

DATE: March 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31428

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Pamela B. Stuart, Esquire

SYNOPSIS

Applicant deliberately falsified his 1990, 1995, and 1998 tax returns. He filed amended returns in 2001 after his conduct came to light during a routine polygraph examination. In 1990, Applicant falsified a final inspection certification for the refinancing of his newly-renovated home. He has failed to mitigate the resulting security concerns under Guideline E (personal conduct) and Guideline F (financial considerations). Clearance is denied.

STATEMENT OF THE CASE

On August 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline E (Personal Conduct) and Guideline F (Financial Considerations). The SOR further informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. ⁽¹⁾

On January 6, 2004, Applicant answered the SOR (Answer) ⁽²⁾ through counsel and requested a hearing. The case was originally assigned to another administrative judge, but was re-assigned to me on November 22, 2004, due to caseload considerations. I convened a hearing in this matter on November 30, 2004. Department Counsel relies on three exhibits (GE 1 through 3), ⁽³⁾ which were admitted without objection. Applicant relies on the documentation presented in his Answer, which was admitted without objection. ⁽⁴⁾ Applicant also testified in his own behalf and presented the testimony of one other witness. I left the record open for 10 days after the hearing to afford Applicant an opportunity to submit via Department Counsel additional relevant information. ⁽⁵⁾ Applicant timely submitted one additional document, which has been admitted without objection as Applicant's Exhibit (AE) A. DOHA received the transcript (Tr) on April 3, 2003.

FINDINGS OF FACT

Applicant admitted the SOR allegation in subparagraph 1.a, but denied all of the remaining allegations. I have incorporated his admission in my findings of fact. Additionally, after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 54-year-old engineer with two bachelor's degrees, one in biology and one in electrical engineering. He also earned a master's degree in electrical engineering in 1976. Except for one year in local government, he has worked in the defense industry and has held a security clearance his entire career. He was appointed to serve as an Assistant Deputy Undersecretary of Defense from 1994 until 1996, after which he returned to private industry. He currently devotes his expertise to research and development of machine vision and artificial intelligence technologies.⁽⁶⁾

As will be seen from the facts that follow, Applicant's personal finances and taxes are rather complex and have been since at least 1990. However, he did not seek any professional tax advice other than using tax preparation services until 2000 or 2001.⁽⁷⁾

In 1996, Applicant was hired by a defense contractor to work in a variety of capacities, including that of Chief Technology Officer. His compensation package included stock options in the company. The company also gave him an interest free loan, which he used along with a second mortgage on his house to purchase additional shares in the company. In 1998, Applicant had to sell his stock and exercise his stock options when the company merged with a larger corporation. He had to refinance his second mortgage to exercise the stock options.

Around the time the merger occurred, Applicant's daughter was preparing to attend a private college for which annual tuition was in excess of \$32,000. Applicant became concerned about having enough money available for his daughter's education, because he knew he would also have to pay significant capital gains taxes on his stock options. When he filed his income tax return for 1998, he accurately stated the stock price for purposes of capital gain, but initially erred by mistaking one of the stocks involved as a long-term gain. When he corrected this mistake, he realized it would cost him more in taxes than he could afford. He subsequently recalculated his return, accurately characterizing the aforementioned stocks, but using an estimated value he knew to be too high so he could lower his tax obligation.

In 1995, Applicant donated a used minivan to charity. He estimated its value at \$2,000 for charitable deductions on his 1995 tax return. He based his estimate on the full blue book re-sale value for that vehicle, but he deliberately failed to take into account mechanical problems and other aspects of the vehicle that would lower its value. Applicant estimates he saved an additional \$1,000 on his taxes that year because of his valuation of the van. He has not submitted an amended return for 1995.

Applicant bought a house in 1980. Over the course of the next decade, he built an addition on the house that more than doubled the available living space, then completely renovated the original house. Throughout construction and renovations, he acted as his own general contractor and hired contractors for work that was beyond his own abilities or that he did not have time to do. This work included framing, roofing, plumbing, electrical work, and so on.

Each major aspect of the new construction and renovation was inspected by local authorities and Applicant received a certificate of compliance after each inspection. When he completed the addition and renovation in 1989, he applied to his bank for refinancing of the mortgage. The bank required a final certification, signed by an authorized inspector, that all work was complete and that the work met code and other specifications. For convenience and expediency, knowing the house was generally complete and within code, Applicant himself signed the final certification form despite lacking any authority to do so.

