

DATE: March 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02528

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has not filed or paid his Federal and state income tax returns for various years between 1992 to 2000. He asserts as mitigation he paid sufficient money through withholding and credits from prior years to pay any taxes. Substantial issues remain unresolved regarding Applicant's reliability and trust sufficient to hold a security clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR), dated October 8, 2002 to the Applicant. This SOR 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, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

The SOR was based on:

1. Guideline F (Financial Considerations) by accruing a tax liability to the Federal Government and the state, causing these government to file tax liens for the amounts of \$670,000 and \$280,000, respectively, or amounts of similar magnitude;
2. Guideline E (Personal Conduct) for wilfully failing to file Federal tax forms for the years 1992 to 2000, wilfully failing to file state income tax forms for the years 1992 and 1996 to 2000, thereby causing a tax lien to be filed, and continuing not to file the required tax forms and pay the taxes at least until August 2001. Furthermore, for deliberately failing to reveal on the Security Clearance Questionnaire (SF86) questions 36, 37, 38 the tax delinquencies and tax liens

you had incurred; and,

3. Guideline J (Criminal Conduct) for willful failure to file federal individual income tax returns for various tax years between 1992 and 1999, and failure to file state individual income tax returns for those same years.

On November 4, 2002, Applicant responded to the allegations set forth in the SOR in a sworn statement. Applicant admitted the two specific allegations made under Guideline F. He denied the first, second, fourth and fifth allegations under Guideline E. He admitted the third allegation that he failed to file his state income tax forms. He admitted the first two allegations under Guideline J in that did not file his Federal and state income tax forms, but denied the third allegation that he falsified any information. He requested a decision based on the written record, in lieu of a hearing.

The Government submitted its File of Relevant Material (FORM) on December 3, 2002, a copy of which was forwarded to Applicant with instructions to submit material in explanation, extenuation or mitigation within thirty days of receipt, which was December 16, 2002. Applicant filed his response to the FORM on January 15, 2003. In that unsworn response he stated he had worked to resolve the state debt, but that state tax authorities kept asking for information from the IRS and his employer. He purportedly obtained that information, gave it to the state tax authorities, paid approximately \$300 plus penalties and interest, and the lien was released. He did not submit any documentation to support his assertion.

On February 5, 2003, the case was assigned for decision to this Administrative Judge. I reviewed the applicable Directive, Guidelines, the evidence in the record, and all of the Applicant's responses to the allegations.

FINDINGS OF FACT

The Applicant has admitted (Answer, Item 3, pages 1 and 2) all the factual allegations pertaining to the Guidelines cited in the SOR, except he does not admit that he was financially overextended, nor the magnitude of the debts to the two taxing governments, nor that his actions were willful. Those admissions are incorporated herein as findings of fact. After a thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 56 year old senior engineer employed by a defense contractor since January 1980. He seeks a Secret security clearance to allow him to continue to perform his duties there. (Item 4, pages 1 and 2)

Applicant failed to file his Federal income tax forms from 1992 to 2000. Applicant also failed to sign his annual income tax forms because he did not file them. Applicant also failed to pay his Federal income tax for the years 1992 to 2000 as required by law. (Items 3, pages 1 and 2, and Item 5, Statement of August 3, 2001, pages 1 and 3)

The Internal Revenue Service filed substitute forms for the income tax for the years 1993 to 1995, and released the lien they had for those years on May 21, 1999. Applicant has not filed with his signature the required income tax returns for those years. Applicant owes the Federal Internal Revenue Service approximately \$670,000 for the unpaid income taxes. (Item 3, pages 1 and 2, Item 6, pages 1 to 13, and Item 9)

Applicant has not filed his state income tax forms for the years 1992, and 1996 to 2000. Applicant owes the state at least \$280,000 in unpaid tax liabilities. (Items 3, pages 1 and 2, and Item 7, pages 1 and 2)

