

DATE: May 27, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07897

DECISION OF ADMINISTRATIVE JUDGE

JACQUELINE T. WILLIAMS

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is an electrical engineer for a defense contractor and he has had a security clearance since 1977. He has failed to file both his federal and state income taxes for tax years 1998 through 2001. He has not shown that he will be motivated to timely file his taxes in the future, and he has already established a pattern of delinquencies when it comes to filing his taxes. Applicant's untimely filing of past due tax returns precludes a finding that it is now clearly consistent with the national interest to grant him access to classified information. 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 under Executive Order 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 (the "Directive"). On October 23, 2003, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision: security concerns under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

On August 11, 2004, this case was assigned to another administrative judge but because of caseload considerations, on February 10, 2005, the case was reassigned to me. A Notice of Hearing was issued on February 28, 2005. The hearing was held on March 31, 2005. The transcript (Tr.) was received on April 11, 2005. The record was kept open until April 15, 2005 to give Applicant an opportunity to file any additional relevant evidence. Applicant filed additional evidence on April 15, 2005. Department Counsel did not object to this additional evidence being admitted into the record.

FINDINGS OF FACT

Applicant admitted all of the factual allegations contained in ¶¶ 1, 2, and 3 of the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following findings of fact:

Applicant is a 50-year-old married man; he and his second wife married in 2004. He has been employed as an electrical engineer for a defense contractor since 1994. He makes about \$100,000 annually. In the past, he has had both secret and top secret clearances and has held a security clearance since 1977.

Applicant separated from his first wife in 1996. While they were together they jointly filed taxes. However, he failed to file his taxes in 1998, 1999, 2000, and 2001. The couple divorced in June 2002, and Applicant, according to his sworn statement dated November 6, 2002, intended to gather the information needed to file his taxes for 1998 through 2001 but never followed through. He claims that he always received money back from the government after he filed his taxes and believes the same should be true for the aforementioned tax years when he did not file taxes.

At the hearing, Applicant testified that in addition to not filing taxes for the period stated in the SOR, he has not filed taxes in tax years 2002 and 2003 and he does not expect to file 2004 taxes until the other tax years have been filed. Taxes for the years 2002, 2003, and 2004 were not mentioned in the SOR; however, his behavior of not filing taxes for 2002, 2003, and 2004 is for the limited purpose of continuing to establish his pattern of delinquencies when it comes to filing his taxes.

While married to the first wife, they purchased a house as their primary residence with the financial assistance of his father and his ex-wife's parents. Later, they purchased an additional 22-acre tract of land, which surrounded their house. In July 1996, he and his first wife separated. His mother was also living on an adjacent property on their land in about 1996 and she died in early 1998. Applicant entered into and executed a settlement agreement with his ex-wife regarding the land. He believes that his personal house and land is now valued well over \$400,000 and he continues to sell off other lots to improve his financial situation. However, he had paid no taxes on these sales because he has not filed federal or state income tax returns in several years.

Applicant received rental income from his house because after his separation from his first wife he rented out rooms in his primary residence for a number of years. Additionally, he inherited his mother's real property upon her death, and he rented out her house before actually selling it. He did not report this rental income and has paid no taxes on it, if taxes were due.

On April 15, 2005, Applicant submitted documentation showing he filed delinquent federal and state taxes for the years 1998, 1999, 2000, and 2001. Applicant incurred tax liability not only for his 1999 and 2000 federal returns but also for his 1999, 2000, and 2001 state returns. As of April 15, 2005, he had not filed his 2003 and 2004 federal and state tax returns.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are:

- (1) the nature and seriousness of the conduct and surrounding circumstances;
- (2) the frequency and recency of the conduct;
- (3) the age of the applicant;
- (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences;
- (5) the absence or presence of rehabilitation, and

(6) the probability that the circumstances or conduct will continue or recur in the future.

Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁾ The government has the burden of proving controverted facts.⁽²⁾ The burden of proof in a security clearance case is less than a preponderance of the evidence.⁽³⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁵⁾

No one has a right to a security clearance⁽⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁸⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽⁹⁾ 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.

Based upon consideration of all the evidence, I finding the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline F - Financial Considerations: 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 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.

