

DATE: January 14, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24360

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

N. James Turner, Esq.

SYNOPSIS

Applicant is a 47-year-old man seeking to retain a top-secret security clearance he has held since January 1993. Applicant willfully failed to file individual federal income tax returns for tax years 1991 through 1998, in violation of 26 U.S.C. § 7203, a federal misdemeanor offense, raising a security concern under Guideline J for criminal conduct. Although filing the belated returns in April and July 2002 is the first step toward rehabilitation, it is too soon to tell if his long-term pattern of behavior is a thing of the past or a firmly established part of his character. Clearance is revoked or denied.

STATEMENT OF THE CASE

On May 31, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) On July 5, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record.

On August 8, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, on August 15, 2002, a notice of hearing was issued to the parties scheduling the hearing for September 11, 2002, at a location near Applicant's place of employment.

At the hearing, Department Counsel offered two documentary exhibits that were admitted without objections; no witnesses were called. Applicant appeared with counsel, offered his own testimony and that of another witness, and offered one documentary exhibit that was admitted without objections.

The record was left open to allow Applicant to offer additional documentary exhibits after adjournment. Applicant did so in a timely manner, and, Department Counsel having no objections, those documents are marked and admitted into the record as follows: Exhibit B-character reference, two pages, dated September 25, 2002; Exhibit C-supplemental affidavit, two pages, dated September 26, 2002; Exhibit D-character reference, one page, dated September 26, 2002; Exhibit E-character reference, three pages, dated September 26, 2002; Exhibit F-the 1991 U.S. Income Tax Return for an S Corporation, nine pages; Exhibit G-the 1998 U.S. Income Tax Return for an S Corporation, six pages; and Exhibit H-the 1991 U.S. Individual Income Tax Return, four pages. DOHA received the transcript on September 19, 2002, and the record closed on September 30, 2002.

FINDINGS OF FACT

The SOR alleges a security concern under Guideline J for criminal conduct based on Applicant's failure-to-file individual federal income tax returns for tax years 1991 through 1998 violating 26 U.S.C. § 7203. In his Answer, Applicant denied the SOR allegations, but he stated the returns had been filed as of July 5, 2002. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

1. Applicant is a 47-year-old unmarried man seeking to retain a top-secret security clearance he has held since January 1993. He is employed as a senior member of a technical staff for a defense contractor responsible for operating a government-owned facility involved in ballistic-missile defense. His primary responsibilities are working as an investigator and test conductor for certain experiments involved with intercontinental and theater ballistic-missile defense.
2. Applicant is a well-educated, respected professional. He earned a B.S. degree in physics and chemistry in 1978. In addition, he has completed 47 hours toward an M.S. degree in space technologies, with the thesis the major remaining requirement. Applicant is published in his field with six articles or papers published in professional journals or presented at professional conferences. He also belongs to three professional associations related to his work. His various character references vouch for his work performance, trustworthiness, integrity, and security suitability.⁽²⁾
3. In approximately 1982, Applicant and a business partner incorporated their small business as an S corporation in State A. This business was in addition to Applicant's regular employment. Initially, the business focused on custom computer assembly and software delivery. Sometime in 1986 to 1987, Applicant's business partner left and Applicant operated the business alone. Over the next few years the business changed from computer assembly to forensic imaging; the primary business is now image restoration and enhancement for law-enforcement purposes. Before departing, Applicant's business partner was primarily responsible for the business paperwork, including preparing the business's tax returns. At present, the S corporation is not in good standing with State A.
4. Before tax year 1986, Applicant had filed individual federal income tax returns. Starting with tax year 1986, Applicant failed to timely file returns (e.g., filing his 1986 return in 1994). This continued without a return timely filed until his 2001 return was timely filed. Sometime before 1995, he received notice from the IRS informing him that they had not received a return. Applicant filed his individual returns for tax years 1989 through 1997 on or about July 5, 2002; he filed his 1998 return in April 2002; and he filed returns for 1999 and 2000 in August 2002.
5. Concerning the business, Applicant filed his S corporation federal income tax returns for tax years 1989 through 1997 on or about July 5, 2002; he filed his 1998 return in April 2002; and he filed returns for 1999, 2000, and 2001 in August 2002.
6. After completing his security-clearance application (SF 86) in June 1998,⁽³⁾ Applicant was interviewed by a special agent of the Defense Security Service (DSS) in March 1999. During that interview, the subject of Applicant's unfiled tax returns was discussed. Thereafter, Applicant made some efforts to resolve his situation.
7. Applicant was interviewed again by the same DSS agent in January 2002. The interview produced a signed, sworn statement⁽⁴⁾ where Applicant acknowledged that although he had made some progress, he had yet to file any returns. He acknowledged becoming more active during the last week since contacted by the DSS agent to arrange the second interview. He anticipated providing the necessary documents to his tax preparer by January 21st. He also acknowledged that his taxes "are fairly simple to complete."⁽⁵⁾ In addition, during the last three years his mother had been ill with cancer and passed away, and he had spent considerable time assisting his father with this difficult situation.
8. After the second DSS interview, Applicant met with his current CPA who assisted in preparing and filing the individual and S corporation returns described above. As Applicant had made estimated payments, he does not owe the IRS for delinquent taxes. He estimates losing approximately \$24,000 in refunds due to his untimely filing of returns.
9. Applicant's explanation for his failure-to-file is that "the root problem was the business."⁽⁶⁾ Believing he could not file an individual return if the corporate return was unfiled, Applicant filed no returns lacking the necessary records for the corporate return. Acknowledging that record keeping for his business is a weak point,⁽⁷⁾ once he fell behind in tax year 1986 or so, he was unable or unwilling to catch up. In addition, his mother's illness with the resulting time away from home and work, the loss of some records in 1996 due to water damage from a storm, and a demanding work schedule also contributed to Applicant's dilatory behavior. He also believed that the government would be unconcerned about his not filing an individual return so long as he did not owe any money.
10. Applicant is not an illegal tax protestor, nor does he believe that the federal income tax system is illegal or unconstitutional. Likewise, his motive was not to avoid or evade paying his federal income taxes.
11. Based on his history of filing individual returns before tax year 1986, the notice he received from the IRS, and his on-again, off-again efforts to file returns, coupled with his age, education, and experience, Applicant knew of his obligation or duty to file an individual return for the years in question. At bottom, I specifically find that chief cause of Applicant's failure-to-file resulted from massive procrastination influenced by a tendency

