DATE: December 23, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-14613

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

A. Bates Butler, III, Esquire

SYNOPSIS

This 44-year-old senior engineer has worked for the same defense contractor since 1987. Applicant was in the practice of having the maximum amount in taxes withheld from his paycheck. This made him eligible for a refund of overpayment each year. In 1993, he began not filing his federal and state income tax returns on the mistaken belief that he did not have to file unless he wanted a refund. He did not realize he was incorrect until he met with a Defense Security Service agent in 2000, after which he timely filed his subsequent returns and filed all of his missing back returns. He had in fact overpaid his taxes each year since 1993. Applicant's conduct in not filing was knowing but not willful, so there has been no criminal violation as alleged. Clearance is granted.

STATEMENT OF THE CASE

On February 19, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On April 15, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me on July 9, 2003. A Notice of Hearing was issued on August 8, 2003, setting the hearing for August 26, 2003. At the hearing, the Government did not call any witnesses, but offered three exhibits, which were marked for identification and admitted as Government Exhibits (GX) 1-3. The Applicant testified, called one other witness, and offered seven exhibits, which were marked and admitted as Applicant's Exhibits (AX) A-G. The transcript (Tr) was received at DOHA on September 8, 2003.

FINDINGS OF FACT

Applicant is a 44-year-old systems engineer for a major defense contractor and has been employed by this company since 1987. The SOR contains two allegations under Guideline J (Criminal Conduct). In his response to the SOR, Applicant "admit[s he] had failed to [timely] file [his federal and state] tax returns for the years stated in paragraphs 1, 1.a., and 1.b. Those admissions are incorporated herein and are considered as Findings of Fact. He denies, however, that had "willfully neglected [his tax] obligations."

After considering the totality of the evidence derived from the contents of the case file, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant knowingly but not willfully failed to timely file his federal income tax returns for Tax Years (TY) 1993, 1994, 1995, 1996, 1997, 1998, and 1999, all in violation of federal law, specifically 26 U.S.C. 7203;

1.b. - Applicant knowingly but not willfully failed to timely file his State A income tax returns for TY 1993, 1994, 1995, 1996, 1997, 1998, and 1999, alleged to be in violation of Section 43-301, State A Revised Code, as to which civil and criminal penalties apply, under Sections 42-1125 and 42-117 of the State A Revised Code.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

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

Conditions that could raise security concerns and may be disqualifying include:

1. None that are supported by the totality of the evidence.[(1)]

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Under 26 U.S.C. 7203 (Willful failure to file return, supply information, or pay tax), "Any person required under this title to pay any estimated tax or tax, or *required* by this title or by regulations made under authority thereof *to make a return*, keep any records, or supply any information, who *willfully fails to* pay such estimated tax or tax, *make such return*, keep such records, or supply such information, at the time or times required by law or regulations, *shall, in addition to other penalties provided by law, be guilty of a misdemeanor* and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Emphasis added).

The term *"required,"* [to file] as used in section 7203, has been unsuccessfully challenged in a variety of cases over the years. Section 6012(a)(1)(A) of the Internal Revenue Code requires that "Every individual who earns a threshold level of an income [not disputed in this case] must file a return." *U.S. v. Pottorf*, 769 F. Supp.1176, 1183 (D. Kansas1991) and failure by such a person to timely file a return subjects the individual to criminal penalty." Id., citing 26 U.S.C. 7203). The criminal violation in such cases occurs when the required return is not timely filed.

Applicant admits he knowingly did not timely file his federal and State A income tax returns for TY 1993 to 1999, i.e., seven years and a total of 14 returns not timely filed. In his response to the SOR, Applicant states that all of the cited returns, both federal and state, have now been filed and no money is owing, which is corroborated by his documentation. He adds that he had "always ensured that [he] had paid all taxes on time and in excess, [by withholding, and therefore] cannot admit to willfully neglecting [his] obligations." A memorandum from the State A tax authorities, dated August 22, 2003, four days before the hearing, verifies receipt of Applicant's State A income tax returns for TY 1993 to 2002. The second page records the receipt in June 2003 of Applicant's returns for 2000, 2001, and 2002, as well as those for 1993-1999, cited in the SOR. (AX A).