The state imposed a tax lien for those years of unpaid taxes on May 10, 2001. The tax liability was not disclosed on Applicant's SF86 completed on August 18, 2000 because it had not occurred yet. Nor was the state lien disclosed in Applicant's subsequent statement of August 3, 2001, though Applicant disclosed his state tax liabilities in that statement. (Items 3, pages 1 and 2, Item 4, pages 9 and 10, Item 5, pages 1 and 3, Item 8, pages 2, 5 and 6, and Item 10)

Applicant has not resolved his Federal or state income liabilities as of January 15, 2003. He is slowly gathering his information. There is no evidence submitted by the Applicant that he has hired a professional tax advisor to prepare and file all delinquent income tax forms for the state and Federal governments. (Reply dated January 15, 2003, page 1)

Applicant's stock holdings had a substantial value during the period in question. Applicant tries to save at least 40% of

his income and invest it. Applicant has the annual income and net worth sufficient to hire qualified professional tax advisors to resolve these tax liabilities in a shorter period of time than the two and a half years since he completed the SF 86, on which he disclosed only his Federal tax liabilities. (Item 5, page 2 and Item 6, pages 1 through 3)

Applicant has not resolved his tax liabilities, has not filed or paid his Federal and state income tax liabilities and has not submitted any evidence to show he is diligently and quickly resolving these unpaid tax liabilities. (Item 5, pages 1 and 3)

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive 5220.6, Section F.3. and Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors 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 other behavior specified in the Guidelines.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline F: Financial Considerations

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. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations;

E2.A6.1.2.2 Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

E2.A6.1.2.3. Inability or unwillingness to satisfy debts

E2.A6.1.3. Conditions that could mitigate security concerns include:

None

Guideline E: Personal Conduct

E2.A5.1.1. *The 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

E2.A5.1.1.2. Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful

questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

E2.A5.1.2.4 Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Guideline J: Criminal Conduct

E2.A10.1.1. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

None

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. Likewise, I have attempted to avoid drawing any inferences that are based on mere speculation or conjecture.

CONCLUSIONS

Having considered the evidence of record under the appropriate legal precepts and factors, I conclude the following with respect to Guideline F:

Applicant meets the criteria of Disqualifying Conditions (DC) 1 (a history of not meeting financial obligations), 2 (Deceptive or illegal financial practices such as income tax evasion), and 3 (Inability or unwillingness to satisfy debts)

of the Guideline. Applicant owes the Federal I.R.S. for unpaid taxes for the years 1992, 1998, 1999 and 2000. A tax lien was filed against Applicant, and later released for the years 1993 through 1995. Applicant continues to owe the I.R.S. approximately \$670,000 for delinquent taxes. Applicant also owes the state over \$280,000 in delinquent taxes, and a tax lien was filed in May, 2001 against Applicant for that debt. Applicant has shown a history of not paying taxes, which are a financial obligation. Income tax evasion is a specific disqualifying condition. His failure to promptly resolve these tax liabilities demonstrates an inability and unwillingness to satisfy his debts.

Mitigating Conditions (MC) are not present. Applicant's behavior is continuous from 1992 onward to the present. There is no evidence that the tax liabilities are paid, or will be paid immediately. Applicant has not hired a tax professional to prepare the returns and resolve the matter, but persists in trying to do it himself, while not gathering his documents together to do that work, as he admits in his January 15, 2003 letter. He has not initiated a good-faith effort to repay overdue taxes. Therefore, an adverse finding is made against Applicant on paragraphs 1a and 1b of the SOR.

The Administrative Judge concludes the following respecting Guideline E:

Applicant meets the DC 2 (deliberate omission of relevant and material facts from any personnel security questionnaire, etc.), 4 (personal conduct or concealment of information increasing vulnerability to coercion and duress) and 5 (a pattern of dishonesty or rule violations). The applicable Disqualifying Conditions apply to the SOR paragraphs 2a, 2b, and 2c, concerning failures to file and pay taxes for various years. Applicant has a history over eight years of not filing signed income tax returns for the Federal and state governments for various years between 1992 and 2000. His explanations for why he did not file, and continues not to file returns, are not persuasive, credible, or logical. He has shown a continuous pattern of not filing tax returns.