In 1990, Applicant took advantage of the booming real estate market where he lived and sold the house (with improvements) for more than five times what he paid for it. He bought another house outright with the proceeds from the sale. When calculating the adjusted cost basis of his house for purposes of determining capital gains tax liability on the remainder of the proceeds of sale, he used an erroneous method based on cost per square foot when he should have based his calculations on actual costs of labor and materials. The method he used on his return significantly reduced the tax liability on the proceeds from the sale of his house that were not reinvested in his new house. Applicant thought, at the time he completed his tax year 1990 return, that his accounting method was correct, but he learned shortly after he filed that return that he was mistaken and should have paid more taxes on the proceeds of sale.

When Applicant sold his house in August 1990, he financed the transaction for the buyer through a second mortgage. The parties agreed the buyer would make payments to Applicant and his bank for one year, culminating in a balloon payment for the balance to coincide with Applicant's purchase of a new home he was buying under similar terms. The following year, the buyer defaulted on the loan, and Applicant commenced foreclosure proceedings. Applicant regained possession of the property in late 1991, and began making significant repairs so he could re-sell it, which he did in March 1992 at a price lower than the first sale. He subsequently filed an amended 1991 tax return to reflect the change in circumstances and costs attendant to the sale, repossession, repair, and resale of the house. His calculation of the adjusted cost basis was still predicated on an improper cost per square foot calculation that he knew worked to his advantage for tax purposes.

In July, 2000, Applicant took a routine polygraph examination required because he had access to sensitive compartmented information (SCI) for the program he was supporting at the time. Applicant passed the counter-intelligence portion of the test; however, during a pre-test interview as part of an expanded portion that would consider other factors, such as drugs, alcohol, finances, etc., Applicant offered the above information about his tax returns and the final inspection certificate. During an investigation and interviews that followed, Applicant stated he knew his tax filings and his submission of a fraudulent inspection certificate were deliberate falsifications on his part.⁽⁸⁾ As to the 1998 tax return, Applicant stated he falsified the stock value because he thought he could get away with it. Regarding his 1990 return, Applicant had known for some time before the polygraph test and related interviews that his cost basis calculations were errors in his favor, but he had not acted to correct the calculations in that return when he was interviewed.⁽⁹⁾

Applicant further told investigators that he regarded the Internal Revenue Service (IRS) as an adversary, expressing a strong dislike for that agency for what he felt were its invasive and arbitrary methods. His animosity stemmed from the fact he and his wife had been audited during the 1970s. Applicant stated he was willing to overcome his adversaries by any means possible, including cheating. At hearing, he testified he no longer feels that way about the IRS.⁽¹⁰⁾

As a result of the subsequent investigation into the adverse information yielded by his polygraph-related interviews, Applicant's SCI access was revoked on February 13, 2001. A formal statement of the reasons for the revocation was issued to Applicant on April 2, 2001. He then sought review of the decision through the process available through the agency his company was supporting. On February 6, 2002, the reviewing official upheld the revocation.

As part of the interview process, Applicant was shown the investigators' notes and summaries, and he indicated he agreed with their contents.⁽¹¹⁾ Yet, in his request for agency review, in his response to the SOR in this case, and in his testimony at this hearing, Applicant has claimed he did not tell investigators he knew his falsifications were deliberate. Further, he now claims he remembered after the interview in 2000 that he had made mistakes in his statements to investigators. Applicant did not ask to be re-interviewed so he could correct his mistakes.

During a subject interview in November 2000, Applicant was asked hypothetically whether he would file an amended 1998 tax return if he knew his clearance might hinge upon doing so. He responded he would indeed do so if he knew he would be able to keep his clearance. In April 2001, after receiving the aforementioned account of the reasons his program access was revoked, Applicant filed an amended tax return for the 1998 tax year. As a result, he paid roughly \$3,000 in additional federal and state taxes and interest. In November 2001, Applicant filed an amended return for his 1990, 1991, and 1992 taxes to reflect the changes in capital gains using the proper accounting method for adjusted cost basis and taking into consideration the effect on his capital gains of the repossession, repair work and subsequent resale of the house. The net result was that Applicant's tax liability was less than when he had originally filed his 1990 return. Applicant is current on all his federal and state tax obligations, past and present.

Applicant has produced nine affidavits as well as witness testimony at hearing, all of which support a finding that Applicant is a highly-valued asset in the defense industry's advanced research efforts. The persons providing this information have known Applicant for several years and are familiar with his work in varying degrees. They uniformly praise the quality of his work, his expertise, and his reliability. However, the affidavits and testimony reflect little independent knowledge of the reasons why the government might question Applicant's suitability for continued access.

Applicant and his wife have been married for over 30 years, and they have three children between the ages of 15 and 24. He is currently a founding partner in a company doing business under contract with various DoD and other government agencies.