As I understand Applicant's explanations, he believed that by authorizing federal and state income tax withholding by payroll allotment, in an amount he believed would more than cover his tax obligations for that year, he had fulfilled his legal obligations under federal and state tax laws and he was not required to file a tax return for those same years. As his counsel states it in his Hearing Memorandum, Applicant "mistakenly believed he was not required to file income tax returns unless he sought refunds."

Applicant testified that he joined Company X in 1987, and the company changed ownership and name twice before reaching its present name and ownership status. (Tr at 26). In effect, therefore, Applicant has worked for his present employer since 1987. Because of the changes in the company, Applicant was transferred from State B to State A in about 1993. (Tr at 27). Among the things he did, was technical writing. (Id.). Around this period, Applicant began maximizing the amount of his withholding of taxes, to insure he would "never get behind on paying taxes." (Tr at 30). Specifically, in the "'93-'99 time frame," Applicant believed that "to get a refund, you had to file a return, but that was the reason to file the return." (Id.). This belief arose while in school, when some of his graduate student friends, with low incomes, apparently told him that they did not need to file a tax return. (Tr at 30). It was during this period, 1977-1982, that he formed the beliefs about filing income tax returns that led to the present circumstances. He put this memory together with the IRS 's failure to react promptly when he did not file his TY 1993 return and formed what he now concedes was the wrong impression, that . . .you didn't have to file a return in general. You filed a return to get a refund." (Id.).

Applicant graduated from college in 1982, and began working for a variety of companies, and filed federal and state income tax returns up to 1993, when he stopped filing. (Tr at 36, 37). In that year, he was on extensive travel, and "never even thought of taxes at that point." (Tr at 30). During this same period, he also stopped consistently filing for reimbursement from his company for his travel expenses, car, hotel, meals, etc. "Getting the job done was my highest priority." (Tr at 29). After the 1993 tax year, when he missed the filing date because of his heavy work schedule, he continued not filing his federal and state income tax returns, because he "had already missed one and the IRS didn't seem to have any kind of problem with [it.]" (Tr at 31). As he worked more and more overtime, "it seemed less and less

important to get . . . that last bit of return." He knew "he "could file [the] return later and get the return later, so it seemed less important." (Tr at 31, 32). He was aware that courts sometimes handled tax cases, but he never researched the federal or state tax laws to see if his understanding was correct or not, and he never discussed his belief with his colleagues at work. (Tr at 45, 46).

In this area of his life, Applicant's thinking was seriously off track, although he did not intend to defraud anyone. It was not until October 2000, when he was interviewed by an agent of the Defense Security Service (DSS), and was advised to "remedy the situation," that he started collecting W-2s in preparation for the filing of the omitted returns. (Tr at 32 and GX 2). Applicant pointed out he overpaid his taxes each year, and denies he had the intent to defraud the government. (Tr at 33). As to how he knew he would have a tax refund due every year, his explanation is that he saw what occurred the first year, and then gained confidence in his belief that the sums withheld in the following years were adequate to cover his tax obligations. (Tr at 45).

Applicant's contention is that his conduct was not "willful," because he honestly, although mistakenly, believed he was not required to file income tax returns unless he sought refunds." (Hearing Memorandum). It is a defense against willfulness if the individual "believes in good faith that he or she has done all that the law requires, that person cannot be guilty of criminal intent to willfully fail to file a tax return." (*Powell, supra*, at 1209). So, if a person *subjectively* believes in good faith that the tax laws do not apply to him, he has not acted willfully. The *objective,* reasonable man standard does not apply, and the question is whether Applicant subjectively believed, in good faith, that he did not have to file a tax return unless he was seeking a refund.

