

DATE: September 11, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07138

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of delinquent federal and state tax debts accumulated over a number of years attributable to excessive claiming of exemptions as a means of addressing his strained finances. Compounding his tax delinquency problems are his multiple late filings of his federal tax returns for tax years 1999 and 2000. Attempts to resolve these tax debts have been partially successful in resolving his older federal tax delinquencies. However, Applicant still owes considerable back taxes for which he has delayed attempting any work-out arrangements with the IRS and state, pending resolution of his security clearance application. As such, Applicant fails to mitigate security risks associated with his unresolved debts and failure to address them earlier through the variety of options available to him. Clearance is denied.

STATEMENT OF THE CASE

On February 28, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 28, 2003, and requested a hearing. The case was assigned to me on June 5, 2003. Hearing was scheduled for July 16, 2003 and was convened on July 16, 2003, as scheduled. for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) of the proceedings was received on July 25, 2003.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant asked to keep the record open to permit him to supplement the record with documented filings of his federal tax returns for tax years 1999 and 2000. Department Counsel offering no objections, and for good cause shown, Applicant was allowed ten days to supplement the record with copies of his filed tax returns. Within the time permitted, Applicant provided copies of his executed returns for tax years 1999 through 2002. Department Counsel expressed no objection to the admission of the exhibit. The exhibit is accepted as Applicant's exhibit B.

STATEMENT OF FACTS

Applicant is a 35-year-old electronics engineer for a defense contractor who seeks to retain his security clearance.

Summary of Allegations and Responses

Under Guideline F, Applicant is alleged to have a history of financial problems, marked by the following delinquent debts: creditor 1.a (a bank creditor) for \$500.00 and creditor 1.b (the IRS) for back taxes for tax years 1997 and 1998 in the aggregate sum of \$10,604.00.

Additionally, Applicant is alleged to have (a) failed to file his federal income tax returns for tax years 1999 and 2000, in violation of 26 U.S.C. Sec. 7203, (b) had his wages garnished by a state tax board in October 1994 to satisfy claimed \$1,800.00 in back state taxes owed, and (c) had his property liened in 1994, 1995, and 1996 by the IRS in the approximate amounts of \$1,23.00, \$10,363.00 and \$5,137.00, for unpaid back taxes.

And Applicant is alleged to have been arrested in September 2002 and charged with DuI, to which he pleaded no contest to a reduced charge of reckless driving, and was court-ordered to perform 15 hours of community service, complete a DuI self-improvement school, and accept one year of supervised probation.

For his response to the SOR, Applicant admitted each of the listed allegations. He claimed to be making payments to the IRS on his back taxes and to have satisfied previous tax liens. Applicant claimed to have paid back taxes owed the state revenue board under a payment arrangement. He claimed to have entered into a payment arrangement with the IRS to pay his back taxes owed for tax years 1999 and 2000. And he claimed to satisfied all of the conditions set by the court relative to his reckless driving conviction.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant's tax problems trace to his 1990 car purchase, which proved to create a bigger strain on his finances than he had anticipated. To address his cash shortages, he got a second job. He quit this job in 1992 to join a friend in a start-up business. This start-up partnership brought no immediate returns to Applicant and, as a result, caused him cash shortages and ensuing credit problems (*see* R.T., at 38-39). Rather than return to his part time job, he began changing his withholding deductions in the hope of making up the tax differences with business deductions from his partnership (*see* ex. 3; R.T., at 39). This brought him some pay check relief, but at a cost. When the expense deductions failed to materialize, his income tax liability increased for the 1993 tax year. With only \$1,860.24 withheld to cover his 1993 tax liability, Applicant became indebted to the IRS for additional taxes. When he didn't pay these additions in a timely way, he was assessed penalties and interest. By staying with his elected ten exemptions instead of the more conservative two exemptions, Applicant's federal tax withholding for the ensuing years of 1994 through 1998 was insufficient as well.

The IRS filed tax liens against Applicant's property in 1994, 1995 and 1996. Specifically, the IRS filed a tax lien in October 1994 to cover back taxes of \$1,823.00, in June 1995 to cover back taxes of \$10,363.00, and in June 1996 to cover back taxes of \$5,137.00. The 1996 tax lien did not cover any of Applicant's back 1996 taxes. Applicant's actual tax liabilities for these years were much greater. By his estimates, he owed the IRS \$7,270.00 for 1993 (only \$1,860.24 withheld), \$6,790.00 for 1994 (only \$1,44.49 withheld), \$7,990.00 for 1995 (only \$1,957.00 withheld) and \$9,803.00 for 1996 (only \$5,160.00 withheld). Because he didn't file a tax return for 1996, the IRS actually computed for him the amount of federal tax owed for the year (*see* R.T., at 56-57). While never liened, Applicant accrued \$9,907.00 in tax

liability for the 1997 tax year, of which only \$4,380.00 was withheld. In turn, he accrued \$10,824.00 in federal tax liability for 1998 (only \$4,995.00 withheld).

Besides claiming extra exemptions to reduce his tax withholding between 1993 and 1998, Applicant used other creative financing techniques to cover his debts. Among these techniques, he used his credit cards to pay off his other debts. One of these other debts (creditor 1.a) was referred to collection in May 2001 on an unpaid balance of \$50.00. While this debt is covered in Applicant's 2001 credit report, it is not covered in his most recent June 2003 credit report (*compare* ex. 2 with ex. 5). Applicant's claim this debt was previously paid represents the most reasonable inference to draw from these facts, and is accepted.

Through agreed payment arrangements with the IRS, Applicant eventually satisfied his back taxes covered by the IRS's tax liens filed in 1994 through 1996. Concerned the IRS might scrap his \$250.00 monthly payment arrangement re: his back taxes, Applicant didn't file a tax return for tax year 1996. Because he didn't file a federal tax return for 1996, the IRS constructed one for him that attributed \$4,613.00 in taxes owing for the tax year. Through a new payment arrangement with the IRS that called for \$400.00 monthly payments, Applicant paid off this 1996 tax debt in three years (*see* R.T., at 86).

Throughout tax years 1997 and 1998, Applicant continued to claim excessive exemptions, and as a result accrued significant tax delinquencies with the IRS on his 1997 and 1998 taxes. Of his accrued tax liability of \$9,907.00 for 1997, only \$4,380.00 was withheld, leaving a balance owing of \$5,527.00 (*see* ex. 6). Combined with interest and penalties, his overall tax liability for 1997 amounted to \$9,444.00 as of October 2001. For the 1998 tax year, Applicant owed the IRS \$10,604.77 as of October 2001. Broken down, this comprises \$5,865.00 in back taxes (after crediting Applicant \$4,959.00 in withholding), interest and penalties.

Addressing his 1997 federal tax debt, Applicant has continued making \$400.00 monthly payments to the IRS, which reduced his aggregate tax liability for 1997 to the sum of \$2,439.80, as of June 2003 (*see* ex. 6; R.T., at 29-30). However, he has yet to make any payments towards his 1998 federal tax liability, which stands at \$11,559.74 (inclusive of interest and penalties), as of June 2003 (*see* ex.6 ; R.T., at 30).

Applicant did not file federal income tax returns for either 1999 or 2000 until March 2003 (*see* ex. B). While he claimed no more than one exemption on each of these returns, he had previously claimed ten exemptions on his W-2 forms he furnished his employer. As a result, his employer took insufficient withholding to cover his annual tax liabilities for these years. As of June 2003, Applicant's outstanding tax liabilities for tax years 1999 and 2000 were \$9,834.66 for tax year 1999, and \$8,659.27 for tax year 2000 (*see* R.T., at 31). As of the close of the record, Applicant had made no payments towards either of these accrued tax liabilities for tax years 1999 and 2000. Altogether, Applicant owes the IRS close to \$40,000.00 in back taxes covering federal tax years 1997 through 2002 (*see* R.T., at 45).

Applicant delayed executing federal tax returns for tax years 2001 and 2002 until March 2003 as well. He attributes his delays to renewed concerns about the IRS canceling his payment agreement in the event he was found to owe more taxes. At the same time, he had sufficient resources at his disposal to purchase a new car for over \$34,000, having previously leased a late model car in 1999, which he continued to retain (*see* R.T., at 64-67).

Applicant's federal tax liability for 2001 is reported to be \$6,218.06; his 2002 federal tax liability is \$2,777.98. While he claimed only two exemptions for part of the 2001 and 2002 tax years, he continued to claim ten exemptions for the duration of 2001 and the remainder of 2002 following his DUI arrest in September 2002 (*see* R.T., at 42-43). To date, he has made no payments towards satisfaction of either his 2001 or 2002 liabilities.

Because of the additional taxes accrued for tax years 2002 and 2003, Applicant believes the IRS has suspended his old payment arrangement covering his past tax debts. While he remains hopeful of entering into a new payment arrangement with the IRS to satisfy his tax liabilities for tax years 1997 through 2002, he has refrained from attempting any, pending the outcome of his clearance application issues (*see* R.T., at 85-86). Should he lose his clearance, he would in all likelihood have to seek new employment with uncertain prospects.

Besides his accrued federal tax liabilities, Applicant also owes state taxes to the state of his former domicile. Before moving to his current state (State B), he accrued a state tax liability with State A. In October 1994, State A garnished his

wages to satisfy \$1,800.00 worth of state tax debts owed to the state's franchise tax board. Applicant, in turn, entered into a payment arrangement with State A to pay off his 1993 tax debt. In making a \$255.56 payment to State A, he believed he had satisfied his State A tax obligation. He acknowledges now that he was mistaken. He currently owes State A \$1,802.46, as of September 25, 2003, on his still outstanding tax debt.

