

DATE: January 10, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08800

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Russell Woodlief, Esq.

SYNOPSIS

Applicant comes with a history of failure to file federal and state tax returns as well as serious debt problems associated with his failure to pay assessed back federal and state taxes and other debts. He fails to mitigate security concerns related to his violating federal and state misdemeanor laws and continuing security concerns about his finances. His omissions of his tax debts from his SF-86 and ensuing misstatement of the status of his filing his federal tax returns in a subsequent DSS interview are compounding security concerns, which are not mitigated either. Clearance is denied.

STATEMENT OF THE CASE

On June 27, 2001, 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 20, 2001, and requested a hearing. The case was assigned to this Administrative Judge on October 22, 2001, and on October 23, 2001 was scheduled for hearing. A hearing was convened on November 13, 2001, 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 ten exhibits; Applicant relied on one witness (himself) and eight exhibits. The transcript (R.T.) of the proceedings was received on November 21, 2001.

PROCEDURAL ISSUES

Prior to the close of the evidence, Applicant asked for leave to supplement the record with documentation of his obtaining estimates of when his delinquent tax returns would be filed. No objections forthcoming from the Government,

and good cause being shown, Applicant was afforded seven (7) days to supplement the record with documented estimates of when he could file his delinquent tax returns. Government, in turn, was granted three (3) days to respond. Within the time permitted, Applicant provided a written estimate from his accountant that his federal and state returns would be ready for filing by the end of December 2001. Government offered no objections to Applicant's submitted estimate, and the same is accepted as exhibit I.

STATEMENT OF FACTS

Applicant is a 60-year old senior engineering analyst for his defense contractor who seeks to retain his security clearance.

Summary of Allegations and Responses

Applicant is alleged to have (a) wilfully failed to file his federal income tax returns for the tax years of 1994 through 1997 and for 1999, in violation of 26 U.S.C. Sec. 7203 and (b) failed to file his state returns for the same tax years in violation of Sec. 58.1-348 of State A's Code, a Class 1 misdemeanor.

Additionally, Applicant is alleged to be indebted to (a) the IRS in excess of \$49,000.00 for delinquent taxes, interest and penalties for tax years 1994 through 1998, (b) State A's Department of Taxation in excess of \$3,100.00 for tax years 1994, 1995, 1997 and 1998, for which his wages were garnished at his former place of employment, and (c) medical providers on debts referred for collection (for \$403.60) and taken to judgment (\$781.00). Also, Applicant was allegedly indebted to a local district's treasurer's office for delinquent personal property taxes and judgments filed against him totaling in excess of \$1,265.00.

Also, Applicant is alleged to have falsified his Security Clearance Application ("SF-86"), which he executed in June 1999, by omitting his financial delinquencies in excess of 180 and 90 days, respectively: both his owed federal and state income taxes.

For his response to the SOR, Applicant admitted delinquent debts to the state department of taxation for tax years 1995, 1997 and 1998 and his delinquent debt to Dr. A in the amount of \$781.00, but denied the balance of the covered allegations.

STATEMENT OF FACTS

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Between 1994 and 1997, again in 1999, Applicant failed to file both his federal and State A tax returns. He offers no excuse for his federal filing failures, just procrastination. He did seek extensions in some years, but never followed up on filing his returns. And he was unaware of the IRS's practice of filing substitute returns, which it has since done for the covered years at issue. Because he didn't file his federal returns, he didn't file his state returns either (*see* R.T., at 29, 40).

Applicant was scheduled to get together with his accountant after the hearing to prepare the necessary schedules for filing his back returns. By post-hearing memorandum, his accountant indicated that the returns shouldn't take any more than fifteen days to complete after receipt of all appropriate documentation. He set a target date of late December 2001 for filing Applicant's back federal and state tax returns. Applicant never sought an additional record extension to afford him time to file his back returns, and never provided any back federal or state returns. Absent any probative extenuating circumstances for his failure to file his federal and state returns for the covered years, inferences are not avoidable that his failure to file his returns was knowing and wilful.

