

KEYWORD: Financial; Personal Conduct

DIGEST: Sixty-two-year-old Applicant, as of August 2004, had not yet filed his federal income tax returns for the tax years 1986-91. He has made monthly payments to the IRS under an installment agreement since 1996. In September 2003, his tax arrearage was nearly \$400,000.00. He attributed his actions largely to procrastination, no money to pay the taxes, inability to contact a particular accountant for around 10 years, and inability to collect all necessary paperwork. He disputed the IRS method of calculating estimated tax liabilities, but has failed to submit documentation to support his contentions, even after this security clearance review process commenced. The absence of timely efforts to resolve his debts, too many unfulfilled promises to do so, and his lack of candor, raise grave questions and doubts as to his security eligibility and suitability. Clearance is denied.

CASENO: 02-09868.h1

DATE: 01/18/2005

DATE: January 18, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09868

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Sixty-two-year-old Applicant, as of August 2004, had not yet filed his federal income tax returns for the tax years 1986-91. He has made monthly payments to the IRS under an installment agreement since 1996. In September 2003, his tax arrearage was nearly \$400,000.00. He attributed his actions largely to procrastination, no money to pay the taxes, inability to contact a particular accountant for around 10 years, and inability to collect all necessary paperwork. He disputed the IRS method of calculating estimated tax liabilities, but has failed to submit documentation to support his contentions, even after this security clearance review process commenced. The absence of timely efforts to resolve his debts, too many unfulfilled promises to do so, and his lack of candor, raise grave questions and doubts as to his security eligibility and suitability. Clearance is denied.

**STATEMENT OF THE CASE**

On November 7, 2003, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In an unsworn and undated written statement, Applicant responded to the allegations in the SOR and requested a hearing. The case was assigned to me on August 2, 2004. A notice of hearing was issued that same day, and the hearing was held before me on August 18, 2004. During the hearing, seven government exhibits, and four Applicant exhibits, and the testimony of two Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on September 10, 2004.

## RULINGS ON PROCEDURE

Applicant's wife had also received an SOR for allegations which were nearly identical to those appearing in Applicant's SOR. Accordingly, they were treated as co-subjects and a joint hearing was conducted without objection.

At the commencement of the proceeding, Department Counsel moved to amend two allegations to conform to the expected evidence. Specifically, in the last sentence of both subparagraphs 1.a. and 1.b., the word "paid" was to be deleted with the words "completely satisfied" to be substituted therefore. Also, subparagraph 1.c. was to be withdrawn. There being no objection by Applicant, the motions were granted, and the changes were made. At the end of the hearing, Department Counsel conceded that subparagraph 2.a. had been mitigated by Applicant and recommended a favorable finding as to the allegation.

## FINDINGS OF FACT

Applicant has admitted some of the factual allegations pertaining to financial matters under Guideline F (subparagraph 1.b. and portions of subparagraph 1.a.). Those admissions are incorporated herein as findings of fact. He denied the factual allegations pertaining to personal conduct under Guideline E (subparagraphs 2.a. and 2.b.), as well as the remaining allegations under Guideline F.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 62-year-old self-employed subcontractor--an owner-operator truck driver--of a defense contractor seeking to retain the SECRET security clearance which had been granted to him in 1989,<sup>(1)</sup> but revoked in March 2004.<sup>(2)</sup> He previously served on active duty with the U.S. Navy and retired in 1980 after 20 years of honorable service.<sup>(3)</sup> He has been in the trucking business, hauling freight, including ammunition, explosives, and weapons,<sup>(4)</sup> since 1980, and has been affiliated with a number of different trucking companies. His current affiliation commenced in 1992.<sup>(5)</sup> Applicant was married in 1961, and he and his wife have been co-drivers since 1981.<sup>(6)</sup>

Prior to 1986, Applicant routinely filed his federal income tax returns and generally received refunds.<sup>(7)</sup> However, in 1986, and each year thereafter, until 1991, for a variety of reasons, he failed to file federal income tax returns, and, as of

the date of the hearing, those filings have still not been made.<sup>(8)</sup> Income tax returns for 1992 through 1995 were not filed until 1996-97.<sup>(9)</sup> Applicant's excuses for failing to file are: very low income,<sup>(10)</sup> procrastination,<sup>(11)</sup> no money to pay the taxes,<sup>(12)</sup> inability to contact a particular accountant (for around 10 years),<sup>(13)</sup> inability to collect all necessary paperwork,<sup>(14)</sup> and "it just snowballed."<sup>(15)</sup>

In June 1995, the Internal Revenue Service (IRS) filed a notice of federal tax lien against Applicant, in the amount of \$177,760.01, for unpaid income taxes, interest, and penalties for the tax years 1986 through 1991.<sup>(16)</sup> The notice was sent to Applicant at an old residence address that he had left approximately 11 years earlier.<sup>(17)</sup> In September 1996, the IRS filed another notice of federal tax lien against Applicant--this time in the location where he resided--in the amount of \$8,498.00, for unpaid income taxes, interest, and penalties for the tax year 1994.<sup>(18)</sup> Applicant eventually met with the IRS in 1996, and at that time, arrangements were made for the filing of past due income tax returns and payment of amounts due the IRS.<sup>(19)</sup> An installment agreement, calling for monthly payments, had already been made in July 1996. Monthly \$250.00 payments have been made to the IRS since that time.<sup>(20)</sup>

