

DATE: February 14, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10227

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant with a history of not filing federal and state tax returns, failure to pay accumulated federal and state tax obligations and misrepresentation of the status of his state filing failures and outstanding state tax obligations in repeated signed, sworn statements to DSS, fails to extenuate or mitigate either his filing and tax debt delinquencies or his misrepresentations sufficient to establish the minimum judgment, reliability and trustworthiness requirements for holding a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On May 9, 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 October 23, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 2001, and on January 2, 2002, was scheduled for hearing. A hearing was convened on January 16, 2002, 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 eight exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on January 25, 2002.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested the record be kept open to permit him to supplement the record with filed state returns for the tax years of 1991 through 1994 and 1997. There being no objection from Department

Counsel and good cause being shown, Applicant was granted an additional eleven days, to the close of business on January 28, 2001, in which to supplement the record with copies of his covered state tax returns. Government was afforded an additional five days to respond to any Applicant submissions. Within the time permitted, Applicant failed to supplement the record.

STATEMENT OF FACTS

Applicant is a classified spray painter for his defense employer, who has been out of work on a work-related disability for the past two years. He seeks to retain his security clearance, which he needs to work at his assigned facility and retain his current disability benefits.

Summary of Allegations and Responses

Applicant is alleged to have failed to file his federal tax returns for the tax years of 1987 through 1989 and his state tax returns for the tax years of 1990 through 1994 and 1997.

Additionally, Applicant is alleged to have (a) failed to pay his accrued state tax obligations for the tax years of 1990, 1991, 1995 and 1996, totaling in excess of \$4,500.00, and (b) to have had his accrued federal tax debts discharged in bankruptcy in July 1999 (*i.e.*, debts totaling approximately \$33,000.00).

And Applicant is alleged to have (a) falsified his signed, sworn statement to DSS in November 1998 by falsely denying any state tax financial problems and (b) furnished information about his state income taxes for the years 1995 and 1996 only after being notified by the IRS that it had forwarded data from his federal tax returns.

For his answer to the SOR, Applicant admitted to his failing to file any state tax returns for the tax years of 1990 through 1994 and 1997, to discharging his federal tax debt in bankruptcy and to being indebted for accumulated state taxes for the tax years of 1990 and 1991 and 1995 and 1996. But he denied failing to file his federal tax returns for the 1987, 1988 and 1989 tax years and falsifying any information regarding his state tax returns and taxes owed in his signed sworn statement to DSS in November 1998.

Relevant and Material Factual Findings

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.

Applicant failed to timely file federal tax returns for the tax years of 1987 through 1989. While he obtained brief extensions from the IRS in some cases, he failed to file any federal returns within the times provided by the extensions. As a result, the IRS constructed federal tax returns for Applicant for the years covered and computed tax obligations totaling approximately \$33,000.00 in the aggregate for the included years.

After separating from his spouse around 1984, Applicant increased his abuse of drugs and alcohol and stopped filing his federal income tax returns (*see* R.T., at 28). Altogether, Applicant failed to file federal returns for the tax years of 1987 through 1989. He attributes procrastination for his failure not to file his federal returns for these years, but acknowledges, too, that he never sought extensions from the Service. Eventually, the IRS constructed tax returns for him and attributed owed taxes to him (*see* ex. 6). By the time he filed for Chapter 7 bankruptcy in April 1999, his accrued federal tax obligations had grown with interest and penalties to approximately \$33,000.00. While Applicant attempted to discharge these federal tax obligations in bankruptcy, he readily agrees they are not dischargeable and are perforce still owed the IRS. What he succeeded in discharging in his bankruptcy were accumulated personal non-tax related debts approximating \$90,000.00 in the aggregate (*see* ex. 7)

Beginning in 1990, Applicant stopped filing his state tax returns with his State's Department of Taxation. After separating from his spouse (with whom he has since reconciled), he developed a "don't care" attitude, which he attributes to his failure to not file any state tax returns for the tax years of 1990 through 1994 and 1997. He never filed state tax returns for the years 1995 and 1996 either, but did supply information about his income to the State's Department of Taxation for these two years after being informed the IRS had forwarded data from his federal income

tax returns (*see* ex. 5).

When initially interviewed by an agent from the Defense Security Service ("DSS"), this coming in November 1998, Applicant assured the agent "he never had any problems with any state tax obligations" (ex. 4). His assurances betrayed his own knowledge at the time that he hadn't filed state income tax returns for the covered back years and likely owed the State taxes for these years. He had, of course, been previously billed (before his November 1998 DSS interview) for state taxes owing for 1995 (\$271.82) and 1996 (\$245.58). So, inferentially, he was aware of likely taxes owed for undetermined amounts (*see* R.T., at 53-54), even if he had not been formally contacted by a state tax official before November 11, 1000 (*see* ex. 5). Implausibly, when interviewed by the same DSS agent in October 1999, and again in November 1999, he repeated his denial of having any state tax financial problems, having had no contact from the State's Department of Taxation. In his ensuing October 1999 interview, he declined to confirm whether "he had filed his state tax returns or not" (*compare* ex. 2 with ex. 3). Since he provides no probative proof of his ever previously resolving these payment and filing obligations, he could not credibly claim he had no state tax financial problems. Nor could he credibly claim uncertainty over whether or not he had filed his state tax returns. Not until confronted by DSS in his third and final interview (*i.e.*, his November 1999 interview) did he commit to filing his state tax returns and addressing his tax obligations through a payment plan (*see* ex. 3). To date, Applicant provides no documentation of his ever following through on either of his filing or repayment commitments.

Applicant currently owes in excess of \$4,500.00 on accrued tax obligations to his State's Department of Taxation, covering tax years 1990-1991 and 1995-1996, in addition to his owing in excess of \$33,000.00 to the IRS, despite making monthly \$240.00 payments for a brief period in the past pursuant to a workout arrangement with the Service.

To be sure, the SOR alleged a discharge of his accumulated federal tax obligations, and Applicant admitted as much in his response. But when questioned about it by Department Counsel at hearing, he recanted his admission and acknowledged his federal tax debts to be undischarged. Applicant is right, of course, about the non-discharged nature of his federal tax obligations. Because tax debts covered by constructed IRS filings (*viz.*, where the tax payer, as here, never filed his federal tax forms) are not dischargeable in bankruptcy as a matter of federal law, SOR allegations to the contrary (even admitted ones) are not controlling, and are subject to adjustment at hearing. So, Applicant's federal tax debts totaling approximately \$33,000.00 for the tax years of 1987 through 1989 are considered not discharged by his bankruptcy discharge.

Failing to obtain a discharge of his federal tax obligations as a part of his July 1999 bankruptcy discharge, Applicant remains indebted to the Service for accrued taxes covering the prior years. While he expressed hope of getting together with his accountant after the hearing to work out repayment plans with the IRS and State, to date he provides no documentation of any earnest attempts to do so. While not covered by the SOR, Applicant's filing of federal and state returns for the tax years of 1999 and 2000 must be considered questionable, as well.

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

Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions

DC1 Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

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 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, *including violation of any written or recorded agreement made between the individual and the agency.*

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

MC 3. The conditions that resulted in the behavior were largely beyond the person's control (*e.g.*, loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).

MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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 presents a troubling history of failing to file his federal and state tax returns over an extended period: three years on his federal returns (1987-1989) and six years on his state returns, (1990-1994 and 1997). He provides little in the way of specifics about his filing failures: procrastination and disinterest in general following his spousal separation and increased resort to substance abuse. 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 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 28 (U.S.C.A.) and State's Sec. 58.1-348, Code of State Ann.(a misdemeanor), *et seq.*, respectively.

Compounding Applicant's multiple failures to file his state returns for the covered years are failure to file his delinquent federal and state returns even after repeatedly assuring DSS that he had no state tax financial problems. Afforded another opportunity to supplement the record with documentation of filing his delinquent state returns he failed to do this as well. Even the potential for good faith claims of no taxes owed were dispelled by the information supplied the State's Department of Taxation by the IRS for the years in question. What is clear is when the record closed herein, Applicant had failed to demonstrate in any cognizable way that he honored his federal and state filing obligations for the delinquent years covered in the SOR. His un-excused filing failures constituted criminal misdemeanors under both the federal and state statutory regimes in place. That Applicant was never charged with any criminal conduct by either the Federal Government or State Government, or that constructive returns were created by the IRS for Applicant for the covered tax years, is not exonerating. 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 that 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 Case No. 90-0049 (Sept. 26, 1991); ISCR Case 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 years of filing omissions in Applicant's case (three in all under the governing federal requirements in place and five collectively under the state regime), 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. On this record, Government makes its initial case.

Of some extenuating value is Applicant's years of family turmoil highlighted by his separation in 1984 and his increased use of alcohol and illegal substances that followed. While worthy of some empathy, Applicant provides insufficient explanations for why he ignored his known tax filing responsibilities, instead of compiling what data he had collected and either making an earnest effort himself to file his returns, or engage a tax preparer to collect the data and file the respective returns for him. His explanations for failing to follow through on filing his returns lack probative merit and deprive him of any meaningful extenuation credits.

Mitigation is unavailing to Applicant. Not only did he fail to file his federal and state tax returns over a considerable number of years, he failed even to take advantage of the opportunity afforded him to furnish filed returns after the close of the hearing. To this date, he has failed to demonstrate that he filed any of his covered delinquent federal and state tax

returns, much less convince that he has taken care of any federal and state tax delinquencies. Without more to show for his four-year efforts at honoring his federal and state tax filing obligations than he has demonstrated so far, he is not well positioned to surmount the evidence of his failure to file his federal and state tax returns for the covered years. Conclusions warrant, accordingly, that the allegations covered by sub-paragraphs 1.a through 1.i under Guideline J are concluded unfavorable to Applicant.

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 repeated misstatements about the status of state tax. So much trust is imposed on persons cleared to see classified information, even those like Applicant who do not actually access such information but who require a clearance to enter and exit the work facility, that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

Applicant fails to provide persuasive cover for misstating the status of his state tax debt predicament and his failure to file state tax returns. The questions posed were straightforward and sought no more than Applicant's respective recollection of his filing and financial status at the time. Yet, in two separate DSS interviews he insisted he had no state tax problems, when he knew he did. Not until pressed in his third and final DSS interview did he acknowledge he had not filed his state tax returns, while promising to do so. Just as he misstated his state filing efforts to date at the time, he broke his promises to file his state tax returns and set up some type of payment plan to honor his state tax obligations. His misstatements and failed promises warrant the invoking of both DC 3 (deliberately providing false or misleading information) and DC 5 (pattern of dishonesty or rule violations). Applicant's various explanations simply cannot be reconciled in any coherent way that would warrant characterizing them as unintentional or aberrant, or the result of well intended, but frustrated efforts to address his still outstanding state tax filings and debts.

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. 2.a and 2.b of Guideline E.

Applicant's still unresolved old tax debts with the IRS and the State also underscore continuing risk-associated financial difficulties which reflect poor judgment, unreliability and untrustworthiness. Protecting classified defense information is much too important to be left to uncertainty over an applicant's unwillingness to follow through on the discharging of his multiple tax debts. By his 1999 bankruptcy petition, he succeeded in discharging much of his debt load, but not his federal tax obligations, which he had scheduled among his non-secured claims. Federal taxes covered by IRS constructed returns in situations (as here) where the tax payer never filed individual tax returns for the covered years are not dischargeable in bankruptcy as a matter of federal law. *See* 11 U.S.C. Sec.523(a)(1)(B). Applicant's bankruptcy did nothing to eliminate his state tax debts either, which he did not schedule (*see ex. 7*). Altogether, Applicant discharged in excess of \$90,000.00 worth of accrued debt with his court-approved bankruptcy in July 1999, while leaving his federal and state tax obligations intact and outstanding. Applicant provides no evidence he is willing or able to address any of this outstanding tax debt in the record concluded.

More seasoning is needed to appraise Applicant's use of judgment in federal and state filing/payment compliance situations before safe predictions can be made about his trust and dependability in handling both his tax filing/paying responsibilities and the Nation's security interests. Applicant fails at this time to carry his mitigation burden relative to the poor judgment allegations ascribed to his failure to address his multiple tax obligations at both the federal and state level. Thus, the allegations covered by sub-paragraphs 3.b through 3.e are concluded unfavorable to Applicant under Guideline F as well. Because of Applicant's successful utilization of the federal bankruptcy laws available to him, he was able to shed his accumulated non-tax related personal debt at a time when his income sources were stretched too thin to enable him to discharge these debts voluntarily. For these efforts, he is entitled to be favorably credited. Sub-paragraph 3.a is, accordingly, concluded favorable to him.

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 (CRIMINAL CONDUCT): 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

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.b: AGAINST APPLICANT

Sub-para. 3.c: AGAINST APPLICANT

Sub-para. 3.d: AGAINST APPLICANT

Sub-para. 3.e: 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