When stopped by police in September 2002, Applicant registered a BAC of .122 percent in an administered Breathalyzer test and was arrested for DuI (*see* R.T., at 68). Since his DuI arrest and resulting reckless driving conviction in 2002, Applicant has experienced no other alcohol-related problems. He completed the conditions set by the court in connection with his accepted plea, which comprised 15 hours of community service and completion of alcohol-education program, in addition to satisfying the imposed one year of supervised probation.

Applicant is well regarded by his supervisor and coworkers as a team member who can be relied on and entrusted to complete his work assignments.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress.

Mitigating conditions:

MC 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation

or duress.

Burden of Proof

By reason of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing on the applicant's eligibility to obtain or maintain a security clearance. The required showing of materiality, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant accrued considerable consumer and tax-related federal and state debts between 1993 and 2002 attributable to claiming excessive exemptions during times of strained finances. While he has been able to discharge imposed federal and state tax delinquencies for tax years 1994 through 1996, he has not satisfied computed tax delinquencies for the ensuing years (1997-2002). Altogether, Applicant currently owes close to \$40,000.00 in back taxes to the IRS and over \$1,800.00 to State A, for which he has hedged on working out any payment arrangements with the respective taxing authorities pending resolution of his clearance application.

On the strength of the evidence presented, Government may invoke two Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

While Applicant's federal tax debts may be partially attributable to unanticipated cash strains and failed partnership expectations, his explanations for failing to follow-up with attempted payment arrangements with the IRS and State A to cover his accumulated tax liabilities are not convincing. Once the IRS filed tax liens and began reconstructing tax returns for him (*i.e.*, in 1996), he should have readily anticipated likely collection actions through levies and other types of IRS collection methods. Despite finally reaching an installment accord with the IRS on earlier tax delinquencies, he has deferred initiation of any payment agreements to cover his other unpaid taxes pending the outcome of his present clearance application proceedings. With the ample time and current income resources afforded him to finally establish a repayment record for all of his outstanding tax debts, he has once again chosen to delay paying on his tax debts in the expectation of working out a better deal with the IRS once he receives a positive clearance assessment. Valuable payment seasoning is lost in the process.

An applicant's exhibited history of ignoring undisputed creditor obligations (tax liabilities included) even when resources become available for repayment bears close resemblance to an applicant's being asked to place his or her other private interests in subordination to the Government's security interests when the two clash with each other. Over time, our Appeal Board has shown general consistency in disallowing applicant claims to mitigation based on faulty or non-existent repayment histories. *Cf.* ISCR Case No. 01-17474 (March 7, 2003); ISCR Case No. 01-13653 (March 7, 2003); ISCR Case No. 01-12147 (January 21, 2003). Security clearance decisions are, of course, never an exact science, but rather involve predictive judgments about a person's security eligibility based on the person's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). With so limited payment seasoning to

rely on to advance his mitigation claims regarding his federal and state tax liabilities, he lacks the probative mitigation necessary to absolve him of the pressure and judgment risks associated with being in debt.

While Applicant has since filed his federal income tax returns for tax years 1999 through 2002, he did not do so until March 2003, well after receiving the SOR. Because his filing delays are linked to his tax delinquencies, they cannot be mitigated without regard to the underlying tax debts associated with them. Under these circumstances, his late filing of his returns are insufficient to eliminate or abate security concerns associated with Applicant's judgment lapses in failing to file his returns in a timely way.

So, while Applicant may take limited advantage of MC 6 (initiated good-faith effort to repay overdue creditors) of the Adjudicative Guidelines to mitigate his tax debt delinquencies, he may not invoke the mitigating provisions of MC 3 (conditions largely beyond the person's control). Claiming excessive tax exemptions and failing to file tax returns due to strained finances associated with spending on the person's means are not circumstances that can reasonably be classed as conditions beyond the person's control. Moreover, MC 6 is not fully available to Applicant as a mitigating condition, absent more concerted efforts to address his delinquent federal and state tax debts.

Applicant, to his credit, is highly thought of by his employer. For his professional accomplishments, he merits acknowledgment and commendation. But the trustworthy impressions he draws from his employer are not a enough to mitigate his financial difficulties associated with his outstanding federal tax liabilities and related filing failures. Unfavorable conclusions warrant with respect to subparagraphs 1.b through 1.d of the Adjudicative Guidelines governing financial considerations. Favorable conclusions do warrant with respect to subparagraphs 1.a and 1.e through 1.g.

Because Applicant's alcohol-related actions associated with his October 2002 reckless driving conviction are isolated in nature and scope, the poor judgment implications associated with his actions are mitigated. Any risk of increase in Applicant's vulnerability to coercion, exploitation or duress (covered by DC 4 of the Adjudicative Guidelines for personal conduct) as the result of his reckless driving conviction is neutralized by the isolated nature of the conviction. Favorable conclusions warrant with respect to subparagraph 2.a of Guideline E of the Adjudicative Guidelines.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge