

KEYWORD: Financial; Criminal Conduct; Personal Conduct

DIGEST: Applicant is an unmarried, 49-year-old employee of a federal contractor. He has a history of late filing of income taxes. He filed extensions, paid in amounts equal or greater than what he estimated he owed, but did not request further extensions as required by law, and he still has not filed his 2002 return. A period of financial instability and aberrant social behavior were a result of a contentious divorce proceeding. These were isolated incidents occurring over seven years ago. His late filing of tax returns is a pattern of violations, an indication of dishonesty, that continues today. He successfully mitigated the security concerns about financial considerations, but failed to mitigate criminal conduct and personal conduct concerns. Clearance is denied.

CASENO: 03-25024.h1

DATE: 05/31/2006

DATE: May 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25024

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS Applicant is an unmarried, 49-year-old employee of a federal contractor. He has a history of late filing of income taxes. He filed extensions, paid in amounts equal or greater than what he estimated he owed, but did not request further extensions as required by law, and he still has not filed his 2002 return. A period of financial instability and aberrant social behavior were a result of a contentious divorce proceeding. These were isolated incidents occurring over seven years ago. His late filing of tax returns is a pattern of violations, an indication of dishonesty, that continues today. He successfully mitigated the security concerns about financial considerations, but failed to mitigate criminal conduct and personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

On December 29, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR alleged facts under Guidelines F (financial considerations) and J (criminal conduct) 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 Applicant's security clearance. At the hearing, the government moved to add a third guideline to the SOR, Guideline E (personal conduct). The motion was granted.

In a written statement dated March 4, 2005, Applicant responded to the allegations in the SOR, and requested a hearing. The case was previously assigned to another administrative judge on June 13, 2005, but was reassigned to me on September 23, 2005, due to caseload considerations. Notice of Hearing was issued October 6, 2005, scheduling the hearing for October 18, 2005. The hearing was held as scheduled. The transcript (Tr.) was received October 31, 2005. At the hearing, the government offered seventeen exhibits, Applicant submitted eighty-one exhibits, the government objected to exhibits 1, 9-31, which objections were sustained. Applicant testified in his own behalf.

FINDINGS OF FACT

Applicant admitted some allegations with explanations which I categorize as a denial. He denied the remaining

allegations. After a thorough review of the record as a whole, I make the following findings of fact:

Applicant is a unmarried, 49-year-old employee of a federal contractor.⁽¹⁾ He has held a security clearance since 1980.⁽²⁾ Applicant was involved in a contentious divorce proceeding lasting from March 1999 until September 2001.⁽³⁾

Applicant's deficiency from a repossession in the amount of \$9,245.00 is in litigation.⁽⁴⁾ A \$383.00 debt to a university is paid.⁽⁵⁾ All tax returns except 2002 have been filed.⁽⁶⁾ The year 2002 provided other complications for Applicant. In January, his father was diagnosed as terminally ill. In March he received notice to vacate his residence, as it was to be sold as part of the divorce property settlement. In May his father died. He bought a new house in June. Around July 1st, he was involuntarily terminated from his employment because his employer's contract with the government terminated. He lived on unemployment benefits for 4 months, then found work with his current employer.⁽⁷⁾ He was attempting to keep his mortgage current, he was still litigating post-divorce motions, his retirement plans were frozen so he could not use those assets to pay debts, and he was living on \$300 per week.⁽⁸⁾ His car was repossessed, the creditor demanded payment in full on the contract, he thought it was sold, and believed he was entitled to a set-off.⁽⁹⁾ The matter is in litigation.⁽¹⁰⁾

At the time the divorce proceedings commenced, Applicant and his former spouse had a negative net worth of (\$450,000.00).⁽¹¹⁾ He and his ex-wife battled constantly over a division of assets and liabilities.⁽¹²⁾ She did not cooperate with him in trying to maintain financial stability during the 2 ½ year divorce process. The parties owned real estate in another state, which was rented. Applicant's then spouse told the tenants they were selling the house (which was untrue), the tenants vacated, the parties were not able to rent the property, they could not keep up with the mortgage payments, and the mortgage was foreclosed.⁽¹³⁾ When he filed bankruptcy, the creditors looked to his former spouse for payment. She eventually filed bankruptcy, and the creditors then began contacting Applicant for payment. The parties had operated a day-care business, but this too, collapsed during the divorce.⁽¹⁴⁾