POLICIES

The Directive sets forth adjudicative guidelines⁽¹²⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, specifically, that information bearing on the question of whether Applicant deliberately falsified his tax returns and a final inspection certificate, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline F (financial considerations).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹³⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹⁴⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽¹⁵⁾

CONCLUSIONS

Guideline E (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.⁽¹⁶⁾ Here, the government's concern centers on Applicant's alleged deliberate falsification of his 1990, 1995, and 1998 tax returns, and his alleged submission of a fraudulent inspection certificate in connection with the refinancing of his home mortgage. Applicant admitted the allegation in SOR ¶1.a that he falsified his 1998 tax return, but denied the remaining allegations. Based on a thorough review of the evidence before me, I conclude the government has presented sufficient evidence to support the remaining allegations under Guideline E, thereby establishing a *prima facie* case for disqualification under this guideline.

As to SOR ¶1.b, Applicant told investigators in November 2000 that he had knowingly overstated on his 1995 tax return the value of a van he gave to charity. The full bluebook value may have been what he declared, but he knew he had failed to adjust the value downward to account for mileage and mechanical defects. He further acknowledged to investigators he saved money on his taxes by doing so. In response to the SOR and in his testimony, Applicant asserts he mistakenly told investigators he was worried about passing the polygraph and offered that he had declared a \$4,000 value for the donated van (as opposed to the \$2,000 on his 1995 Form 8283⁽¹⁷⁾) so he could satisfy for the vagaries of the polygraph process. However, this allegation is based on statements made during a November 2000 interview four months after the polygraph, wherein Applicant stated he deliberately falsified this aspect of his 1995 return. There is no mention in the November 2000 report of a different figure declared such as \$4,000.⁽¹⁸⁾

Regarding SOR ¶1.c, Applicant told investigators that he initially did not realize he had erred in his favor on his 1990

taxes when he calculated the adjusted cost basis of the house he renovated and sold that year. However, he became aware of his error after he filed the return and knew it was an error he ostensibly could have already corrected when he took the polygraph in July 2000. He had previously submitted an amended 1990 return to account for his repossession, repair, and resale of the house he renovated, but apparently did not correct his cost basis mistake. It was not until 2001, after his clearance was revoked and he was seeking review of that revocation, that he filed a correct return for that year. Lastly, as alleged in SOR ¶1.d, Applicant told investigators he had submitted a fraudulent inspection certificate for the sake of expediency when he was trying to refinance his mortgage in 1990. Notwithstanding the fact the house was essentially complete and within code, he lacked any authority to make such a representation to his lenders. The foregoing facts present a pattern of dishonesty and rules violations that warrant application of Guideline E disqualifying condition (DC) 5. [\(19\)](#)

In response to SOR ¶1.a, Applicant asserts that the passage of time and the fact he has since filed an amended return are sufficient to mitigate this conduct. Granted, it has been nearly seven years since he filed his 1998 return. However, over those eight years, the money he saved by his falsification helped him put at least one of his children through college. As with his other falsifications, he gained financially from his deception and was only willing to correct his returns and make restitution when faced with the loss of the clearance he needs for his work.

In response to SOR ¶1.b, Applicant submits he was mistaken when he told investigators he overstated the value of the van. In support of his claim that he correctly valued the donated vehicle, he enclosed with his Answer a bluebook estimate for what purports to be a comparable vehicle. However, this misses the point; that is, Applicant should not have claimed the full value, but should have reduced the value (even if comparable to the estimate he submitted here). Unlike his other returns in question, he has not corrected this error. By itself, this allegation may seem a trivial matter that should not be disqualifying. However, when taken in context of the entire record in this case, even a relatively minor transgression is significant to a determination of one's suitability for clearance.

In response to SOR ¶1.c, Applicant again insists his miscalculation in 1990 of the adjusted cost basis of his house was a mistake. However, he has acknowledged that the mistake worked in his favor and that he knew of the mistake after he filed his initial return. Yet, when he filed an amended return to account for the subsequent resale of his house, he still did not correct his error. Applicant now relies on the fact that in 2001 he filed amended returns to correct his errors and has made good on any taxes he may have owed.

As to SOR ¶1.d, Applicant argues he never actually submitted an inspection certificate and never told investigators that he committed such a deliberately fraudulent act. He insists he thought about doing so, but never had to as the bank that was refinancing his mortgage never needed the certificate. However, aside from his denials, Applicant has submitted nothing to refute this allegation that is based on Applicant's own statements to investigators. On balance, I am inclined to give more weight to Applicant's statements to investigators made before he knew his clearance would be revoked.

Indeed, with respect to Applicant's November 2000 statements about these events, if Applicant felt after the interviews that he had mis-spoken, he could have requested another interview. He is an intelligent, experienced professional who, at the time of the 2000 investigation, had nearly 25 years experience working in highly classified environments, including having served as a high-level DoD officer. It does not follow that he would leave such obvious errors unaddressed.

