

DATE: October 27, 2005

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-09564

DECISION OF ADMINISTRATIVE JUDGE

DAVID S. BRUCE

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

Applicant failed to file federal income tax returns for two of four years he was working in Taiwan for a defense contractor in the early 1990's. He further failed to file any federal or state income tax returns for the eight-year period after he returned from Taiwan and was working in the U.S. Applicant failed to successfully mitigate security concerns raised under Guideline J regarding criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 2, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant alleging facts that raise security concerns addressed in the Directive under Guideline J - Criminal Conduct. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance. By his answer filed September 30, 2004, Applicant admitted, with some specific explanations, the allegations of subparagraphs 1.a. through 1.v. of the SOR, and requested a hearing before an administrative judge.

The case was assigned to me on June 27, 2005, and I conducted the hearing on August 16, 2005. Department Counsel asked to amend subparagraphs 1.n through 1.v. of the SOR regarding a technical reference to a state statute involved in the case, and the amendments were granted without objection. The government submitted exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified at the hearing along with two other witnesses on his behalf, and offered exhibit (AE) A containing 32 numbered sub-exhibits (AE sub exh) 1 through 32, also admitted without objection. DOHA received the hearing transcript (Tr.) on September 6, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations of the SOR are incorporated herein by reference. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant is 40 years old and obtained a B.S. degree in electrical engineering in 1987. He has been steadily employed by defense contractors since January 1989, and has been working in his present position as a software engineer since June 1995. ⁽¹⁾ He is highly regarded by his supervisors at work and is considered reliable and dependable, and an outstanding employee. ⁽²⁾ He was recently married for the first time in June 2005, ⁽³⁾ and he has no children. ⁽⁴⁾ He has not served in the military, but previously held a clearance granted to him in 1989 while working for another contractor. ⁽⁵⁾ He does not use illegal drugs and has never had a problem with alcohol, and he has no criminal record. ⁽⁶⁾

Applicant has endured a chronic sleep disorder for many years. He recalls having had difficulties in college by being unable to stay awake in class. He had various diagnostic tests for the problem in the late 1980's and early 1990's, without objective findings. His sleep problems have persisted as an adult, until he was finally diagnosed in 2003 with obstructive sleep apnea. ⁽⁷⁾

Applicant worked in Taiwan from January 1992 until May 1995, while employed by a different defense contractor. ⁽⁸⁾ His work overseas was stressful due to having no previous management experience, on-going sleep deprivation problems and other general health issues, and difficulties in adjusting to a foreign culture. ⁽⁹⁾

While in Taiwan, Applicant filed tax returns with the government of the Republic of China. ⁽¹⁰⁾ Applicant did not file U.S. federal income tax returns for 1991 and 1994, however, he did file his 1992 and 1993 federal returns as required. It is unclear whether or not the foreign income exemption form was included in Applicant's 1992 and 1993 returns. ⁽¹¹⁾ He was not required to file state tax returns for the period of time he worked in Taiwan, however, he failed to file his state tax return for 1991.

After returning from Taiwan, Applicant did not file federal or state income tax returns for tax years 1995-2003. Applicant filed his 2003 returns in August 2004, and ultimately filed his remaining overdue federal and state tax returns by the Spring 2005. ⁽¹²⁾ As to his federal returns, Applicant owed taxes only for 1996, and was either entitled to a refund or no tax was due for the other years. Applicant paid modest income taxes due on his state returns for 1996 and 2004, with no reply received regarding his state tax filings for 2000-2003 at the time of the hearing. All of Applicant's overdue federal and state tax returns have now been filed and are current. ⁽¹³⁾

Applicant candidly acknowledges he has no good reason for not having filed his tax returns, particularly after he returned from Taiwan. In spite of the fact he essentially did not owe any appreciable taxes for the time period, he fully admits his personal problems involved with his move overseas, not retaining his records in good order, and his sleep apnea and other general health concerns, provide no justification for his procrastination and inaction. He attributes blame for his conduct on his own unjustified neglect, and simply not knowing how to go about fixing the problem. ⁽¹⁴⁾

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at well- informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should

consider pursuant to the concept are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of the participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽¹⁵⁾ The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant.⁽¹⁶⁾ It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions by substantial evidence which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information.⁽¹⁷⁾ The legal standard for the burden of proof is something less than a preponderance of the evidence.⁽¹⁸⁾ When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.⁽¹⁹⁾

Upon consideration of all the evidence submitted in this matter, the following adjudicative guideline is appropriate for evaluation with regard to the facts of this case:

Guideline J - Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established a *prima facie* case for disqualification under Guideline J - Criminal Conduct.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) applies in this case. Willful failure to file U.S. federal income tax returns when required is a violation of Title 26 - Internal Revenue Code, U.S.C., Section 7203, which provides for criminal sanctions upon conviction.⁽²⁰⁾ Similarly, failure by Applicant to file his state income tax returns is also a criminal misdemeanor violation of his state's criminal code, also punishable by criminal sanctions.⁽²¹⁾ Applicant's conduct in failing to file both his federal and state tax returns for many years qualifies as serious uncharged criminal conduct within the meaning of Guideline J.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC), and specifically CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*), and find none apply.