None of the mitigating factors are present, for the reasons stated previously, and it is of particular concern that the Applicant has not corrected the situation and swiftly filed the returns and paid these taxes since he filed his SF 86 in August, 2000. His wilfulness for non-filing his taxes is shown from his admissions and the time periods involved. He also stated he thought enough had been withheld each year to pay for any tax.

Regarding paragraphs 2d and 2e, alleging he did not answer questions 37 and 38 truthfully about his financial delinquencies, there is no evidence that he did not answer question 37 truthfully. Question 37 asks about judgements in the past 7 years, and there is no evidence of any judgements. Question 38 concerns delinquencies over 180 days in duration. Applicant only disclosed and admitted to the Federal tax debt for 1993 and 1999, or 1993 through 1999, tying this answer to the disclosure of a Federal tax lien in Question 36. In answer to Question 36, however, Applicant only lists 1998 as a year for which he owes a tax liability. Therefore, he has not fully disclosed the full extent of his Federal tax liability. He did not disclose a state tax lien in Question 36's answer because it was not filed until May, 2001, after he completed the form. But there is also no evidence that he disclosed later in his August 3, 2001 statement the existence of the state tax lien which was not released until September 24, 2002. Therefore, he cannot be held accountable for disclosing a lien which had not yet been filed. But he is liable for not disclosing the state tax liability of more than 180 days of delinquency.

Question 39 asks about financial delinquencies over 90 days in duration. The SOR did not allege a violation of Guideline E by failing to answer truthfully Question 39 on the financial delinquencies over 90 days in duration. Therefore, Applicant cannot be held liable for not truthfully answering that question. Applicant answered "no" in response to the question, and his answer should have been "yes" because the Federal and state obligations were both overdue by at least 90 days when he completed the SF 86. He could have been held liable for not truthfully and fully answering that question if he had been charged with that violation of the Directive..

I conclude the following respecting Guideline J:

Applicant had no requests for extensions to file his income tax returns for the years at issue. Therefore, his actions constitute misdemeanor violations of Title 18, Section 7203 of the United States Code. Title 44, Chapter 30, of the state taxation and finance code also punishes as a misdemeanor the willful refusal to make a required return when a return has been requested by the commissioner or his agent.

DC 1 (any criminal conduct) is clearly applicable. The crime does not have to be charged by any government, it merely

has to have occurred. DC 2 (single serious crime or multiple lesser offenses) applies because Applicant has committed a continuous series of felony and misdemeanor offenses under Federal and state law over an eight year period by not filing his income tax returns for the Federal and state governments.

Applicant cannot avail himself of any of the MC under this Guideline. Applicant owed the IRS some \$670,000.00 because he willfully did not file returns or pay his taxes from 1992 to 2000. Applicant owes the state at least \$280,000. He deliberately did not file in a timely manner those tax returns due. In admitting the allegations of the SOR, Applicant acknowledged the criminality of his conduct. Yet, whether an applicant has reformed depends as well on whether he demonstrates over a measurable period of time that he is willing to adhere to applicable laws and regulations. Applicant placed his personal financial needs and his convenience above his legal obligations from 1992 to the present. Adverse findings are therefore warranted with respect to subparagraphs 3.a., 3.b., and 3.c., of the SOR.

FORMAL FINDINGS

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

Paragraph 1 Guideline F: Against the Applicant

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2 Guideline E: Against the Applicant

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant Regarding All Allegations Except That Pertaining to Question 37 Because of the Absence of Any Evidence on That Allegation, Finding for Applicant on That Part of the Paragraph.

Subparagraph 1.e.: Against the Applicant Regarding All Allegations Except That Pertaining to the Disclosure of a State Tax Lien Which Did Not Exist on August 18, 2000 on Question 36.

Paragraph 3 Guideline J: Against the Applicant

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

DECISION

In light of all the facts presented by the record in this case, and applying the applicable Guidelines, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Philip S. Howe

Administrative Judge