

KEYWORD: Criminal Conduct; Financial

DIGEST: Applicant's continuing failure to file his income tax returns as required by law requires a denial of his clearance request. Clearance is denied.

CASENO: 02-00839.h1

DATE: 03/31/2005

DATE: March 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00839

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant's continuing failure to file his income tax returns as required by law requires a denial of his clearance request. Clearance is denied.

STATEMENT OF THE CASE

On July 27, 2004, 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 denied or revoked.

Applicant responded to the SOR in writing on August 30, 2004. The case was assigned to the undersigned on December 7, 2004. A Notice of Hearing was issued on January 11, 2005, setting the Hearing for February 10, 2005. Applicant did not appear for the Hearing. He subsequently represented in writing that he became too sick on the morning of February 10 to attend the Hearing, and requested a new Hearing date. An Amended Notice of Hearing was issued on February 24, 2005, and the hearing was held on March 15, 2005. The transcript was received on March 24, 2005.

FINDINGS OF FACT

Applicant is a 46 year old employee of a defense contractor.

Applicant has not filed his Federal income tax returns for tax years 1998, 1999, 2000, 2001, 2002 and 2003 as required by law (26 U.S.C. 7203).

Applicant has not filed his State income tax returns for tax years 1995, ⁽¹⁾ 1996, 1997, ⁽²⁾ 1998, 1999, 2000, 2001, 2002 and 2003 as required by law (California Revenue and Taxation Code, Section 19701).

Applicant testified, in essence, that his income tax return filing problem exists because of bad advice he received from the IRS and his own procrastination. As to the bad advice he received from the IRS, he testified that he called the IRS in 1996 when he realized he wouldn't be able to file his 1995 returns on time, and was told the following:

[B]e careful of whether you owe any money or not. If you don't owe any money, it's not a problem. You can file whenever you get around to it. If you owe money, you're going to be hit with interest and penalties and all kinds of stuff that's going to hurt. If you don't owe money, not a problem . . . (TR at 70).

Because applicant always "over withheld" so he wouldn't owe additional income tax when he filed his returns (TR at 81), he took the IRS advice to mean that he could file the returns when he got around to it. And, based on what the IRS told him, he didn't realize his failure to file his State and Federal income tax returns on time was criminal. In his words, "[T]hey never once said anything about anything criminal" (TR at 20-21). He testified that he first realized his conduct was criminal when he received the SOR in July/August 2004. He further testified that after he learned his failure to file was criminal, he "redoubled" his efforts to get the returns filed (TR at 72). When asked by Department Counsel why the returns still have not been filed, he further testified: "Because I didn't have everything prepared to instantly the day I found that out (that his conduct was criminal) to go out and file them. I've been getting the information together and I also still have a lot of responsibilities as well." He further testified that he intends to file the delinquent returns "as soon as possible" (TR at 74).

On February 9, 2001, applicant gave a signed, sworn statement to a Special Agent of the Defense Security Service (DSS). In said statement, applicant stated, among other things, that although he could not give a specific date when all his delinquent tax returns would be done, he would do his best to get them done no later than March 2001. In a second, signed sworn statement given to DSS in July 2001, applicant reiterated his intention to file the delinquent returns, but declined to give an approximate date for filing.

As of January 2005, applicant owed the IRS the following amounts in back taxes, penalties and/or interest for the following tax years: 2001:\$2,460.07; 2000:\$4,415.29; 1997:\$97.62.

Applicant believes that this tax debt "goes away" as soon as he files the delinquent returns (TR at 77). Applicant's testimony that his failure to file his income tax returns on time has resulted in him paying more to the IRS and California Franchise Tax Board (CFTB) than he would have paid if he filed on time, was credible and worthy of belief. He presented credible proof that approximately \$10,000.00 of assessed past-due State and Federal income tax was collected by the IRS and the CFTB by the garnishment of his wages.

Documentary evidence offered by applicant establishes that he is financially capable of satisfying the remaining tax debts, if necessary, without much difficulty. He is not experiencing financial difficulties at the present time, and is not likely to experience any in the foreseeable future.

The SOR alleges applicant owes Verizon \$75.00. Because I found applicant's testimony that he does not owe Verizon anything to be credible and worthy of belief, this allegation is found for applicant.

Documentary evidence offered by applicant establishes that he performs well at his job.

CONCLUSIONS

With respect to Guideline J, the evidence establishes that applicant failed to file his (1) Federal income tax returns for tax years 1998 through 2003 and (2) State income tax returns for tax years 1995 through 2003. His failure to file his Federal income tax returns was in violation of 26 U.S.C. 7203. His failure to file his State income tax returns was in violation of Section 19701 of the California Revenue and Taxation Code. Applicant's pattern of criminal conduct reflects adversely

on his judgment, reliability and trustworthiness, and requires application of Disqualifying Condition E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*).

Applicant does not qualify for any mitigating conditions. Even if applicant's testimony that he was misled by IRS employees was taken at face value, the fact remains he knew by at least February 9, 2001 (over four years ago) that DoD was concerned about his income tax filing status, and yet, to date, he has not filed a single delinquent tax return. More importantly, applicant knew by July or August 2004 that (1) his failure to file his Federal and State tax returns on a timely basis was a crime, and (2) DoD was seeking to revoke his security clearance on the basis of this criminal conduct. Yet, even with this knowledge, he has not filed a single delinquent return. Applicant's inability or

unwillingness to follow the law, even with the knowledge that his failure to do so could cost him his security clearance, is particularly troubling.

Applicant testified that since late 2004, he has had a tax preparer helping him prepare his delinquent tax returns. This is certainly a step in the right direction. However, given applicant's history, this in no way guarantees that applicant's delinquent tax returns will be filed. Based on applicant's continuing failure to follow the law, I have no choice but to conclude that applicant does not currently possess the good judgment and reliability required of security clearance holders. Accordingly, Guideline J is found against applicant.

With respect to Guideline F, applicant's failure to file his income tax returns on time has cost him thousands of extra dollars, and has resulted in his wages being garnished by both the IRS and CFTB. Forcing the IRS and CFTB to garnish his wages in order to collect his tax debts requires application of Disqualifying Conditions E2.A6.1.2.1 (*a history of not meeting financial obligations*) and E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*).

The evidence establishes that applicant has satisfied most of his past-due tax debts. With respect to the remaining IRS debt totaling approximately \$6,900.00, I found his testimony that, when he files his delinquent returns this debt "goes away," to be credible and worthy of belief. However, even if he is found to be liable for this debt, he clearly has the financial resources to satisfy it and still meet his day-to-day living expenses. In short, even if this tax debt is factored in, applicant's current financial stability will not be adversely affected. Although applicant has chosen a strange and costly way to pay his income taxes, it is not causing him financial difficulties at the present time, and it is unlikely to cause him financial problems in the foreseeable future. Given these facts, I conclude that applicant is not "at risk of having to engage in illegal acts to generate funds."⁽³⁾ Based on the foregoing, Guideline F is found for applicant.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: FOR 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.

Joseph Testan

Administrative Judge

1. Applicant testified he filed his 1995 State income tax return. Although I believe that applicant truly believes this return was filed, based on Exhibits 6 and 11, I find that it was not filed.
2. Applicant testified he believes a tax preparer, to whom he gave all the necessary paperwork in late 2004, filed his 1996 and 1997 State income tax returns. Applicant's belief appears to be based more on hope than on fact since the tax preparer could not find any record of applicant's returns when applicant went to his office on the morning of the Hearing to inquire about them. Based on the evidence as a whole, I find that these two tax returns have not been filed.
3. E2.A6.1.1. *The Concern:* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.