1999 tax liens against Applicant in July 2005. Whether the Service released its liens due to computed credits to the underlying assessment supporting the liens or because of running of statutes of limitations is unclear. Applicant does not know the reasons for the release; albeit, he continues to claim he has more than paid any taxes due the IRS through years of withholding (R.T., at 133-34). The record does not reflect any disposition of State G's entered tax lien, and presumably, it remains in place.

In July 2003, DOHA propounded a set of interrogatories to Applicant. Applicant returned his answers in August 2003 (ex. 4). Responding to questions two and three, he stated that he chose to challenge the IRS assessments and retained an accountant (M) to address the IRS's tax claims (*see* ex. 4; R.T., at 106). Applicant indicated his accountant was committed to refiling tax returns for the years in question and negotiating tax adjustments with the IRS, but had been hampered somewhat by the absence of financial records covering his taxes for the 1993 through 1996 tax years.

Applicant attached two letters from M to the IRS to his interrogatory answers, confirming ongoing negotiations with the IRS, and estimated 30 to 60 days to complete and mail the back returns to the IRS. M confirmed in his July 2003 letter that Applicant's 2002 income tax returns were 70 to 75 per cent complete and were expected to be completed in the ensuing two weeks. M advised that the IRS was unwilling, however, to delay collection activity and was intending to levy on Applicant's wages to cover taxes associated with his 1993 to 1996 returns (*see* ex. 4). M stated he was involved in ongoing negotiations with the IRS to lower the levy amount based on financial data to be furnished by Applicant and M.

To date, Applicant has been unable to resolve his disputes with the IRS over his assessed taxes for the tax years of 1993 through 1996, or the subsequent years of 1997 through 1999. Nor has he provided documentation of his filing federal and state tax returns for these years (R.T., at 96-97). His accountant (M) continued to furnish updates on ongoing negotiations with the IRS over the same tax issues, but without any noted success (*see* exs. 5 and 10). M did confirm his filing of federal tax returns for the years 2000 through 2002. According to M, these returns produced refunds of \$3,538.00 for these three years, which the IRS was holding back (in addition to funds it was already holding) to apply to taxes the IRS claimed were due for the 1993 through 1996 tax years. In as much as M was still in the process of preparing returns for 1997 through 1999, he could not estimate what monies might be due or eligible for refund for these tax years (*see* ex. 5). Applicant has not provided any further updates on his unresolved tax issues.

Besides failing to file tax returns for the years 1993 through 1999 and accumulating assessed tax deficiencies with the IRS and State G, Applicant was sued by a female acquaintance (A) over monies Applicant was supposed to have invested for her (*see* exs. 3 and 8; R.T., at 60-61). The acquaintance obtained a judgment against Applicant in State G in December 1999 for \$5,104.00 (*see* ex. 8). When Applicant did not pay the amount demanded in the judgment, A obtained a garnishment order. Between January and August 2000, A garnished Applicant's wages in six different installments to satisfy the amount of the judgment. The garnishment was released in August 2000 (*see* ex. 8).

Applicant earned over \$96,000.00 a year in 2003 (with just \$62,000.00 in salary and the balance produced from overtime) and listed a net remainder of \$88.78 in his August 2003 personal financial statement (*see* ex. 4; R.T., at 85-86). Since his Air Force activation in 2004, he has continued to receive his full salary from his defense contractor employer, in addition to his active duty compensation benefits from the AF (*see* ex. 4). He estimates to have made approximately \$65,000.00 to \$70,000.00 in 2006 (R.T., at 92). Both in his testimony and prior statements (*see* exs. 2 and 4), he has indicated an ability to pay any tax assessment determined to be rightfully due and owing (*see* ex. 2). He has a 401(k) retirement plan with a fund balance of \$448,763.46, as of April 2007 (*see* ex. A) and timber valued at \$100,000.00 or more as of April 2007 (*see* ex. C), all of which could be drawn on to discharge any sums still due the IRS and State G (R.T., at 67-68).

Asked to complete an SF-86 in June 2000, Applicant failed to disclose the tax lien filed by the IRS in May 1999 against his property interests. Applicant denies ever receiving any notice of lien or having any knowledge of a tax lien before filling out his SF-86 (R.T., at 118-19). Albeit, he did acknowledge in his DSS statement of October 2004 to receiving both threats and liens from the IRS, without qualifying which liens he received and when (*see* ex. 2; R.T., at 68-69, 74-75). He suspects that his mail was tampered with while he was away on overseas deployments (R.T., at 77-78). After taking down his mailbox, his mail was delivered to a mailbox, which in Applicant's experience was sometimes diverted elsewhere (R.T., at 100-07).

While Applicant's stated reasons for removing his mail box are a little puzzling, his assurances that he was unaware of the IRS's 1999 lien notice before executing his SF-86 are plausible enough to be accepted, given his 1994 divorce, the absence of mailing certification from the IRS (*see* ex. 7), and all of the circumstances surrounding his heavy work and single parenting responsibilities (*see* ex. E).