Of the listed Guideline E mitigating conditions (MC), only MC 1-[\(20\)](#) might have some applicability here. (The others are simply inapposite to the facts of this case.) However, I conclude Applicant has failed to present evidence that convincingly refutes the government's information. His uncorroborated denials are insufficient in this regard. Additionally, his admissions at the time these allegations came to light, his stated willingness to cheat the government out of its tax revenues, and his failure to correct his tax returns until faced with the imminent loss of his security clearance all serve to undermine Applicant's position. I conclude Guideline E against the Applicant.

Guideline F (Financial Considerations). A security concern arises when it is shown that a person is either unwilling or unable to manage his finances so that he avoids unreasonable delinquencies. Further, a person who is overextended financially is at risk of engaging in illegal actions to obtain money. [\(21\)](#) In SOR ¶2, the government has simply cross-referenced the SOR ¶1 allegations about Applicant's personal conduct as also disqualifying because of financial

considerations. In response, Applicant has assumed the gravamen of SOR ¶2 is a concern about unexplained affluence. To that end, Applicant has provided substantial information about Applicant's finances and has demonstrated that Applicant is very well-off financially. However, at certain times since 1989, Applicant has been either unwilling or unable to pay the full amount of taxes he owed. Proceeds from the 1990 sale of his house were enough to pay for another house outright, but he would still owe taxes on the remaining profit. While he should be credited with filing what he thought was a correct 1990 return, when he realized that an amended return using correct cost basis calculations would result in a higher tax obligation, he apparently ignored his error until 2001. Further, when faced with a high tax bill and his daughter's pending enrollment at an expensive university, he deliberately falsified the value of his 1998 stock options to lower his tax liability. In 1995, he knowingly overstated a charitable deduction to save himself about \$1,000 in taxes. Lastly, Applicant falsified an inspection document so he could get financing for his house more quickly than if he had waited for an actual authorized signature.

Based on the foregoing, the government's chief concern here is that Applicant has demonstrated a willingness to engage in deceptive or fraudulent actions for financial gain. The same information that supports the government's allegation in SOR ¶1 also supports the allegation in SOR ¶2.a, thereby establishing a *prima facie* case for disqualification under Guideline F. Based on the available information, I conclude Guideline F DC 2⁽²²⁾ applies. Of the listed mitigating conditions, only MC 1⁽²³⁾ may apply in that the last incidence of Applicant's falsified tax returns occurred in 1998. However, because Applicant did not act to correct his returns until 2001, and only when faced with adverse consequences, I do not believe he is entitled to the full effect of MC 1. In any event, MC 1 alone would be insufficient to mitigate the government's concerns in this regard. I conclude Guideline F against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. A fair and commonsense assessment⁽²⁴⁾ of the record before me shows that Applicant on several occasions deliberately manipulated the information in his tax returns. He did so either because he needed the money, or he had a low opinion of the IRS, or because he simply thought he could get away with avoiding his responsibilities. In fairness, he has made good on his taxes; however, the more important issue here is the lack of resolution of the doubts about his judgment and honesty that his conduct has fostered. His delay in making good on his taxes until confronted with the loss of his clearance serves only to sustain those doubts. Because doubts about one's suitability for clearance must be resolved in favor of the government, I must conclude it is not clearly consistent with the national interest to grant Applicant's request for a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Paragraph 2, Financial Considerations (Guideline F): AGAINST THE APPLICANT

Subparagraph 2.a Against 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 the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant's Answer consists of a 28-page letter and brief by Applicant's counsel, a 17-page responsive affidavit from Applicant and 32 enclosed exhibits in support of Applicant's affidavit.
3. GE 3 consists of 11 documents identified as GE 3.a through 3.k.
4. Tr., p. 9 - 10.
5. Tr., p. 54.
6. Answer, enclosure 2; GE 1; Tr., p. 20 - 24.
7. Tr., p. 27 - 28.
8. GE 3.h.
9. Tr., p. 37 - 38.
10. GE 3.h; Tr., p. 32 - 33.
11. GE 3.h.
12. Directive, Enclosure 2.
13. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
14. *See Egan*, 484 U.S. at 528, 531.
15. *See Egan*; Directive E2.2.2.
16. Directive, E2.A5.1.1.
17. Answer, enclosure 9; Tr., p. 28 - 29.
18. GE 3.h.
19. Directive, 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;
20. Directive, E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
21. Directive, E2.A6.1.1.
22. Directive, 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;
23. Directive, E2.A6.1.3.1. The behavior was not recent;
24. Directive, E2.2.3.