Beginning with his spousal separation in 1994, Applicant began experiencing financial difficulties, mostly with his federal and state taxes (ex. 2). Applicant has made no payment arrangements to date, though, to pay any of his back federal or state income taxes. Back federal taxes owed aggregate as follows: for tax year 1994, \$17,805.14, for tax year 1995, \$16,652.05, for tax year 1996, \$1,483.54, for tax year 1997, and for tax year 1998, \$1,751.06. These delinquent

tax debts remain delinquent. He also remains indebted for state taxes for the years 1994 (\$95.83), 1995 (\$1,483.54), 1997 (\$828.00) and 1998 (\$726.00), following some state garnishment of his wages in 1998 for delinquent state income taxes. Applicant assures he intends to resolve his tax delinquencies. To obtain the monetary resources to address his delinquencies, he now must look to borrowing from his retirement plan as his only way out; since the home equity he expected from a divorce settlement (*see ex. 2, R.T., at 32*) failed to materialize. But as of the close of this record, he has made no tangible efforts to pay off or reduce his federal and state tax delinquencies by any chosen means.

Besides his outstanding debts, which now exceed \$49,000.00 in back taxes owed the IRS and over \$3,000.00 in delinquent state taxes, Applicant is indebted to a medical provider for \$403.60 and for unpaid dental services of \$781.00 (for which judgment was taken in October 1993), of which he provides no documentation of either payment or proof that either of the debts belonged only to his spouse. He is also indebted for delinquent personal property taxes totaling \$1,265.00 for the assessment years of 1993, 1994 and 1997. While Applicant claims to have discharged all of his assessed property taxes (*see ex.2*), only payment for the 1996 year is documented (*see ex. 10*)

Asked to complete an SF-86 in June 1999, Applicant answered **no** to both question 38 (debts over 180 days delinquent) and question 39 (debts over 90 days delinquent). In doing so, he omitted all of his tax delinquencies. He attributes misunderstanding to his failure to list his debts, not deliberate concealment. When he filed out the SF-86, he claims to have not considered his tax obligations to be debts; even though, he now realizes this was a mistake. Considering the magnitude and history of his tax debts, neither common sense nor reason provide any basis for his averting inferences of knowing and wilful omission regarding these tax debts.

When asked about his tax filings in an ensuing DSS interview in December 2000 (over a year later), Applicant admitted he owed federal and state taxes since 1998 and was even garnished by the State in 1998. But he also claimed to have asked for and received extensions for some tax years and to have "filed my Federal taxes," only to have some of his claimed deductions denied by the IRS (*see ex. 2*). Most of this was untrue, for he failed to file any of his federal or state returns for the years covered in the SOR after these requested extensions had expired. The IRS did file substituted returns for him for the tax years 1994 through 1996, because he had failed to file for the same years. Prompt, good faith corrections of prior omissions may be mitigating under certain circumstances, but Applicant does not provide any demonstration of prompt, good faith disclosures of his tax delinquencies. By misstating the status of his tax filings, he actually compounds his omissions with outright misstatements about his filing his federal and state tax returns.

Applicant is a well-regarded engineering analyst for his defense contractor who has impressed colleagues with his dedication to his work.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires 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 E2.2 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:

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions: None.

Personal Conduct

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.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

DC 5 A pattern of dishonesty or rule violations.

Mitigating conditions: None.

Financial Considerations

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.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions: None.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, 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 accessible 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 proof 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.

CONCLUSION

Applicant comes with a considerable history of failing to file his federal and state tax returns over a six-year period (spanning 1994 to 1999, save for 1998). He provides little in the way of explanation for his filing failures: basically neglect and procrastination following his marriage separation in 1994. By all reasonable barometers, though, his multiple filing omissions meet the wilful test traditionally expoused 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 established wilful failure to file federal and state income tax returns (as here) constitutes criminal conduct of a misdemeanor nature under both the federal and State statutory schemes, punishable by fine and imprisonment. *See* Sec. 7203 of Title 26 (U.S.C.A.) and Sec. 58.1-348 of State A Code Ann., respectively.

Even assuming Applicant is never prosecuted for federal and state filing failures, he could not be excused from his filing omissions. For cognizable criminal conduct under the Directive's Adjudication Guidelines does not depend for its sustenance upon an actual admission or conviction. Our Appeals Board has consistently affirmed the fact that federal or state authorities have not pressed criminal charges against an applicant for failure to timely file tax returns is not dispositive of the security significance of the same conduct. *See* ISCR OSD No. 90-0049 (Sept. 26, 1991); ISCR OSD No. 90-0095 (January 14, 1991). In the course of establishing an applicant's security

worthiness, criminal conduct may be considered *de novo* independent of any decision by federal or state prosecutors whether to press criminal charges against an applicant.