Applicant ostensibly failed to file timely federal and state tax returns over a 12-year period. While there may have been some confusion about his tax status while he was working in Taiwan, he, nevertheless, filed two of his required federal returns during the time period. The inference is clear that he knew he was required to file federal returns, and he was cognizant of tax issues that might be favorable to him.

What is more troubling is his failure to file both federal and state tax returns after he returned from Taiwan. He

recognized his obligation each year to file, but was concerned about penalties being assessed against him. (22) He offers no viable excuses. He even purchased a home in 1997 which would have impacted his taxes thereafter. When he filed his SF 86 in December 2000, he acknowledged he had several delinquent returns to file. (23) He further indicated he was working with the IRS at the time to resolve the matters, which was not true. (24) He did not purchase tax assistance materials to get him started until 2003. (25) He made no actual filing progress until August 2004. He clearly knew his responsibilities the entire time.

Interestingly, the date he finally took positive action by actually filing a return occurred after issuance of the SOR. Applicant conferred with a Defense Security Service (DSS) Special Agent four months before, and he knew his failure to file tax returns would be a concern. He blamed his lengthy inaction on misplaced paperwork, and simply rationalizing he likely would not owe additional tax. He apparently was not concerned if the only consequence of failing to file was not getting a refund. (26) This continued for eight years following his return from Taiwan, without adverse consequences to him. It is reasonable to question whether or not Applicant would have initiated any effort to file the overdue returns had it not been for the problems it created with respect to his clearance. Such conduct is incomprehensible for a college educated, otherwise productive, American citizen, working for a government contractor no less.

With excellent assistance and advise from counsel, and strong support from his wife, Applicant has now filed all his delinquent federal and state tax returns. Applicant claims he has taken steps to assure he will not revert to the same pattern of neglecting his taxes in the future. He plans to rely on computer tax preparation services, and his wife will help keep his records better organized. He even likes the idea of actually receiving refunds, and says he will consult with a CPA if his tax situation becomes more complex. (27) Are Applicant's assurances in this regard ample evidence of a specific plan to assure future compliance with the tax laws? Applicant's behavior for many years was a flagrant and blatant disregard for IRS rules and regulations, done willfully, knowingly, and deliberately. It took Applicant over four years from the time he filled out his SF 86 to remedy the delinquent filings. It should have taken four months. Simply filing all the delinquent tax returns is not necessarily enough to overcome the government's concerns. The gravity of Applicant's conduct creates serious doubt about his judgment, reliability, and trustworthiness. He has failed to show clear evidence of lasting successful rehabilitation at this time, and has, accordingly, failed to successfully mitigate the security concerns raised under Guideline J.

I have further reviewed all the record evidence in this case with respect to the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. Although Applicant's loyalty to the United States is not an issue, I am persuaded by the totality of the evidence that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has failed to mitigate the security concerns regarding the criminal conduct issues. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant
Subparagraph 1.h. Against the Applicant
Subparagraph 1.i. Against the Applicant
Subparagraph 1.j. Against the Applicant
Subparagraph 1.k. Against the Applicant
Subparagraph 1.l. Against the Applicant
Subparagraph 1.m. Against the Applicant
Subparagraph 1.n. Against the Applicant
Subparagraph 1.o. Against the Applicant
Subparagraph 1.p. Against the Applicant
Subparagraph 1.q. Against the Applicant
Subparagraph 1.r. Against the Applicant
Subparagraph 1.s. Against the Applicant
Subparagraph 1.t. Against the Applicant
Subparagraph 1.u. Against the Applicant
Subparagraph 1.v. 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. Clearance is denied.

David S. Bruce

Administrative Judge

1. GE 1 (Applicant's Security Clearance Application dated December 7, 2000), at 3-4.
2. Tr., at 23-24.
3. *Id.*, at 30.
4. GE 1, *supra* note 1, at 5.
5. *Id.*, at 5-9.
6. *Id.*, at 7-9.
7. Tr., at 41-42, 47, and 50-53.
8. GE 1, *supra* note 1, at 3.

9. Tr., at 47-48.
10. *Id.*, at 46.
11. *Id.*, at 67-68.
12. *Id.*, at 62.
13. AE A, AE sub exh 3-27 (Applicant's federal and state tax returns).
14. Tr., at 57, and 65-66.
15. Directive, Enclosure 2, Para. E2.2.2.
16. Executive Order 10865 § 7.
17. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
18. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
19. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.
20. GE 3 (United State's Code: Title 26: Section 7203), at 1.
21. GE 4 (State Consolidated Laws, Tax); and GE 5 (Section 105-152. Income tax returns).
22. Tr., at 53.
23. GE 1, *supra* note 1, at 10.
24. *Id.*
25. Tr., at 54. See also AE A, sub exh 2 (Pilla Talks Taxes).
26. GE 2 (Applicant's statement dated April 8, 2003), at 2.
27. Tr., at 73.