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

Initially, the Government has the responsibility to present evidence under the disqualifying conditions that demonstrate it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate allegations in the SOR in order to overcome the doubts raised by the Government and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provision of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching a fair and impartial overall common sense determination, the administrative judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

The government has established its case under Guideline F. Applicant's admissions and the government's documentary evidence support the application of three potentially disqualifying conditions under Guideline F of the Directive, specifically ¶ E2.A6.1.2.1, *a history of not meeting financial obligations*, ¶ 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*, and ¶ E2.A6.1.2.3., *inability to satisfy debts*. These conditions raise security concerns because a person who is financially overextended is at risk of having to engage in illegal acts to generate funds.⁽¹⁰⁾ Applicant has not offered any evidence to show that he reformed and can now be relied upon to handle his financial affairs in a responsible manner. The SOR alleged Applicant had not filed tax returns

for tax years 1998 through 2001. At the hearing, Applicant stated that he had not yet filed tax returns for tax years 2002 and 2003. During the periods 1998 through 2001, he has rented property and received rental income, he has sold property, he has cashed in retirement accounts, he inherited property, and none on these transactions were reported on his tax returns because of his failure to file the returns. I have considered all the financial considerations mitigating conditions and find that none apply in this case. I conclude Applicant has not mitigated the security concerns arising from his financial difficulties.

The government has established its case under Guideline E. Applicant's admissions and the government's documentary evidence support the application of a potentially disqualifying condition under Guideline E of the Directive, specifically ¶ 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*. Applicant's failure to file his federal income tax for tax years 1998 through 2001 is in violation of 26 U.S.C. § 7203. Failure to file his state income taxes is also in violation of state law. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the Applicant may not properly safeguard classified information. (11) None of the personal conduct mitigating conditions under Guideline E apply in this case. I conclude Applicant has not mitigated the security concerns regarding personal conduct.

The record in this case was kept open for an additional 15 days to allow Applicant to offer any evidence indicating that he followed through and filed the delinquent returns. On April 15, 2005, Applicant submitted documentation showing he filed delinquent federal and state taxes for the years 1998, 1999, 2000, and 2001. Applicant incurred tax liability not only for his 1999 and 2000 federal returns but also for his 1999, 2000, and 2001 state returns. As of April 15, 2005, he had not filed his 2003 and 2004 federal and state tax returns. The mere fact that he finally filed his federal and state tax returns is not a basis upon which to conclude he has reformed and can be relied upon to file future tax returns within the time requested by law. Applicant breached both federal and state laws by not filing his tax returns, and if he is prosecuted for said crimes, he could face monetary penalties and imprisonment.

The government has established its case under Guideline J. Applicant's admissions and the government's documentary evidence support the application of a potentially disqualifying condition under Guideline J of the Directive, specifically ¶ E2.A10.1.2.1, *allegations or admission of criminal conduct, regardless of whether the person was formally charged*. Although, Applicant has not been formally charged under federal or state law for failure to file his taxes for a number of years, his failure to file his federal and state income tax for tax years 1998 through 2001 indicates a history or pattern of criminal activity, creating doubt about a person's judgment reliability, and trustworthiness. (12) Applicant admitted he did not file his taxes and he has no reasonable explanation other than he usually gets money back from the government, so it is not like he is going to owe the government money. He also admitted not filing federal or state taxes for 2002, 2003, and at the time of the hearing, 2004 taxes were no closer to being filed; taxes for these years were not mentioned in the SOR. However, I mention his behavior of not filing taxes for 2002, 2003, and 2004 for the limited purpose of establishing a further pattern of delinquencies when it comes to filing his taxes. None of the mitigating conditions under Guideline J apply in this case. I conclude Applicant has not mitigated the security concerns regarding criminal conduct.

I have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case that it is clearly not consistent with the national interest to grant Applicant a security clearance. Applicant has not mitigated the security concerns caused by his financial considerations, personal conduct, and criminal conduct. Accordingly, Guideline F (financial considerations), Guideline E (personal conduct), and Guideline J (criminal conduct) are decided against Applicant.

FORMAL FINDINGS

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

Paragraph 1., Financial Considerations (Guideline F) AGAINST APPLICANT

Subparagraph 1.a Against Applicant

Subparagraph 1.b Against Applicant

Paragraph 2., Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraph 1.a Against Applicant

Subparagraph 1.b Against Applicant

Paragraph 3., Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a Against Applicant

Subparagraph 1.b Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Jacqueline T. Williams

Administrative Judge

1. ISCR Case No. 96-0277 (July 11, 1997) at 2.
2. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
3. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
4. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
5. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
6. *Egan*, 484 U.S. at 531.
7. *Id.*
8. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
9. Executive Order 10865 § 7.
10. Directive, ¶ E2.A6.1.1.
11. Directive, ¶ E2.A5.1.1.1.
12. Directive, ¶ E2.A10.1.1.