He entered a guilty plea to a DUI in December 1999, and received a suspended execution of one year in jail, \$550.50 in fines and costs, probation, and a 90-day license suspension.⁽¹⁵⁾ After the divorce had been filed the children were in placed in temporary joint physical custody with their parents. In July 1999, Applicant was picking up the children for his turn of visitation, his son wanted to ride in the front seat, his former spouse had a problem with that, and an argument ensued. She called the police alleging that he hit her. He denied that to police but was arrested anyway.⁽¹⁶⁾ He was charged with domestic battery, was placed in a diversion program, and the charges were dismissed in October 2000.⁽¹⁷⁾

Applicant has a history of late-filing his income tax returns. He filed his 1995, 1996, and 1997 returns in the spring of 1998.⁽¹⁸⁾ His 1999 return was filed timely on April 15, 2000.⁽¹⁹⁾ Returns for 2000, 2001, and 2003 were filed on April 15, 2005.⁽²⁰⁾ He estimated his 2002 tax to be \$8,200, filed an extension, and paid \$10,300 to insure that he paid any

taxes due. ⁽²¹⁾ Tax returns for 2004 were timely filed on April 15, 2005. ⁽²²⁾ The return for 1998 was filed September 27, 2003. ⁽²³⁾ Applicant filed extensions in those years that were not timely filed, but did not request additional extensions after the automatic extensions expired. ⁽²⁴⁾ No taxes were ever due and he was unaware that additional extensions needed to be requested. ⁽²⁵⁾ His reasons for late-filing include he is a single father living 170 miles from his employment, the contentious divorce including post-trial motions and litigation through February 2005, the aforementioned financial crisis in 2002, and an inability to hire professional tax preparers due to cost. ⁽²⁶⁾ He is negotiating with the IRS to conclude matters on his 2002 returns. ⁽²⁷⁾

Applicant's employer's performance reviews indicate a competent employee, a team player, and one making important contributions to the company's mission. ⁽²⁸⁾

POLICIES

"[No] one has a 'right' to a security clearance." ⁽²⁹⁾ 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." ⁽³⁰⁾ 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information." ⁽³¹⁾ Eligibility for a security clearance may be adjudicated using 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 factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

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. ⁽³²⁾ 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. ⁽³³⁾

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁽³⁴⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽³⁵⁾ 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 judgment, reliability and trustworthiness of one who will protect the national interests as his or his 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.⁽³⁶⁾ Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, not actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the evidence as a whole, I find the following guidelines most pertinent to an evaluation of the facts of this case:

Guideline F: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts;

Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness; and

Guideline E: 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.

CONCLUSIONS

Financial Considerations. Financial Considerations. The government has established its case under Guideline F. Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1. arises where there is *A history of not meeting financial obligations*. Similarly, FC DC E2.A6.1.2.3. applies where the information shows an *Inability or unwillingness to satisfy debts*. The available information demonstrates Applicant has a history of not meeting his financial obligations. He has been delinquent in payments on numerous accounts and has been delinquent in filing his income tax returns. I conclude that FC DC E2.A6.1.2.1. and FC DC E2.A6.1.2.3. apply.

The only time he experienced trouble was during the time of his divorce. He had property repossessed, lost his job through no fault of his own, and the only unpaid debt involves an automobile repossession which is still in litigation. Tax returns from 1995 through 2004 (except 1999 and 2004) were filed late. He filed requests for automatic extensions and insured that adequate funds were paid to cover any taxes owed. He usually received refunds when the returns were filed. The time periods both before and after the divorce show Applicant as meeting his financial obligations. And there is no evidence of Applicant's unwillingness to satisfy his financial obligations. Since 2004 he has had the ability to keep his obligations current. He did the best he could do under the given circumstances. The Directive sets out Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.3. (*The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment or a death or divorce)*). Applicant experienced all three. FC MC E2.A6.1.3.3. applies.

FC MC E2.A6.1.3.6. may apply where (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve bad debts*). Applicant has paid all debts except the repossession deficiency which is still in litigation. He believes he was not given credit for the subsequent sale of the vehicle by the creditor. He has a right to pursue legal redress if he feels he has been wronged. All returns except 2002 were filed, there was never any tax owing, and as detailed above, 2002 was an extremely bad year for Applicant. He paid in over \$2,000.00 more than he anticipated owing on the 2002 return. I find FC MC E2.A6.1.3.6. applies, and find Guideline F for Applicant.

Criminal Conduct. The government has established its case under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) applies. Applicant admitted his criminal conduct involving the DUI and domestic assault. He also admitted late filing 8 of 10 years' tax returns.

Applicant failed to timely file his state and federal income tax returns since 1995, with only 1999 and 2004 filed timely. He filed for automatic extensions, often paid in more than he thought he would owe, and usually received refunds. His 2002 remained to be filed. Applicant did not understand that subsequent extensions must be requested from the taxing authorities once the automatic extension date expires. He normally received a refund so his belief was that if he was entitled to a refund, the IRS and state taxing authorities were not as concerned about when a person files a return because there is no money owed. Ignorance of the law is no excuse. 26 U.S.C. §7203 states: "Any person required under this title to pay any...tax, or required ...to make a return, who, willfully fails to pay such ...tax, at the time...required by law or regulations, shall...be guilty of a misdemeanor." I find his failure to file to be willful.

Regarding the other two crimes, Criminal Conduct Mitigating Conditions CC MC E2.A6.1.3.1. *The criminal behavior was not recent*, and CC MC E2.A6.1.3.2. *The crime was an isolated incident* are applicable. The December 1999 DUI is mitigated under these two factors. Also mitigated under these conditions is the July 1999 domestic abuse charge. As he is divorced the conduct is not likely to occur again. But because of his problems with his tax returns, I find Guideline J against Applicant.

Personal Conduct. The government has established its case under Guideline E. Personal conduct disqualifying conditions (PC DC) include PC DC E2.A5.1.2.4. *(Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress)*, and PC DC E2.A5.1.2.5. *A pattern of dishonesty*.

The government questions Applicant's trustworthiness because of his history of willful violation of 26 U.S.C. §7203. There are no other allegations of dishonesty or questionable conduct. Applicant filed extensions. He was aware the tax codes require that a taxpayer must pay an amount necessary to pay the estimated taxes due when he files the extension. Applicant filed for his extensions with that understanding and paid in sufficient or greater amounts to pay his taxes due. What he failed to do and what is the crux of this issue is his failure to request additional extensions. When the automatic extensions expired, it was his obligation to file for new extensions, and by failing to do so and waiting several years to ultimately file the returns, he broke the law. It is a continuing pattern of dishonesty and it continues up to this time. I find PC DC E2.A5.1.2.4. and PC DC E2.A5.1.2.5. apply.

In the face of Applicant's repeated acts of violating the income tax laws, his favorable character evidence and employment contributions are not enough to absorb security concerns extant with the Government over his failure to abide by the law. There are no mitigating factors that apply. Accordingly, I conclude the SOR allegations under Guideline E Against Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. His employer's performance review indicate Applicant is a part of a team effort and is progressing nicely at his job. He has held a security clearance for over 25 years. But his violation of the tax laws and associated personal conduct, raise reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Clearance is denied.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3

of the Directive, are:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a. For Applicant

Subparagraph 1.b. For Applicant

Subparagraph 1.c. For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a. Against Applicant

Subparagraph 2.b. Against Applicant

Subparagraph 2.c. Against Applicant

Subparagraph 2.d. Against Applicant

Subparagraph 2.e. Against Applicant

Subparagraph 2.f. Against Applicant

Subparagraph 2.g. Against Applicant

Subparagraph 2.h. Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a. Against 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. Clearance is denied.

Christopher Graham

Administrative Judge

1. Government Exhibit 1 (*Standard Form 86 (SF 86) Security Clearance Application*, signed January 21, 2003) at 1.

2. *Id.* at 8; Applicant's Response to Interrogatory 11, dated June 24, 2003, at 2.

3. Tr. at 14,16.

4. Tr. at 12.

5. *Id.*

6. Tr. at 13.

7. Tr. at 39-40.

8. Tr. at 30.

9. Tr. at 31-32.

10. Tr. at 12.

11. Tr. at 46.

12. Tr. at 14-18.

13. Tr. at 46-47.

14. Tr. at 14-18, 29-34.

15. Tr. at 19.

16. Tr. at 29.

17. Tr. at 19-20, 27-29.

18. Applicant's Exhibit 6 (Answers to Interrogatories, dated August 6, 2004) at 1.

19. *Id.* at 2.

20. Tr. at

21. Tr. at 37.

22. Tr. at 44.

23. Applicant's Exhibit 43 (1998 U.S. Individual Income Tax Return, dated September 27, 2003) at 2.

24. Tr. at 37-43; Applicant's Exhibit 6, *supra*, at 4-B.

25. *Id.*

26. Applicant's Exhibit 7 (Answer to Statement of Reasons, dated March 4, 2005) at 2; Applicant's Exhibit 6, *supra*, at 1-2.

27. Applicant's Exhibit 65 (Letter to IRS dated July 18, 2005); Applicant's Exhibits 66-68 (Letters from IRS dated August 3, 2005, August 17, 2005, and September 19, 2005).

28. Applicant's Exhibits 2-4, Performance Reviews for 2003 through 2005.

29. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).

30. *Id.* at 527.

31. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).

32. *Egan, supra*, at 531.

33. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

34. *See* ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

35. *Id.*, at 3.

36. *See Egan*; Directive ¶ E2.2.2.