toward perfectionism.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, the following adjudication policy factors are most relevant here:

Guideline J-Criminal Conduct⁽⁸⁾

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 may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include: None.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹¹⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹²⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹³⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁴⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁵⁾

Under 26 U.S.C. § 7203, "[a]ny person required under this title . . . or by regulations made under authority thereof to make a return . . . 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." *Willfully* is the key term. In *United States v. Cheek*, the U.S. Supreme Court reviewed a series of tax cases and concluded that "the standard for the statutory willfulness requirement [for all federal criminal-tax offenses] is the 'voluntary, intentional violation of a known legal duty.'"⁽¹⁶⁾ The Court also explained the government's requirement to prove willfulness in criminal-tax cases:

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.⁽¹⁷⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁸⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history

of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. It is undisputed that Applicant failed to timely file his individual federal income tax returns for tax years 1991 through 1998. And I'm persuaded, by substantial evidence, that Applicant's failure-to-file was willful. To suggest that Applicant--a well-educated, respected professional--made an innocent mistake or had a good-faith misunderstanding of his obligation or duty to file an annual income tax return is contrary to the record evidence, common sense, and experience in the ways of the world. Plainly, he knew of his obligation or duty to file tax returns in both his personal capacity and for his S corporation, and yet he failed to do so until after receiving the SOR, except the 1998 return filed a month earlier. His massive procrastination over many years is sufficient to establish willfulness. Accordingly, Disqualifying Condition (DC) a (allegations of criminal conduct) and DC b (multiple lesser offenses) apply and raise a security concern.

The nexus or security significance between Applicant's behavior and his eligibility for access to classified information was explained by the DOHA Appeal Board when they stated that failing to file income tax returns:

[R]eflect both an overall pattern of [a]pplicant's failing to live up to his lawful obligations as a citizen, and his selective compliance with the laws. Such a pattern has negative security implications because the industrial security program relies heavily on the full and voluntary compliance of applicants with security regulations, practices, and procedures. Persons who are unwilling or unable to fulfill all their lawful obligations in a conscientious manner do not inspire trust and confidence in their willingness or ability to properly handle and safeguard classified information. ⁽¹⁹⁾

That is the situation here. Applicant was either unwilling or unable to timely file the returns in question. His behavior is a security concern because it creates the potential for compromise of classified information should a situation arise that feeds into his character trait, practice, or habit of needless delaying where action is required. In other words, although Applicant is not a tax protestor or tax defiant, his procrastination in the serious business of tax reporting might easily carry over into lapses in the serious business of security compliance.

In mitigation, I have reviewed the mitigating conditions (MC) under Guideline J and conclude none apply. Applicant failed to timely file individual returns since tax year 1986 through tax year 2000. Given these circumstances, his behavior cannot be viewed as not recent, ⁽²⁰⁾ nor can it be viewed as an isolated incident. ⁽²¹⁾ Applicant has now filed the returns in question, which is the first step toward rehabilitation. But his remedial actions do not automatically cure the problem, and his actions are not clear evidence of successful rehabilitation. ⁽²²⁾ Despite being put on notice that his failure-to-file was a concern during his first DSS interview in March 1999, Applicant didn't get around to filing the returns until more than three years later. Given Applicant's long-term pattern of behavior, it is simply too soon to tell if he has changed or will change his ways. ⁽²³⁾

To sum up under Guideline J, the record evidence shows Applicant has a history of multiple lesser criminal offenses by willfully failing to file his federal income tax returns over many years. At this time, I assess the likelihood of recurrence as average. And I have weighed the record evidence, both disqualifying and mitigating, and conclude that a reasonable doubt exists about whether Applicant should be allowed access to classified information. Time will tell if his long-term pattern of behavior is a thing of the past or a firmly established part of his character. Until he can establish a track record of living up to his lawful obligations by filing his annual federal income tax return in a timely manner, a security concern exists. Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a : Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: Against the Applicant

DECISION

In light of all the circumstances presented by the record evidence, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Transcript at pp. 65-79; exhibits B, C, D, and E.
3. Exhibit 1.
4. Exhibit 2.
5. Exhibit 2 at p. 2.
6. Transcript at p. 58.
7. Transcript at pp. 52-53.
8. As revised by the Deputy Secretary of Defense in a memorandum, dated June 7, 2001.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
11. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
13. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
14. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
15. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
16. 498 U.S. 192, at 201 (1991).
17. 498 U.S. at 201.
18. *Egan*, 484 U.S. at 528, 531.
19. ISCR Case No. 94-0964 (July 3, 1996) at p. 5 (citations omitted).
20. MC a ("The criminal behavior was not recent.").
21. MC b ("The crime was an isolated incident.").
22. MC f ("There is clear evidence of successful rehabilitation.").

23. The other mitigating conditions (MC c, MC d, MC e, and MC g) do not apply on their face.