Applicant disputes the IRS method of calculating estimated tax liabilities because it does not take into consideration such factors as number of dependents, operational expenses, or other deductions,<sup>(21)</sup> but he has, so far, failed to submit documentation to support those expenses because the paperwork is scattered in a variety of locations.<sup>(22)</sup> The IRS has a policy of applying all installment agreement payments to the oldest tax owed.<sup>(23)</sup> Applicant contends the monthly payments and overpayments from other tax years are being applied to the most recent tax years first,<sup>(24)</sup> but acknowledged payments have been applied to his income tax liability for 1986, 1989, 1992, and 1995.<sup>(25)</sup>

In December 2001, while being interviewed by a special agent of the Defense Security Service (DSS), Applicant and his wife both indicated they intended to file an Offer [in] Compromise with the IRS in an effort to reduce and resolve their outstanding federal income tax issues.<sup>(26)</sup> One and one-half years later, in June 2003, Applicant's wife indicated their CPA "is filing paper work for an Offer [in] Compromise on this tax debt."<sup>(27)</sup> In his undated 2003 Response to SOR, Applicant stated an Offer in Compromise "is being prepared by my accountant" to send to the IRS.<sup>(28)</sup> During the hearing, in August 2004, Applicant refined his earlier statements and said he had seen his accountant in March 2004, but it had not yet been completed, or filed, because Applicant had not yet located all the necessary documents to complete the action.<sup>(29)</sup>

As of September 10, 2003, the status of Applicant's federal income tax arrearage--totaling \$395,438.36--was as follows:<sup>(30)</sup>

Tax Year	Estimated Unpaid Tax	Accrued Interest	Total Balance Due
1986	\$41,906.87	\$45,743.50	\$87,650.37
1987	\$34,314.70	\$33,068.51	\$67,383.21

1988	\$32,319.01	\$31,052.23	\$63,371.24
1989	\$27,729.56	\$26,634.45	\$54,364.01
1990	\$27,016.86	\$25,765.41	\$52,782.27
1991	\$24,491.04	\$23,266.81	\$47,757.85
1992	\$1,968.63	\$4,137.03	\$6,206.19 (31)
1994	\$8,515.32	\$6,374.70	\$15,923.22 (32)
1995	overpaid	none	zero

As of the date of the hearing, all current payments to the IRS are being applied solely to the balance remaining for 1992, (33) with that balance indicated as \$4,111.54. (34)

In January 2001, Applicant completed a Security Clearance Application (SF 86), (35) and in response to a finance-related inquiry: (*In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?*), (36) responded "yes," and provided information pertaining to the 1996 lien. (37) He certified his response was true, complete, and accurate, but it was obviously incomplete, for no mention was made of the 1995 lien. Applicant denied intending to falsify his response and explained he was unaware of the 1995 lien. Considering the facts surrounding the time and location of its filing, I find his explanation credible: Applicant did not receive any timely notification of the lien and was unaware of it at the time he completed the question in issue.

In response to another finance-related inquiry: (*In the last 7 years, have you been over 180 days delinquent on any debt(s)?*), (38) Applicant responded "no." (39) He certified this response was also true, complete, and accurate, but it was obviously false, for Applicant failed to mention his federal income tax delinquencies. Applicant denied intending to falsify his response and explained the delinquencies did not exist because, at the time he completed the SF 86, they were covered by his installment agreement with the IRS, and he was making payments. (40) I find Applicant was not candid when he completed this question and the facts do not support his contentions. Applicant's federal income tax returns for the years 1986-91 were still not filed when he made his response and the delinquencies associated with his actions were clearly continuing for over 180 days.

The quality of Applicant's work performance is not known.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider 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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Financial Considerations - Guideline F: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.**

**Personal Conduct - Guideline E: 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.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to both adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security,"<sup>(41)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

## CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline F. Applicant's failure, to date, to file federal income tax returns for the tax years 1986-91, and his delayed filing of returns for 1992-95 until 1996-97, without approved IRS extensions, fall within Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1. (*history of not meeting financial obligations*), FC DC E2.A6.1.2.2. (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*), and FC DC E2.A6.1.2.3. (*inability or unwillingness to satisfy debts*). His failure to file some returns, as well as his late filing of others, has caused his federal income tax liability to mushroom to \$395,438.36, as of September 2003. Considering the length of time involved and the degree of his procrastination, aside from the installment agreement with the IRS, Applicant has not even made superficial efforts to

resolve his outstanding financial obligations, and his varying statements seem to be nothing more than perpetual promises made and broken, followed by additional promises made and broken. Not even this security clearance review process could motivate him to take *some* positive action with regard to resolving the disputed estimated unpaid taxes. Instead of making the collection of income tax records and meeting with an accountant priorities in his life, Applicant has seemingly washed his hands of his responsibility and looked to a resolution of his problems by fantasizing about a potential Offer in Compromise. He seems satisfied with the installment agreement with the IRS which mandates \$250.00 monthly payments, even when he has the ability to pay much more. At that rate, Applicant will not even come close to paying off the balance within his lifetime.

