

DATE: July 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-11851

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to timely file federal and state individual income tax returns for tax years 1993 through 2003, raising serious criminal conduct concerns. While his state tax debt has been repaid through garnishment of his wages, financial considerations persist where he owes more than \$100,000 to the IRS. He misrepresented his tax situation in a May 2002 sworn statement, falsely claiming that he had filed his delinquent state and federal returns and owed no federal taxes. Clearance is denied.

STATEMENT OF THE CASE

On November 25, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. The SOR was based on financial considerations (Guideline F), criminal conduct (Guideline J), and personal conduct (Guideline E).

Applicant answered the SOR on January 6, 2004, and requested a hearing before a DOHA administrative judge. Department Counsel released the case as ready to proceed on December 10, 2004, and pursuant to formal notice of that date, I scheduled the hearing for January 18, 2005. At the hearing held as scheduled, nine government exhibits were admitted and Applicant testified, as reflected in a transcript received on January 27, 2005.

The record was held open following the hearing until February 8, 2005, for Applicant to submit documentation of income tax filings. Applicant timely submitted copies of his federal income tax returns for tax years 1993-1997 and 1999-2002, his performance appraisals from June 1996 to May 2001, and numerous awards and letters of appreciation. On February 15, 2005, Department Counsel indicated the government had no objection to their admission. Accordingly, the documents were marked and entered as Applicant exhibits A-O.

FINDINGS OF FACT

The SOR alleges Applicant failed to file his federal and state income tax returns for tax years 1996 through 1992, owes \$72,618.66 in delinquent state taxes for those years and \$94,675.88 in delinquent federal taxes for 1993, 1994, 1995, and 1996, and had deliberately falsified a May 2002 sworn statement by falsely claiming he had filed his delinquent income tax returns and denying he owed any back federal taxes. In his answer, Applicant admitted the federal and state tax debts in the amounts alleged, but claimed he had paid his state income tax debt for 2001. He acknowledged his failure to timely file his state and federal returns. Applicant denied any deliberate falsification of his May 2002 sworn statement. Applicant's admissions are accepted and incorporated as findings of fact. On a complete review of all the evidence of record, including his post-hearing submissions, I make the following additional findings:

Applicant is a 60-year-old technical project leader who has been employed by a defense contractor since June 1985. He seeks to retain the secret-level security clearance that he has held since September 1985.

After 21 years of active duty service, Applicant officially retired from the U.S. Navy at the rank of chief petty officer in August 1985. Familiar with naval ships, he had already started working as a test director for a defense contractor where he was responsible for ensuring that combat systems on newly built ships were working properly. After a couple of years, he was promoted to a lead field maintenance analyst position. He earned excellent performance ratings for the period July 1996 to July 1997, and his job duties changed thereafter to focus on the selection, coordination, and organization of the crews brought in to work on ships in port ("post shakedown availability"). Required to follow the ships where they are deployed, Applicant spent all but five weeks of 2003 away from his home. In 2004, he was at home a total of 3 ½ weeks. Since 1988, Applicant has earned several awards from his employer and from his military customer for his professionalism, team skills, leadership expertise, and technical ability.

In about 1992, Applicant began having problems with his wage and tax statement (W-2) for his military retirement pay, receiving no W-2 form for the 1991 tax year. Applicant did not file his federal or state individual income tax returns, assuming he would eventually receive the form.⁽²⁾ The next year, he received an incorrect W-2 form from the government, which he returned with a written explanation. Pending correction of his W-2 form, Applicant elected not to file federal or state income tax returns, figuring that if the government couldn't prepare an accurate form for him, he shouldn't worry about it. After the filing deadline for tax year 1995 passed, Applicant's W-2 form was corrected. He made no effort to file his delinquent state or federal returns, or to timely file his returns for subsequent years. He has no explanation other than he was initially frustrated by the government's failure to provide him a correct W-2 form and he "got [himself] wrapped around an axle more or less."⁽³⁾

In late November 1995, the IRS filed a substitute return for tax year 1993, assessing Applicant's tax liability at \$13,490.31 inclusive of penalties and interest. In June 1996, the state filed a tax lien against Applicant for unpaid taxes in the amount of \$16,679.⁽⁴⁾ In January 1997, the state filed a tax lien of \$923. A tax lien in the amount of \$11,598 was filed in May of that year with another \$26,248 lien filed one month later. In August 1997, the \$923 lien was satisfied. In October 1997, the IRS filed a substitute federal return for tax year 1995, assessing Applicant's liability for that year at \$13,782.81. In December 1998, the IRS filed substitute returns for tax years 1994 and 1996, assessing his tax liability at \$22,397.71 and \$13,160.31, respectively.