Considering the number of years of filing omissions in Applicant's case (five in all covered by the SOR), the number of jurisdictions involved (federal and state), 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 J in appraising Applicant's overall security eligibility. Government makes its initial case.

That the IRS ultimately prepared substituted tax returns on Applicant for some of the filing deficient years does not address his State A filing failures, and certainly doesn't atone for his ignoring his federal filing responsibilities for these back years. Moreover, even if the possibility of increased tax liability exposure could be significantly discounted for the 1999 tax year, uncertainties continue to abound over what (if any) supplemental tax liabilities Applicant might be faced with over the years he has failed to file with both federal and state authorities.

Applicant's multiple failure to file his federal and state returns as required by law, and not failure to pay, remains the core of the cited security concerns in the SOR. Without more time to provide a seasoned track record of timely compliance with the pertinent federal and State A taxing laws, it is much too difficult to gauge the seriousness of Applicant's professed commitment to meeting his tax filing obligations in the future. At the moment, too many doubts remain to accord Applicant the benefit of his professed intentions to meet his filing responsibilities. Where such reasonable doubts remain after all of the facts are established under a less than a preponderant proof burden, our Supreme Court has counseled that they should be resolved against clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Applicant fails to mount the kind of convincing mitigation showing needed to absorb all reasonable doubts about his eligibility for retaining access to classified information. Therefore, sub-paragraphs 1.a through 1.j are concluded unfavorable to Applicant.

Besides failing to file his federal and state tax returns over a prolonged period, Applicant failed to discharge determined tax liabilities to the IRS and State Department of Taxation for most of the covered years. He also accumulated delinquent debts for medical and dental services which he has failed to take care of. Only his assessed personal property taxes have partially satisfied, and then only by wage garnishment. Appraising the security significance of Applicant's financial deficiencies, a number of Disqualifying Conditions (DC) of the Adjudicative Guidelines (for financial) are applicable. With respect to her covered debts, DC 1 (history of not meeting financial obligations) and DC 2 (inability or unwillingness to satisfy debts) apply.

Just as too little time is provided by which to appraise Applicant's freshly claimed commitment to responsible tax filing management, insufficient testing of Applicant's judgment and trustworthiness in meeting his financial responsibilities to discharging both his federal/state tax debts and other unresolved debt delinquencies to ensure he is currently restored to the requisite levels of judgment compatible with accessing classified defense information. More seasoning is needed to test Applicant's use of judgment in the critical security linked area of federal and state filing compliance, discharge of determined tax obligations, and overall financial management, before safe predictions become reasonable about Applicant's trust and dependability in handling both his financial commitments and the Nation's security interests. Applicant fails at this time to carry his mitigation burden relative to unresolved risks associated with his accumulated financial lapses. Thus, sub-paragraphs 2.a through 2.1 are concluded unfavorable to Applicant under Guideline F.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's respective SF-86 omissions of his mental health evaluative/consultative sessions, unsatisfied judgments and delinquent debt history. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

Applicant fails to provide any persuasive cover for his omitting his numerous debts. That clearly exceed both 180 day and 90 day delinquency periods. The questions posed were straightforward and sought no more than Applicant's respective recollection of his debts, which manifestly covered tax delinquencies. Applicant's executed SF-86 does not reflect any rush-related stress or justifiable reasons for omitting any of his tax debts that would warrant characterizing them as unintentional or aberrant.

Without any clear showing of his correcting his debt omissions in a prompt, and good faith way, either in his subsequent DSS statement or by other means, he cannot mitigate his deliberate omissions through any of the available mitigating conditions of the Adjudicative Guidelines, such as MC 3 (prompt, good faith disclosure of omissions).

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 3a and 3.b of Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 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 J: 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

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

Sub-para. 1.i: AGAINST APPLICANT

Sub-para. 1.j: AGAINST APPLICANT

GUIDELINE F: AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: AGAINST APPLICANT

Sub-para. 2.f: AGAINST APPLICANT

Sub-para. 2.g: AGAINST APPLICANT

Sub-para. 2.h: AGAINST APPLICANT

Sub-para. 2.i: AGAINST APPLICANT

Sub-para. 2.j: AGAINST APPLICANT

Sub-para. 2.k: AGAINST APPLICANT

Sub-para. 2.l: AGAINST APPLICANT

GUIDELINE E : AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.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.

Roger C. Wesley

Administrative Judge