Applicant draws considerable praise from his former wife (*see ex. E*) and his human resources manager with his defense contractor (*ex. F*). Both characterize Applicant as an employee who has demonstrated integrity, responsibility and dedication to his work. His resource manager describes him as an employee committed to the “highest ethical standards,” and one who has consistently utilized good judgment, decision-making and interviewing skills since she came to know him in 1996 (*see ex. F*). Applicant is also highly regarded by his daughter, who describes him as very patriotic and one who would likely sacrifice himself for his country, were he faced with such an option in hostile circumstances (R.T., at 51-52). However, it is unclear whether any of Applicant’s character references are fully familiar with the specific security-related concerns raised in these proceedings.

POLICIES

_____The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

_____ *The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Financial Considerations

The Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of

an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

_____ Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

_____ Applicant comes to these proceedings with a long history of meritorious service with his defense contractor, but with security significant issues pertaining to his many of years of failing to file federal and state tax returns, accumulating federal and state tax liens covered by his filing failures, and having his wages garnished to satisfy an unpaid judgment obtained by a female acquaintance. Security significant issues are also raised relative to his omission of the federal tax lien filed against his property interests in 1999.

Applicant's non-filing tax issues

Applicant presents a troubling history of failing to file his federal tax returns over a seven-year period (1993-1999). He provides little in the way of specifics about his filing failures: Distractions in general attributable to his extensive focus and devotion to his work and family and uncertainty over whether his withholdings exceeded what he owed the IRS comprise the rough essentials of his claimed collective failures to address his federal tax returns. By all reasonable accounts, though, his multiple filing omissions meet the wilful test traditionally espoused by the courts. *See United States v. Weninger*, 624 F.2d 163, 167 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1981)(good faith disagreement over taxes owed, no matter how earnest, cannot avert a conclusion of wilful failure to file).

A taxpayer's wilful failure to file federal income tax returns (as here) constitutes criminal conduct of a misdemeanor nature under the federal statutory scheme in place, punishable by fine and imprisonment. *See* Sec. 7203 of Title 28 (U.S.C.A.). While criminal conduct is not alleged, Applicant's filing omissions still reflect serious judgment lapses covered by the personal conduct guidelines of the Directive. One disqualifying condition of the Adjudicative Guidelines for personal conduct: E2.A5.1.2.5 (*A pattern of dishonesty or rule violations*) is applicable here.

Although Applicant claims to be working on filing his federal tax returns for tax years 1993 through 1999, he provides no documentation of his filing any federal or state tax returns for the years in question. His unexcused filing failures constituted not only criminal misdemeanors under the federal statutory regime in place, but serious lapses in judgment and reliability.

Considering the number of years of filing omissions in Applicant's case (seven in all under the governing federal and State G filing requirements in place, which have been only partially addressed before the close of the record), the imputed wilful nature of the filing omissions, and the absence of any convincing explanations in the record to temper the manifest wilfulness in Applicant's conduct, this is clearly an appropriate case for applying Guideline E in appraising Applicant's overall security eligibility. On this record, Government makes its initial case.

Of some extenuating value are Applicant's years of dedicated devotion to his work and family as a single parent, which consumed most of his time during the years in question. While his job and family commitments merit empathy, his experiences provide inadequate cover for why he failed to timely file his federal and State G tax returns for the years in question. His explanations for failing to follow through on filing his tax returns for all of the years in question lack coherency and deprive him of any meaningful extenuating credits.

Mitigation is unavailing, too, to Applicant. Not only did he fail to file his federal and state tax returns for a considerable number of years, but he failed to take advantage of the opportunity afforded him by the interrogatories propounded to him in 2003 and after the hearing to document the filing of his federal and state tax returns for the years in questions and address his federal and state tax liens. To this date, he has failed to demonstrate that he filed any and all of his covered delinquent federal and state returns, much less convince that he has taken care of any federal and state tax delinquencies. Without more to show for his three-year efforts (at least since August 2003) at honoring his federal and state tax filing obligations than he has demonstrated so far, he is not in a good position to surmount the evidence of his failure to file his federal and state tax returns for the covered years.

Based on his imputed knowing and wilful to file federal and state tax returns for multiple years, Applicant may not avail of any of the mitigating conditions of the personal conduct guideline. Only MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) would appear to have any applicability to Applicant's tax filing failures, and to date he hasn't provided any documentation of completing either federal or state returns for the years in issue. As a result, this mitigating condition doesn't apply.

Applicant's collective filing failures reflect poor judgment, unreliability and untrustworthiness. Protecting classified defense information is much too important to be left to uncertainty over an applicant's disposition for diligently addressing his tax filing obligations. More seasoning is needed to appraise Applicant's use of judgment in federal filing compliance situations before safe predictions can be made about his trust and dependability in handling his tax filing responsibilities, which are requisite to his holding a security clearance.