Starting in December 1999, the state garnisheed Applicant's wages to collect back taxes, in an amount based on his income, which was initially \$240 per week. On October 18, 2000, Applicant was interviewed by a Defense Security Service (DSS) special agent about his past due state taxes. Applicant indicated the debt, which was for years 1993 through 1999, was being repaid at the rate of about \$350 weekly. He claimed the tax forms for those years were being completed for submission. Through garnishment of his wages, two of the state tax liens had been released by February 2002, but Applicant had not yet filed his delinquent state or federal returns.

On May 9, 2002, Applicant was reinterviewed about his back tax debts and the status of his tax filings. Applicant explained that his tax problems began with incorrect W-2 forms from the Navy. While his W-2 form was eventually corrected, it was not until after he had missed the filing deadlines for tax years 1991-1995. Since December 1999, his wages had been garnisheed to collect back state taxes at about \$240 per week, sometimes more. Applicant denied owing any back taxes to the federal government, and claimed to have submitted all his federal and state income tax returns for

tax years 1996 through 2000. Applicant provided a personal financial statement reflecting a monthly net remainder of \$1,728.

In October 2002, the state filed a tax lien of \$14,044 against Applicant. As of April 2003, Applicant had neither filed his delinquent state or federal tax returns nor paid his federal tax obligations. Due to interest and penalties, he owed the IRS \$24,926.96 for 1993, \$29,361.28 for 1994, \$22,270.67 for 1995, and \$18,116.97 for 1996. The IRS attempted to collect the back taxes in 2003. Applicant has received no correspondence from the IRS since. As of July 2003, Applicant had satisfied his state tax liabilities for tax years 1996 through 2001, and all state tax liens had been released.

As of October 2004, Applicant had not filed his delinquent state and federal returns, including his state and federal returns for 2003. Home about 23 days the entire year, Applicant and his spouse discussed filing but took no action. At his DOHA hearing, Applicant expressed his belief he owed no federal tax liability for 1993 and 1994 other than interest and penalties for not filing. After his DOHA hearing, he completed many of his delinquent federal income tax returns, as follows:

Tax year	Date return completed	Adjusted gross income	Tax liability
1993	1/25/05	\$69,338	\$649
1994	1/28/05	\$87,726	\$2,457
1995	2/1/05	\$72,270	\$1,544
1996	2/1/05	\$74,180	\$2,344
1997	2/2/05	\$75,965	\$1,868
1998	Pending W-2 forms		
1999	1/25/05	\$74,139	\$767
2000	2/5/05	\$77,041	\$1,088
2001	2/5/05	\$82,295	\$1,123
2002	1/22/05	\$88,925	\$1,227
2003	Pending W-2 forms		

Applicant has no delinquent debt other than the unpaid income taxes. His spouse handles the bills and they are paid on time. Applicant is hoping to obtain a waiver of some of the tax penalties. Applicant plans to eventually repay the debt.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Concerning the evidence as a whole, the following adjudicative guidelines are most pertinent to this case:

Financial Considerations. 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. (¶ E2.A6.1.1.)

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (¶ E2.A10.1.1.)

Personal Conduct. 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. (¶ E2.A5.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to Guideline F, financial considerations, Guideline J, criminal conduct, and Guideline E, personal conduct:

The evidence establishes Applicant failed to timely file his federal and state income tax returns for at least ten years (tax years 1993 through 2003).⁽⁵⁾ While the problems with his W-2 form extenuate his initial failure to file required returns, his W-2 had been corrected before his returns for 1996 were due. His failure to file timely federal and state returns for tax years 1996 through 2003 was willful, and criminal under both federal and state law.⁽⁶⁾

Applicant did not seek to evade payment of his income taxes, as he had monies withheld from his employer. Yet, Applicant's repeated disregard of this legitimate cost of United States citizenship, which includes not only paying taxes but filing the required tax forms timely, reflects adversely on his judgment and reliability and it raises questions as to whether he takes his obligations seriously. Guideline J, criminal conduct, disqualifying condition E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, clearly applies.