Over the past six decades, the Supreme Court has given a special meaning to the terms "willful" and "willfully" in criminal tax offenses because of the complexity of the tax laws." (*Cheek v. United States*, 498 U.S. 192, 199, 200 (1991)). The Court's rationale is that "the proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." In response to the Court's's decisions, Congress has softened the impact of the common-law presumption that ignorance of the law is no excuse by making specific intent to violate the law an element of certain federal criminal tax offenses. (*See, Bates v. United States*, 522 U.S. 23 (1997)).

This an unusual case for a number of reasons. There is no evidence that the U.S. Department of Justice initiated any criminal or civil action against Applicant. There is no doubt that Applicant did not timely file his federal and state income tax returns for TY 993-1999. There is also no doubt that he knew he had not filed the returns. Since both the federal and state tax laws cited in the SOR require "willfulness" to prove a violation, I must decide whether Applicant's knowing actions were also willful, as that term is used in the tax law and cases.

I have considered arguments of both counsel. I am familiar with those cases cited by Applicant's counsel s in the Hearing Memorandum. Counsel is correct that 26 U.S.C. 7203 applies only if the failure to timely file a federal income tax return was "willful." As I understand the case law, Applicant's failure to file was obviously "knowing, " but not "willful."[(2)]

The cases cited by Applicant, specifically *U.S. v. Powell*, 955 F.2d. 1206, 1209 (9th Cir.1992) and *Cheek v. U.S.*, 498 U.S. 192, 111 S. Ct. 604 (1991), clarify the definition of "willfulness." The difference between those cases and the present one is that Applicant's conduct did not show any intent to defraud the government of any money and, in fact, Applicant overpaid his tax obligation for all of the seven years. There is clearly questionable judgement, but under our facts, I do not find the conduct to be criminal, and that is what is alleged.

I conclude that Applicant allowed himself to be led astray by his misunderstanding of what he what he thought he had heard while in graduate school many years ago, and by his assumption that the lack of any quick response by the IRS to his not filing in 1993 means that he was not required to file in succeeding years. His lack of any effort over the years to uncover the realities and legalities of his beliefs is puzzling, but it suggests a combination of procrastination and immaturity, even at his age, to allow this situation to have gone on for so long, and at such cost to himself. In light of the entire record, I conclude that the evidence does not establish the applicability of either of the Disqualifying Conditions under the Criminal Conduct guidelines.

FORMAL FINDINGS

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

Guideline E (Personal Conduct) For the Applicant

SOR 1.a. For the Applicant

SOR 1.b. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent

with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

Administrative Judge

1. I find that Applicant's conduct was not willful and therefore was not a criminal violation of the federal and state tax laws alleged in the SOR. Assuming, for the sake of argument, that the failure to file the cited returns were each criminal violations, then Disqualifying Conditions (DC) 1 (any criminal conduct . . .) and DC 2 (a single serious crime or multiple lesser offenses) would apply. However, Mitigating Condition (MC) 1 (the criminal behavior is not recent) is applicable; MC 2 (the crime was an isolated incident) is not strictly applicable since there were a total of 14 missed filings over seven years, but some mitigation is found in that the missed filings were part of a single erroneous belief and, taken together, constitute a single area of misconduct within an otherwise positive life. MC 5 is also applicable since Applicant's statements, conduct, and tax filings over the past three years are clear evidence of successful rehabilitation. I conclude that the three mitigating conditions, taken together, outweigh the cited disqualifying conditions.

2. The word "willfully" is "a word of many meanings," whose construction is often dependent on the context in which it appears. *See, e.g., Spies v. United States*, 317 U.S. 492 , 497 (1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As the Supreme Court explained in *United States v. Murdock*, 290 U.S. 389 (1933), a variety of phrases have been used to describe the concept of willfulness. As a general rule, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." (*See*, *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).