Applicant fails at this time to carry his mitigation burden relative to the poor judgment allegations ascribed to his multiple tax filing failures. Conclusions warrant, accordingly, that the allegations covered by subparagraph 2.b under Guideline E are resolved unfavorably to Applicant.

Applicant's financial issues

Applicant accrued three federal tax liens between 1999 and 2004. These liens covered assessed federal taxes for tax years 1993 and 1999 and exceed \$66,000.00 in aggregate taxes, interest and penalties assessed. His accrued federal tax obligations for tax years 1993 through 1995 alone account for over \$16,000.00. While two of these federal tax liens were released in July 2005, the reasons for their release remain unknown to Applicant, and he provides no documented proof of paying the tax debts that supported these liens. For lack of any documented returns and payments regarding his federal tax liabilities for tax years 1996 and 1999, his accrued federal taxes for these years remain unaccounted for as well. Further, without state filing documentation for the unaccounted years in question (*i.e.*, tax years 1993 through 1999), it is not known how much he still owes State G in state taxes at this time. Doubts about the status of his state taxes preclude the drawing of any favorable inferences about his being up to date with his state tax obligations at this time.

Conceivably, the IRS released its 1999 and 2004 federal tax liens covering tax years 1993 through 1995 because of the expiration of the controlling federal statute of limitations for enforcing unpaid assessments more than 10 years old. *See* Sec. 6502(a) of Title 28 (U.S.C.A.). But without more documentation than this record provides, Applicant may not avail of any possible federal statute of limitation to mitigate security concerns covered by the financial considerations guideline. Our Appeal Board has never equated expiration of controlling statutes of limitation with good-faith efforts to repay overdue creditors. *See, e.g.*, ISCR Case No. 02-30304, at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001)).

To be sure, Applicant did not assert relevant statutes of limitation in his defense, but rather he questioned whether he owed the IRS any money after proper crediting of withholding by his employers. His subsequent failures to earnestly address these underlying tax debts preclude him from taking advantage of any of the other mitigating conditions of the financial considerations guideline.

Based on Applicant's considerable accumulation of delinquent debt, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for Guideline F apply: E2.A6.1.1 (*A history of not meeting financial obligations*) and E2.A6.1.3 (*Inability or unwillingness to satisfy debts*). While his accrued debts are accompanied by some extenuating circumstances (*viz.*, reduced job status and increased financial needs of his two children), for the most part his finances have permitted modest attempts to pay on his old creditors with the resources available to him since at least July 2003.

Applicant's debts are neither extenuated nor mitigated enough to enable him to take advantage of any of the mitigating conditions at this time. His devotion to meeting his professional responsibilities with his employers and single parent obligations, while commendable, do not excuse his failures to resolve his federal tax liabilities, and possible state tax obligations associated with any unresolved federal obligations. Significant delinquent debt attributable to an applicant that is neither

extenuated nor mitigated by good-faith resolution raises implicit security risks over the potential for needed funds and recurrent judgment lapses. The government does not have to wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *Cf. Adams v. Laird*, 420 F.2d 230, 238-39 (DC Cir. 19969), *cert. denied*, 397 U.S. 1039 (1970).

Taking into account all of the circumstances surrounding Applicant's accumulated tax debts over the past 14 years, the absence of sufficient attention he has shown with his tax filing responsibilities and associated tax debts in the past, and his failure to follow through on his filing and repayment commitments he made in his 2003 answers to interrogatories propounded to him by DOHA, Applicant fails to mitigate the Government's security concerns at this time. Unfavorable conclusions warrant, accordingly, with respect to subparagraphs 1.a through 1.d of the allegations in the SOR governed by the Adjudicative Guidelines pertinent to Guideline F.

Personal Conduct issues associated with Applicant's clearance application

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under the personal conduct guideline, too, as the result of his omissions of his 1999 federal tax lien in the SF-86 application he completed in June 2000. By omitting the tax lien attributable to him, Applicant failed to furnish materially important background information about IRS action taken against him to enforce a tax obligation. This information was needed for the Government to properly process and evaluate his security clearance application.

Applicant's SF-86 omissions are attributable to his lack of received notice of the lien or any knowledge of the lien at the time he completed his SF-86. Applicant's impressions at the time, while potentially mistaken (based on the absence of furnished documentation in the record), were made in good faith, without any indicated intent to mislead. Applicant's explanations, considering both the circumstances surrounding the furnished information at the time and Applicant's overall reputation for honesty and trustworthiness among his friends and colleagues who know him well, enable him to convincingly refute the falsification allegations.

Considering all of the evidence produced in this record, favorable conclusions warrant with respect to the personal conduct allegations that Applicant knowingly and wilfully omitted his 1999 federal tax lien when completing his security clearance application. Favorable conclusions warrant, accordingly, concerning sub-paragraph 2.a of the SOR pertinent to Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E2.2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL):

AGAINST APPLICANT

Sub-para. 1.a:	AGAINST APPLICANT
Sub-para. 1.b:	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	AGAINST APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2.a:	FOR APPLICANT
Sub-para. 2.b:	AGAINST 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge