

KEYWORD: Drugs; Criminal Conduct; Personal Conduct

DIGEST: Applicant used and purchased cocaine from November 1998 to mid-January 1999 when he was arrested for illegal possession of cocaine. Placed on supervised probation for the offense, he underwent a court-ordered drug evaluation and counseling for cocaine abuse. The drug involvement concerns are mitigated by his abstinence with no intent to abuse any illicit drug in the future. He failed to disclose an Internal Revenue Service wage garnishment in 1998 when he completed his security clearance application, but it was not with an intent to conceal that information. Criminal conduct and personal conduct concerns persist because of his willful failure to file federal and state income tax returns for tax years 1993 through 1999, which have still not been filed because of his lack of due diligence. Clearance is denied.

CASENO: 02-28606.h1

DATE: 03/17/2005

DATE: March 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28606

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used and purchased cocaine from November 1998 to mid-January 1999 when he was arrested for illegal possession of cocaine. Placed on supervised probation for the offense, he underwent a court-ordered drug evaluation and counseling for cocaine abuse. The drug involvement concerns are mitigated by his abstinence with no intent to abuse any illicit drug in the future. He failed to disclose an Internal Revenue Service wage garnishment in 1998 when he completed his security clearance application, but it was not with an intent to conceal that information. Criminal conduct and personal conduct concerns persist because of his willful failure to file federal and state income tax returns for tax years 1993 through 1999, which have still not been filed because of his lack of due diligence. Clearance is denied.

STATEMENT OF THE CASE

On February 12, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. [\(1\)](#) DOHA 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 drug involvement (Guideline H), criminal conduct (Guideline J) and personal conduct (Guideline E).

On March 1, 2004, Applicant filed his response to the SOR allegations and requested a hearing. The case was assigned to me on July 22, 2004, and pursuant to notice of that date, a hearing was held on August 13, 2004. At the hearing, two government exhibits and six Applicant exhibits were entered into the record. Testimony was taken from the Applicant, as reflected in a transcript received on September 7, 2004.

FINDINGS OF FACT

The government alleged as security disqualifying that Applicant used cocaine with varying frequency, purchasing it five times, from November 1998 to at least January 1999 when he was arrested for illegal possession, and he was treated for cocaine abuse from February 24, 2000 to March 28, 2000. It was also alleged that Applicant failed to timely file his federal and state individual income tax returns for tax years 1995 through 1999, and he falsified material facts on his October 1999 security clearance application (SF 86) by not disclosing that his wages had been garnished to recover unpaid federal income taxes for 1993 and 1994. In his answer, Applicant admitted he abused cocaine approximately five times during the three month period alleged, and on completion of counseling the illegal possession charge was dismissed. He also acknowledged he had not filed his income tax returns but had paid taxes for those years. He admitted he may have answered the garnishment question on his SF 86 wrongly, but attributed it to a misunderstanding of the question. Applicant's admissions are accepted and incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings:

Applicant is a 44-year-old assembler who has been employed by the same defense contractor since March 1979. He seeks a security clearance for his duties.

In December 1991, Applicant and his spouse were divorced after seven years of marriage and two children, sons born in February 1985 and January 1988. Confused initially over his eligibility to claim his children as dependents, Applicant and his spouse agreed that in return for paying her extra funds of between \$600 to \$700 annually, she would not claim their children as dependents on her income tax return. Applicant did not timely file federal or state individual income tax returns for tax years 1993 through at least 1999, in disregard of his known obligation to file those returns. ⁽²⁾

For approximately eight months beginning in January 1998, the Internal Revenue Service (IRS) garnished Applicant's wages to recover delinquent federal taxes of \$6,934.24 (including interest and penalties) for tax years 1993 and 1994.

In November 1998, Applicant began dating a woman who used cocaine. He snorted cocaine with her on five or six occasions over the couple of months. Present three times when she purchased cocaine with funds he contributed, Applicant bought cocaine for their use on two other occasions from her supplier(s) while she was at work. He spent about \$300 total on cocaine during this period. Applicant used the cocaine while he held a company-granted confidential security clearance for his duties with the defense contractor.

In mid-January 1999, Applicant went to a local public transit station to purchase cocaine for him and the woman he was dating. After exchanging \$50 for a half gram of cocaine, Applicant was arrested by an undercover officer and charged with possession of a class B substance (cocaine), a felony. Sufficient facts were found, and he was placed on one year supervised probation, ordered to undergo a drug evaluation, and fined approximately \$150. After his arrest, Applicant stopped dating the woman with whom he used the cocaine. He has abstained from all illegal drug use since and intends no future involvement. Applicant does not knowingly associate with individuals involved with illegal drugs.

On October 4, 1999, Applicant completed a security clearance application (SF 86), disclosing his arrest in January 1999 for possession of a class B substance and his use of cocaine five times from November 1998 to January 1999. Applicant responded negatively to whether his wages had been garnished in the last seven years. Applicant did not list this garnishment because it had been paid in full and he thought it was not necessary to list it.

At the referral of a court appointed drug counselor, Applicant received counseling for cocaine abuse on two occasions between February 24, 2000 and March 28, 2000. No further treatment was required, and on completion of his probation in April 2000 his case was dismissed.

On October 18, 2000, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his illegal drug use and arrest, the wage garnishment and tax levy, and omissions from his SF 86. Applicant admitted his use and purchase of cocaine from November 1998 until his arrest in January 1999. He also confirmed that his wages had been garnished to collect federal income taxes, late fees and penalties for 1993 and 1994, as reflected in his employment files, and admitted he had not filed any federal or state returns for tax years 1995, 1996, 1997, 1998, and 1999. Applicant acknowledged he had been "lazy and stupid . . . irresponsible in neglecting to do so." Applicant expressed his belief that he was probably owed refunds from the state and the IRS for those tax years. Applicant disclosed that his wages were being "garnished" in the amount of \$170 weekly for child support pursuant to court order. Since he had asked the court to take the child support out of his pay, he did not consider it a garnishment so he did not disclose it on his SF 86.

In July 2003, Applicant hired a tax problem resolution firm to assist him in filing his delinquent federal and state income tax returns, and he provided the firm with some financial records.⁽³⁾ As of August 2004, his delinquent returns had not been filed. Applicant has had no contact with the individual attempting to resolve his tax filings since July 2003, but he has made payments totaling \$1,500 to the company for its services. Applicant has not yet completed all the paperwork or provided all the necessary financial documents to the tax resolution firm.

Applicant's state income tax return for tax year 2003 was filed timely on February 27, 2004, with \$275 expected to be refunded to him. On March 3, 2004, Applicant's federal income tax return for tax year 2003 was timely filed. He expected a federal tax refund of \$1,310.

Applicant's ex-wife confirms he has been a good father to their two children. A member of his local union for over 25 years, Applicant served as his union's shop steward as of August 2004. Applicant has demonstrated to the union's president that he can be trusted with sensitive duties.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and adjudicative guidelines, and having assessed the credibility of the Applicant, I conclude the government established its case under guidelines H, J, and E. While Applicant has mitigated the drug involvement (Guideline H) concerns by his abstinence from all illegal drugs since his arrest in January 1999, his demonstrated disregard of his known obligation to file federal and state income tax returns continues to raise doubts for his judgment, reliability, and trustworthiness.

Drug Involvement. Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Applicant's abuse of cocaine on five or six occasions between November 1998 and mid-January 1999 raises significant Guideline H concerns, notwithstanding the limited number of occasions on which he used cocaine. Not only did Applicant use the cocaine while he held a confidential security clearance, but he purchased the cocaine from the supplier(s) of the woman he was dating. One such purchase at a local public transit station led to his arrest for felony possession of a Class B substance.

While Applicant exercised extremely poor judgment in using cocaine while he possessed a company-granted confidential clearance, he has abstained from all illegal drug use since his arrest, and he terminated his relationship with the woman who used cocaine regularly. He also completed the terms of his probation for his drug offense, including two sessions of required counseling. Whereas his involvement with illegal drugs was limited to about five occasions during a short period of time, and he realizes it was stupid of him to become involved with a woman who abused a drug like cocaine, he is not likely to abuse an illegal drug in the future. Mitigating condition (MC) a., *The drug involvement was not recent*) and MC c. *A demonstrated intent not to abuse any drugs in the future*, apply. SOR subparagraphs 1.a., 1.b., 1.c., and 1.d. are resolved in his favor.

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Applicant admits he failed to file his federal and state income tax returns within the time required by law for the tax years alleged. He also did not timely file returns for 1993 and 1994, leading the IRS to assess penalties and interest, and to garnish his wages to collect his back tax debt for those years. By willfully failing to file federal income tax returns for several years, Applicant committed repeated misdemeanor criminal conduct, in violation of Title 26, Section 7203 of the United States Code. That taxes were withheld from his pay and he believed he was entitled to refunds for those years does not make his conduct less criminal. As noted by the DOHA Appeal Board in ISCR Case No. 97-0176, decided January 22, 1998, "The legal obligation to file income tax returns is independent and distinct from whether the taxpayer is entitled to receive a refund or not." DC a. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and b. *A single serious crime or multiple lesser offenses*, apply because of his deliberate and repeated failure to file federal income tax returns.

With the record silent as to whether Applicant timely filed his federal returns for tax years 2000, 2001, and 2002, there is no evidence that Applicant has engaged in criminal behavior since April 15, 2000, when his 1999 return would have been due absent an extension to file. While there is a basis to apply MC a. *The criminal behavior was not recent*, concerns persist about the extent of his rehabilitation. To his credit, Applicant timely filed his federal (and state) income tax returns for tax year 2003. Yet, the issue of his delinquent returns remains unresolved. Aware as of October 2000 that the Department of Defense was concerned about his failure to file, Applicant did not secure the services of the tax resolution firm until July 2003. He has had more than a year since then to locate the required documentation and provide it to the tax resolution firm but has not done so. As of his hearing, he had not filled out the required forms. His testimony that he has been "working on it" is not sufficient to mitigate the concerns over his inaction. SOR subparagraphs 2.a., 2.b., 2.c., 2.d., and 2.e. are resolved against him.

Personal Conduct. 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. Applicant willfully failed to file his state income tax returns for tax years 1993 through at least 1999. Although the government has not alleged the conduct as criminal,⁽⁴⁾ as noted by the DOHA Appeal Board in ISCR Case 98-0810, decided June 8, 2000, a person who repeatedly fails to fulfill his legal obligation to file a return does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. DC E2.A5.1.2.5., *A pattern of . . . rule violations*, under Guideline E is pertinent, and none of the mitigating conditions work to his benefit. In his favor, Applicant acknowledges he was wrong in not filing his returns on time, and his timely filing of his 2003 state return is a step in the right direction. While he has paid about \$1,500 to the tax resolution firm in the past year, his procrastination in collecting his financial records and filling out the required forms casts substantial doubt as to whether he can be counted on to adhere to his security responsibilities. SOR subparagraphs 3.a., 3.b., 3.c., 3.d., and 3.e. are resolved against Applicant.

The government alleged independent personal conduct concerns related to Applicant's failure to disclose the IRS wage garnishment on his October 1999 SF 86. The omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire raises security significant Guideline E concerns if done deliberately. Applicant has consistently denied any intent to conceal that information from the government. In October 2000, Applicant told a DSS agent that he thought it was not necessary to report the garnishment as it had been paid in full. In light of his candid admission at that time to having failed to fulfill his responsibility to file income tax returns for several years, his explanation for not disclosing the garnishment is accepted and warrants a favorable finding as to subparagraph 3.f. of the SOR.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Paragraph 2. Guideline J: 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

Subparagraph 2.e.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 3.d.: Against the Applicant

Subparagraph 3.e.: Against the Applicant

Subparagraph 3.f.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The W-2 wage and tax statements submitted by Applicant as exhibit F confirm Applicant earned sufficient income to where he was required by law to file the returns. In October 2000, Applicant attributed his failure to file returns for tax years 1995, 1996, 1997, 1998, and 1999, to irresponsibility, stupidity, and laziness. At his hearing, he testified that his wages were garnished for tax years 1993 and 1994, and the penalties were so outrageous that the debt almost doubled what he had paid for the year in taxes. (Tr. 47) He expressed a fear that he would be unable to afford the taxes (" . . . because when they garnished my wages it took almost a year to repay them, they took the wages before they took any taxes." Tr. 55). It is not clear when the IRS levied the interest and penalties for 1993 and 1994, although the garnishment

was not instituted until 1998. The record is silent as to whether Applicant timely filed federal and state income tax returns for tax years 2000, 2001, and 2002.

3. When asked at his hearing about the documentation he provided to the tax resolution firm (*see* Tr. 38), Applicant responded:

[Applicant]: Just financial.

Administrative Judge Matchinski: Copies of W-2 forms, things like that?

[Applicant]: I don't think so. I am not positive.

4. Department Counsel did not provide the undersigned with the text of those statutes cited by the government in the SOR (Sections 3 and 25 of Chapter 62C of the state's general laws). The tax laws of the particular jurisdiction currently require every individual inhabitant who receives or accrues during the taxable year state gross income in excess of \$8,000 to make a return of such income on or before the 15th day of the fourth month following the close of each taxable year (Chapter 62C § 6). Any person required to make such a return at the time required by law who willfully fails to do so is guilty of a misdemeanor (Chapter 62C § 73).