DATE: July 17, 2002

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-20001

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Towbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 52-year-old quality control engineer willfully failed to timely file his Federal and State

A income tax returns for the years 1990 to 1999, in violation of both Federal and State A laws. He

believes that only income earned outside the United States is subject to taxation. His belief is based on a variety of unreliable sources that have been rejected by the courts and he ignores legal authority. His disagreement with the statutes and IRS regulations is not an excuse for disobeying the law. No mitigation was established. Clearance is denied.

STATEMENT OF CASE

On December 26, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On February 25, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to me on April 15, 2002. A Notice of Hearing was issued on May 10, 2002, and the matter was heard on May 29, 2002. At the hearing, the Government offered seven exhibits, to which the Applicant made no objection. The exhibits were marked as Government Exhibits (GX) 1 - 7. Applicant testified on his own behalf and offered nine exhibits. These were marked as Applicant's Exhibits (AX) A - I). The transcript (Tr) was received on June 11, 2002.

FINDINGS OF FACT

Applicant is a 52-year-old quality control inspector on an advance missile program for a defense contractor that is seeking a security clearance for Applicant (Tr at 4).

Based on Applicant's testimony and all documentary evidence, I find the following as to both allegations:

Guideline J (Criminal Conduct)

Applicant willfully failed to file timely Federal Income Tax Returns for Tax Years (TY):

1.a. - 1990; 1.c. - 1991; 1.e. - 1992; 1.g. - 1993; 1.i. - 1994; 1.k. - 1995; 1.m. - 1996;

1.o. - 1997; 1.q. - 1998; and 1.s. - 1999.

Applicant also willfully failed to timely file his State A Income Tax Returns for:

1.b. - 1990; 1.d. - 1991; 1.f. - 1992; 1.h. - 1993, 1.j. - 1994; 1.l. - 1995; 1.n. - 1996;

1.p. - 1997; 1.r. - 1998; and 1.t. - 1999.

In addition, I find that Applicant did not timely file his Federal and State A Income Tax returns from 1984 to 1990 (Tr at 72).

Applicant received a "Collection Due Process" hearing before an IRS Appeals Officer on November 7, 2001. During the Due Process hearing, Applicant's representative (apparently a CPA) attacked the IRS levy document as "fraud" (AX H). While it is clear that Applicant did not timely

file his income tax returns for the cited years, he was subject to withholding by his employer and levies by the IRS (Tr at 65 and GX 4).

Applicant did timely file both returns in 2000 and 2001 (Tr at 73) and is now working on his Form 1040s for TYs 1997 to 1999 (Id.). This is because he considered it to be a "waste of time and money to engage in an adversarial relationship with the IRS" (Tr at 74). He understands the U.S. Supreme Court has disagreed with him "in specific cases," but he still believes the IRS is "inappropriately applying the tax laws" (Tr at 74, 75). He ha s not changed his mind and will continue to "challenge" the tax laws by timely filing, paying what is due, seeking a refund, and "taking it to court that way" (Tr at 73).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

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

Conditions that could raise a security concern and maybe disqualifying include:

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

2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

None that are applicable under the facts of this case

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

The criminal statute that is involved in the SOR allegations concerning Federal taxes is Title 26 U.S.C. Sec. 7203, which makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations.

A person can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person was required by law or regulation to make a return of his income for the taxable year charged;

Second: That the person failed to make a return at the time required by law; and

Third: That the person's failure to make the return was willful.

As discussed below, I conclude that all three requirements are supported by the record evidence.

Applicant was born in 1949 has been employed by his present company since 1982 (GX 1). For at least the first three years of his present employment, Applicant did submit Federal and State A Income Tax Returns without apparent problems. At some point in or before 1990, Applicant became aware of individuals, organizations, and publications expressing the belief or premise that individuals in Applicant's earning position did not have to pay income taxes for one reason or another. Applicant accepted one or more of these arguments and, as a result, knowingly and intentionally failed to timely submit his Federal and State A Income Tax Returns for each of the ten years from 1990 to and including 1999 (Tr at 47). The IRS filed a tax lien in September 2000, covering Tax Years 1994 - $4,481.11; 1995 - $3,563.02; and 1996 - $5,850.93 (GX 5; *see also* Levy Data, GX 3). Applicant ignores the long established precedent in the courts that any financial gain, lawful or unlawful, constitutes taxable income "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."[(1)]

Although Applicant is not a lawyer, he discusses in great detail his understanding of the tax laws and why he believes he has not violated any law by not filing for the years 1990 - 1999. Although Applicant cites sources that contain a variety of attacks on the Federal tax system, Applicant appears to have focused on the premise that the Federal income tax applies only to "foreign income;" i.e., income earned "outside the United States" (Tr at 54)." He also disagrees with the wording of the Internal Revenue Code and with court decisions in which arguments like his have not been accepted (Tr at 59). After a close review of his argument and his supporting documentation, I conclude that his testimony and argument do not support his underlying premises. His documentation contains arguments that have been considered and ultimately rejected by the courts that have considered them over a period of many years.

In the present matter, the IRS has taken legal action, specifically a wage garnishment for $44,052.00, against Applicant in August 1994 (GX 2, his June 18, 1999 Security Clearance Application at Item 34). Applicant has not successfully challenged his tax liability within the IRS process and he has never challenged the IRS determinations in the Federal or State A courts (AX H at p. 23).

At a November 2001 administrative "Due Process" hearing, the IRS Appeals Officer determined the total estimated payoff from Applicant as $19, 817.07 (Tr at 48 and AX H at p. 27). Applicant has not appealed the adverse determination by the Appeals Officer in the courts (Tr at 49). Applicant claims he has given up his challenges to the Federal tax laws and began timely filing his recent Federal and State A tax returns as of April 2000 (GX 3).

