

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant failed to pay his federal income taxes for tax years 1993 and 1994. In 1995 and 1996, Applicant filed deceptive returns by refusing to report his civilian wages as income. Although Applicant completed paying off his delinquent federal taxes in December 2003, he still owes state taxes for 1995 and 1996 and failed to report his tax delinquencies on his security clearance application. Clearance is denied.

CASENO: 02-07751.h1

DATE: 08/05/2004

DATE: August 5, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07751

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Peter R. Moughan Jr., Esq.

SYNOPSIS

Applicant failed to pay his federal income taxes for tax years 1993 and 1994. In 1995 and 1996, Applicant filed deceptive returns by refusing to report his civilian wages as income. Although Applicant completed paying off his delinquent federal taxes in December 2003, he still owes state taxes for 1995 and 1996 and failed to report his tax delinquencies on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 15 October 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 15 December 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 8 March 2004. I delayed convening the hearing until 25 May 2004 because of scheduling conflicts with Applicant's attorney. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 4 June 2004.

RULINGS ON PROCEDURE

Department Counsel moved to amend SOR ¶¶ 2.a and 2.b by changing the date Applicant executed his security clearance application (SCA) from "January 31, 2000" to "January 24, 2000," and ¶ 2.c as follows:

c. You failed to abide with an agreed upon repayment plan with the United States Department of the Treasury, Internal Revenue Service on September 4, 2000 by failing to ~~make your monthly payment as agreed~~ pay the additional federal tax you owe.

Applicant objected to the amendment to ¶ 2.c, but not to ¶ 2.a and 2.b. I granted the Department Counsel's motion to amend the three subparagraphs. Tr. 103.

FINDINGS OF FACT

Applicant is a 49-year-old senior engineer for a defense contractor. He is married and has three children. He served 20 years in the U.S. military, retiring as a captain (O-3) in 1993. Applicant went to work in the civilian sector and his wife continued a day care business. Applicant is well respected by his friends and supervisors as an honest and dependable worker who is careful (Tr. 41), detail oriented (Tr. 40), and has outstanding ability to deal with technical minutia (Tr. 36). Applicant has held a security clearance for approximately 31 years.

Applicant had a \$1,000 liability to the IRS on his 1993 federal income taxes. He incurred a \$3,000 liability to the IRS on his 1994 federal income taxes. He made no effort to pay the IRS the balance owing on his income taxes for those years. Ex. 2 at 1.

About this time, Applicant heard a commentator on the radio argue the federal income tax system was illegal. He read books with a similar theme. For tax years 1995 and 1996, he filed income tax returns based on the advice in these books—he declared his military retirement pay as income, but not his civilian wages. He received a refund for tax year 1995, although the IRS later billed him for taxes due for that year. *Id.*; Ex. 6 at 2; Tr. 83. Applicant testified the IRS may have sent him notice that the 1996 return was "frivolous." Applicant believes that may have influenced his decision to file a full return for 1997. Nevertheless, he was unable to pay the \$3,000 liability for that tax year. *Id.* at 1-2. Applicant described why he decided to file a return that conformed to IRS rules:

Then the horror story began I decided I did not have the resources to combat the "Goliath" and was concerned that my livelihood was in complete jeopardy. I decided that I would comply with the apparently illegal tax system. I just do not and did not have the time, nor the drive or the will it takes to fight the system.

Ex. 2 at 2-3. Applicant still had difficulty with his 1997 return, yet he took no steps to remedy his problem. Tr. 67. The IRS froze his bank account in 1998. To avoid prosecution by the IRS, Applicant agreed to make monthly installment payments of \$250 to satisfy the 1993 and 1994 tax liabilities.

On 24 January 2000, Applicant executed an SCA. Question 38 asked if, in the previous seven years, Applicant had been delinquent more than 180 days on any debts. Applicant answered "no." Ex. 1 at 10. He denies ever knowingly doing anything illegal with regards to filing income tax returns. Ex. 6 at 1.

In September 2000, the IRS issued Applicant a notice of intent to levy claiming he defaulted on his installment agreement because he "didn't pay the additional federal tax" he owed. Ex. 4. The additional federal tax he had not paid was actually the over \$18,000 he owed from tax year 1996. Tr. 76. To resolve the issue, Applicant negotiated an increase in his payments to the IRS from \$250 to \$400 a month.

On 2 October 2000, a Defense Security Service (DSS) agent interviewed Applicant about his tax deficiencies. As Applicant's state income tax returns were based on his federal income tax returns, Applicant realized he also owed state income taxes for 1995 and 1996 when Applicant was not reporting his civilian wages on his federal tax return. During a second interview on 5 October 2000, Applicant noted that he probably owed the state between \$3,000 and \$5,000 for tax years 1995 and 1996 and that he intended to contact the state tax authorities within the next 30 days to resolve the issue. Ex. 6 at 3. To date, Applicant has not resolved his taxes with the state.

For tax year 2000, Applicant made a mistake on his federal return by not showing a 401k rollover that increased his tax liability by \$700. In tax year 2002, Applicant was delinquent in paying about \$3,000 of his tax liability. Answer.

DOHA issued the SOR on 15 October 2003. At the time, Applicant was paying the IRS \$400 a month to reduce his tax liabilities. He failed to make the 28 November payment. Instead, on 1 December 2003, he paid the IRS \$5,957.08 to settle his tax liability for all previous tax years. On 4 December 2003, he signed receipt for the SOR. Applicant filed for an extension on filing his 2003 taxes, but paid the tax due with the extension. Tr. 96.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in

the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged Applicant failed to pay his federal income taxes for years 1994 (¶ 1.a), 1996 (¶ 1.b), 2000 (¶ 1.c) and 2002 (¶ 1.d); and failed to pay his state income taxes for years 1995 (¶ 1.e) and 1996 (¶ 1.f). An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established by substantial evidence each of the allegations in the SOR. Applicant has a history of not meeting his financial obligations (DC E2.A6.1.2.1) and was unable or unwilling to satisfy his debts (DC E2.A6.1.2.3). Starting in 1993 and running through to tax year 2002, Applicant had outstanding federal tax liabilities totaling about \$27,000. These tax liabilities were not resolved until December 2003. His failure to report his civilian wages as income for tax years 1995 and 1996 was a deceptive and illegal financial practice. DC E2.A6.1.2.2. Applicant's claim that he never knowingly did anything illegal with regards to filing his income taxes (Ex. 6 at 1) is unpersuasive. He knew he was required him to declare his wages as income, he declared his wages as income in the past, and although some

extremists insisted the tax code was unconstitutional, he knew no court had so held.

Applicant still has not resolved his state income tax deficiencies. He estimates he owes between \$3,000 and \$5,000 to the state. The state income tax was based on the federal income tax and Applicant claims he has not been able to find sufficient data from his records to reconstruct the state of his finances from 1995 and 1996. I find his argument unpersuasive. He has had several years to work on this and, after resolving his federal income taxes for those years, he should be able to calculate his state taxes with the help of state authorities. Although he claims to have talked to the state authorities by telephone about his tax records, there is no evidence he made much of an effort to sit down and talk to the state about resolving his tax delinquencies.

None of the mitigating conditions listed under the guideline apply. Applicant failed to produce any evidence he sought counseling or initiated a good-faith effort to resolve his tax problems. It appears the impetus for resolution of the federal tax deficiencies was his inability to fight the "Goliath" of the IRS and the consequences of the tax debt on his security clearance. If he had questions about his tax liability, he could have consulted an accountant or a tax attorney. He did not do so. Tr. 89. Although Applicant has paid his federal income taxes through tax year 2002, he still has not resolved the state tax income tax deficiencies. As late as April 2003, he had another debt that was past due more than 180 days. Ex. F at 7. Applicant failed to mitigate the financial considerations security concern. I find against Applicant on ¶¶ 1.a-1.e.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified his SCA by denying that, in the previous seven years, he had been delinquent more than 180 days on paying taxes owed the IRS (¶ 2.a) and the state (¶ 2.b); and he failed to abide by a repayment plan with the U.S. Department of Treasury for the payment of additional federal taxes he owed (¶ 2.c). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant failed to disclose in his SCA that in the previous seven years he had federal and state tax debts that were delinquent more than 180 days. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant claims that, when he completed his SCA, he did not consider himself delinquent on his accounts with the IRS. He had a negotiated a payment plan with the IRS and was making regular payments on that plan. Answer at 2. Applicant also asserts he did not know when he completed his SCA that he owed the state any money because, until he discussed his case with the DSS agent, he did not realize the amount of his state taxes was dependent on income he reported on his federal tax return. *Id.* Applicant denies he failed to abide by his repayment plan with the I.R.S. Applicant did not

convince me that he did not consider he was delinquent on his federal taxes and did not realize his state taxes were dependent on his federal taxes. It is unreasonable to believe that someone who completed his state income tax forms in the past did not realize his state tax liability was based on his federal income tax return. The evidence established Applicant abided by his payment plan with the IRS. The notice of levy was issued because the IRS discovered Applicant owed money for an additional tax year-1996. I find for Applicant on ¶ 2.c, but against him on ¶¶ 2.a and 2.b.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

DECISION

In light of all of 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. Clearance is denied.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).