None of the corresponding mitigating conditions apply in his favor. His failure to file was knowing, recurrent, and continued to 2004. Absent an extension, his federal and state income tax returns for tax year 2003 were due on or before April 15, 2004. Having been interviewed about his tax obligations in October 2000 and May 2002, Applicant knew his tax delinquencies and failure to file returns were of concern to the Department of Defense and could cost him his clearance. He provided no justification for his failure to file other than he planned to do it but would go back on the road and didn't take the documents with him. (Tr. 48). After he received the SOR in November 2003, he took no action to prepare his delinquent return, despite concerns expressed to him by his spouse. The extensive travel required for his job does not excuse him from his legal obligation to file. Applicant is credited with completing (albeit not yet filing) his federal income tax returns for tax years 1993, 1994, 1995, 1996, 1997, 1999, 2000, 2001, and 2002, after his January 2005 hearing, but these efforts are very belated and were prompted by the potential loss of his clearance rather than out of a sense of duty to comply with this known obligation.

Furthermore, because Applicant failed to file returns, the state and the IRS assessed his tax liability. The state filed tax liens against him totaling more than \$69,000. For tax years 1993 through 1996 alone, Applicant was assessed a total federal tax liability of \$62,831.14, which with penalties and interest continuing to accrue, had reached \$94,675.88. Under Guideline F, financial considerations, the security eligibility of an applicant is placed into question when he is shown to have a history of excessive indebtedness, recurring financial difficulties or a history of not meeting financial obligations. Although Applicant's adjusted gross income has been in the \$80,000 range in recent years, and he is timely in his payments of his monthly expenses, DC E2.A6.1.2.1. *A history of not meeting financial obligations*, and E2.A6.1.2.3. *Inability or unwillingness to satisfy debts*, apply because of his tax delinquency.

Through garnishment of his wages from December 1999 to July 2003, Applicant has satisfied his state tax liability for tax years for 1996 through 2001. While a state attachment of his wages is not entitled to the same weight in mitigation as had Applicant initiated repayment voluntarily on being notified of the debt,⁽⁷⁾ the financial pressures of the state tax delinquency no longer exist. However, Applicant remains indebted to the IRS in the amount of \$94,675.88 for 1993 through 1996. Based on the returns completed after his DOHA hearing, he owes at least an additional \$6,000 for

subsequent years, which brings his outstanding federal tax debt to more than \$100,000. While Applicant intends to eventually repay his obligations, there is little assurance in the record that he will do so in the reasonably foreseeable future. He has yet to contact the IRS despite receiving notice from the IRS in 2003 that he owed substantial back taxes. He meets none of the mitigating conditions under Guideline F.

Under Guideline E, personal conduct concerns are raised where an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination (E2.A5.1.2.3.). In a sworn statement presented to a DSS agent on May 9, 2002, Applicant stated, "I do not owe any back taxes to the federal government. In late January or early February 2002, I have submitted all Federal and State income tax returns from 1996 through the 2000 tax year." (*See* Ex. 5) At his hearing, Applicant continued to maintain that he did not deliberately misrepresent his tax filing, claiming that he filed two income tax returns (for 1996 and 1997) but could not find the copies. The IRS filed a substitute return for 1996. Even if Applicant had submitted a return for that tax year which was lost in transit or misplaced by the IRS, he admitted at the hearing that he had not filed any state returns nor any federal returns for tax years 1998 on. As to whether he knew he owed federal taxes, even assuming he had completed 1996 and 1997 returns, he had no basis for claiming he owed no back federal taxes. The returns he submitted after his hearing show he underpaid his federal taxes every year. Based on the available record, his denial of intentional misrepresentation is not credible. The government can ill afford to have individuals decide for themselves the timing and extent of disclosure, and he made no effort to correct the record other than to apparently inform the DSS agent by telephone that he could not find the copies of the returns that he claimed he filed.