It is apparent that Applicant's current finances are presently in pretty good shape, with no other financial delinquencies. For reasons not satisfactorily explained, he simply chose not to file his federal income tax returns or pay his taxes in a timely manner. His explanations for not doing so: a very low income, procrastination, no money to pay the taxes, inability to contact a particular accountant for around 10 years, inability to collect all necessary paperwork, and it just snowballed, are not, in my view, acceptable. Applicant's persistent problem is not, and has never been, the result of conditions beyond his control. Instead, it is his intransigence. Moreover, the record is unclear as to whether Applicant approached the IRS regarding the installment agreement or if the IRS finally caught up with him and imposed the installment agreement. In the former situation, he would receive credit under Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). In the latter situation, he would not. Nevertheless, because of his faithful adherence to the installment agreement, I have given him substantial credit. However, other than his moderate payments under that agreement, he has made no other efforts to resolve his debts. Under these circumstances, I believe Applicant has failed to mitigate or overcome the government's case, for the evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability with respect to his financial considerations. Accordingly, amended allegations 1.a. and 1.b. of the SOR are concluded against Applicant. Allegation 1.c. of the SOR was withdrawn.

The government has established its case under Guideline E. Examination of Applicant's actions reveals conduct involving questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. There is little dispute surrounding Applicant's actions. He consistently failed to file federal income tax returns in some cases and filed them very late in others, in violation of the law. Likewise, when he completed his SF 86, he lied, willfully falsified, omitted, and concealed his debts with the IRS that were over 180 days delinquent. Applicant is steadfast in his position he did not intend to falsify or omit the correct information. Instead, his explanation is, at the time he completed the SF 86, the debts were covered by his installment agreement with the IRS, and he was making payments. As I indicated above, Applicant was not candid when he completed this question and the facts do not support his contentions. His federal income tax returns for the years 1986-91 were still not filed when he made his response and the delinquencies associated with his actions were clearly continuing for over 180 days. In this instance, I have no credible evidence of inadvertent or accidental oversight, but rather what appears to be a calculated and deliberate omission of information which Applicant chose not to reveal.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate, meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

Applicant's overall questionable personal conduct in this regard clearly falls within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and PC DC E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). None of the Mitigating Conditions apply.



I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent conditions and factors under the Adjudicative Process, Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegation 2.b. of the SOR is concluded against Applicant. Allegation 2.a. has been conceded by Department Counsel as mitigated.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline F: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Withdrawn

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 2 (Security Clearance Application (SF 86), dated January 11, 2001), at 6.

2. Tr., at 7-8.

3. Government Exhibit 2, *supra* note 1, at 4.

4. Tr., at 74.

5. Government Exhibit 2, *supra* note 1, at 1.

6. Tr., at 93-94.

7. Tr., at 40-41.

8. Tr., at 50, 54.

9. Tr., at 51.

10. Tr., at 42.

11. Tr., at 39.

12. Tr., at 39.

13. Tr., at 71.

14. Tr., at 65.

15. Tr., at 39.

16. Government Exhibit 7 (Notice of Federal Tax Lien, dated June 16, 1995).

17. The notice was sent in June 1995, but Applicant had moved from the address in 1984. Tr., at 38, 63.

18. Response to SOR, undated, at 2.

19. Tr., at 40; *Id.*, at 1.
20. Applicant Exhibit D (Ledger Entries, undated).
21. Tr., at 50, 55, 60; Response to SOR, *supra* note 18, at 2.
22. Tr., at 50-51.
23. IRS Monthly Statement, dated January 5, 2000, attached to co-subject's undated Response to SOR.
24. Tr., at 52.
25. Response to SOR, *supra* note 18, at 2.
26. Government Exhibit 4 (Statement of Subject, dated December 29, 2001), at 3.
27. Government Exhibit 6 (Applicant's wife's Response to Financial Interrogatory, dated June 25, 2003), at 3.
28. Response to SOR, *supra* note 18, at 3.
29. Tr., at 64-66.
30. IRS taxpayer transaction statements, dated September 9, 2003, attached to co-subject's undated Response to SOR.
  31. Amount includes accrued penalty of \$100.53.
  32. Amount includes accrued penalty of \$1,033.20.
33. Tr., at 53.
34. Applicant Exhibit C (IRS account statement, dated July 12, 2004).
  35. Government Exhibit 2, *supra* note 1.
  36. Question 36.
  37. Government Exhibit 2, *supra* note 1, at 7.
  38. Question 38.
  39. Government Exhibit 2, *supra* note 1, at 7.
  40. Response to SOR, *supra* note 18, at 3.
41. Exec. Or. 12,968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)