Applicant cites, as support for his position, the United States Supreme Court decision in *Cheek v United States,*[(2)] but that reliance is misplaced. Cheek's main defense was that he had been duped by tax protesting attorneys and others into believing he was not a "taxpayer" under the Internal Revenue Code and, therefore, was not required to file income tax returns. The Supreme Court expressly rejected his claims, concluding that a tax protestor's argument; including, as is the case in the present matter, a litany of claims as to why income taxes were unconstitutional, or at least were voluntary and not mandatory, were clearly frivolous and not objectively reasonable. I understand this last phrase as meaning that no objectively reasonable person would believe in the merits of these arguments.

The long established standard for willfulness under the applicable statutes is "the voluntary, intentional violation of a known duty."[(3)] Under the facts of the present case, I find that Applicant was aware of the duty to pay taxes. After all, he had done so in the same basic employment and earning position with the same company for some years prior to his stopping. His conduct was clearly voluntary, in that no one forced him in any way to stop filing his income tax returns.

As to the issue of intent, I note that the Federal income tax laws have been in existence for almost 90 years[(4)] and have been consistently upheld by the Federal Courts of Appeal and the Supreme Court. Although Applicant relies on sources he found on the Internet, those sources are interspersed with other sources that explain the problems, shortcomings, and illegality of the rationales provided by Applicant as the basis for his beliefs. Looking at the complete record, I conclude that it is unreasonable to offer as a defense to charges of statutory willfulness the proposition that the wages he receives for his labor for a defense contractor within the United States are not taxable income.

In addition, Applicant has not explained why he also failed to file his State A Income Tax returns during the same10-year period.

I conclude that Applicant's position is more precisely a disagreement with a known legal duty imposed by Federal (and State A) tax laws found to be constitutional. He knew or should have known that his beliefs/understandings about the tax laws and his obligation to file timely tax returns

have been overwhelming rejected by the courts in other cases. To the degree Applicant relied on these sources, that reliance was unreasonable. Further, Applicant did not seek any of the legal remedies provided for under the Federal tax laws. Applicant could have filed his returns each year, made what ever tax payments were due under the properly completed tax forms, filed for a refund and, if denied, pursued his claim of invalidity, constitutional or otherwise, to the courts. Applicant, without paying the tax, could also have challenged claims of tax deficiencies in the Tax Court, with the right to appeal to higher courts.[(5)]

Instead, he simply did not file either Federal or State A tax returns for the ten years, 1990 to 1999, cited in the SOR and, apparently, as far back as 1985 (Tr at 72, 73). I conclude this long standing conduct demonstrates extremely poor judgment on his part. In effect, Applicant has demonstrated an inability or unwillingness to comply with laws with which he disagrees. A person who picks and chooses which laws he will to obey can not automatically be relied upon to comply with the laws, regulations, and guidelines intended to protect the nation's secrets. His view of his legal obligations toward the United States over a period of ten years and involving a process that allows our nation to survive economically, and to reap the benefits thereof, is patently unreasonable by any objective standard.

Since Applicant was not subjected to criminal prosecution by the Federal (and State A) government for his willful failure to file his income tax returns for 10 years, I must decide whether his conduct did violate the pertinent criminal laws. Considering the totality of the evidence, I conclude that his conduct in not filing from 1990 to 1999 did violate 26 U.S.C. 7203 and the parallel laws in State A, for a total of 20 criminal violations.

In evaluating his suitability to hold a security clearance, I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a case as to all 20 SOR allegations, which in turn establishes a nexus or connection with Applicant's security clearance eligibility.

Viewing the above facts and discussion under Guideline J (Criminal Conduct), I conclude that Disqualifying Condition (DC) E2.A10.1.2.1. is applicable in that the SOR's allegations of criminal conduct - his willful failure to file Federal and State A Income Tax returns for 10 years has been established by the totality of the record. Likewise, DC E2.A10.1.2.2. - applies in that Applicant's conduct is found to be both a single serious crime and/or multiple lesser offenses. The evidence does not establish the applicability of any of the parallel Mitigating Conditions. Applicant's misconduct is still recent, is not an isolated incident, was not coerced, and was voluntary. There is no clear evidence of successful rehabilitation.

FORMAL FINDINGS

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

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against 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

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. Against the Applicant

Subparagraph 1.m. Against the Applicant

Subparagraph 1.n. Against the Applicant

Subparagraph 1.o. Against the Applicant

Subparagraph 1.p. Against the Applicant

Subparagraph 1.q. Against the Applicant

Subparagraph 1.r. Against the Applicant

Subparagraph 1.s. Against the Applicant

Subparagraph 1.t. Against the Applicant

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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. *Rutkin v. United States,* 343 U.S. 130, 137, 72 S.Ct. 571, 575, 96 L.Ed. 833 (1952). *See also Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955) (receipt of punitive damages taxable); *United States v. Schmidt*, 935 F.2d 1440, 1448 (4th Cir.1991) (dominion and control of property makes it taxable); *In re Bentley,* 916 F.2d 431, 432 (8th Cir.1990) (increase in wealth over which taxpayer has dominion is taxable).

2. 498 U.S. 192, 91-1 USTC 50,012 (1991)

3. *Cheek*, supra, at 201, *United States v Pompanio*, 429 U.S. 10, 12, (1976), and *United States v. Bishop,* 412 U.S. 346, 3460 (1963).

4. Revenue Act of 1913, 38 Stat. 166

5. Internal Revenue Code, sections 6313, 7201, and 7203,