Security clearance decisions are not designed to punish an applicant for past wrongdoing, but rather involve an assessment of security risk. Applicant has held a security clearance since 1985 and has made valuable contributions to his employer and government customer. At the same time, he ignored for several years a very significant obligation of his U.S. citizenship (failing to file returns and pay taxes assessed), and in May 2002, he placed his personal interest ahead of his obligation of candor to the U.S. government. Applicant's efforts to rectify his criminal conduct by completing most of his delinquent federal income tax returns are too recent to determine, with a reasonable degree of certainty, that he is successfully rehabilitated, or that there is little risk, if any, of recurrence. He has not acknowledged his lack of candor to the DSS agent, willing to admit only that he was nervous. Moreover, he owes a substantial federal tax debt that he has not started repaying. While a favorable finding is returned as to SOR ¶ 1.a., as the debt has been paid through garnishment, ¶¶ 1.b., 1.c., 1.d., 1.e., 2.a., 2.b., 3.a., and 3.b. are resolved against him.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline F: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The government alleges, and Applicant admits, he failed to timely file state and federal individual income tax returns for tax years 1996 through 2002. There is evidence Applicant stopped filing his returns a few years before. He testified his tax problems began in 1991 or 1992 when he did not receive his W-2 form, and that he didn't file for the first few years as he assumed he would eventually receive the correct W-2 forms. (Tr.30-32) In May 2002, he told a Defense Security Service agent that he had missed filing his income tax returns for the years 1991 to 1995. (Ex.5)
3. Applicant testified on direct that he filed federal income tax returns for tax years 1996 and 1997, and that he owed about \$600 one year and around \$1,000 the other, but he could not find copies of these returns.(Tr. 28) IRS reports no record of Applicant having filed federal tax returns for 1993, 1994, 1995, or 1996 (Ex. 6) or 1999 through 2003 (Ex. 8). There is no evidence in the IRS documentation of a failure to file for 1997 and 1998. However, Applicant admitted in his Answer that he had not filed federal returns for those years. After his hearing, he submitted federal returns for tax years 1993 through 1997 and 1999 through 2002 (Ex. A-I), and indicated he was still waiting for W-2 forms for tax years 1998 and 2003.
4. It is not clear in the record which tax year(s) this lien or the other tax liens pertain to. State tax authorities report Applicant's tax liabilities at \$7,513.23 for 1996, \$7,313.62 for 1997, \$7,311.94 for 1998, \$7,413.31 for 1999, \$7,825.18 for 2000, and \$1,828.00 for tax year 2001. (Ex. 7) The liens filed between June 1996 and June 1997 amount to \$55,248.
5. The government did not allege the willful failure to timely file his individual income tax returns for any tax years before 1996. IRS records confirm that substitute returns had to be filed for 1993, 1994, and 1995. While an adverse decision cannot be based on conduct not alleged, his failure to file these earlier returns as well as his 2003 returns--which would have been due after the SOR was issued but before his DOHA hearing--are part of a pattern that can be considered when determining the seriousness and extent of Applicant's conduct.
6. Although not contested by Applicant, the government did not allege pertinent legal authority to substantiate its allegation that the failure to file is criminal. Department Counsel made no effort to amend the SOR or request administrative notice of any federal or state statute, but argued in losing the applicability of 26 U.S.C. § 7203 and "a variety of violations of Maine State law." 26 U.S.C. § 7203 is penalty provision which sets for the sanctions for failing to file federal returns by those required under law to file ("Any person required under this title. . .to make a return, keep any records, or supply any information, who willfully fails to make such return. . .at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000. . .or imprisoned not more than 1 year, or both, together with the costs of prosecution. . ." The IRS filing of substitute returns for 1993 through 1996, and the federal returns completed by Applicant after the hearing confirm his legal obligation to file. Pertinent state statutes provide that a state resident required to make a federal tax return for a tax year is required to also make a state return for that same year. (Me. Rev. Stat. § 5220) The failure to make a return within the time required by law is a class D crime. (Me. Rev. Stat. § 5332)
7. Mitigating condition E2.A6.1.3.6. requires that the individual initiate a good-faith effort to repay overdue creditors or otherwise resolve debts. There is no evidence Applicant took any action to repay his state tax debt before the state

issued the tax liens and the levy on his wages.