

KEYWORD: Financial; Criminal Conduct

DIGEST: Applicant knowingly and deliberately refused to file federal income tax returns between 1992 and 1996, or to pay his taxes, in violation of federal law. He persisted in his refusal until jailed for contempt of court by a federal judge in 1997. Applicant filed his tax returns properly since then. He has been unable to make payments toward the resulting \$17,816.00 tax delinquency, although the Internal Revenue Service has reduced the debt by seizing other funds. Applicant failed to mitigate the security concerns arising from his financial difficulties and history of criminal conduct. Clearance is denied.

CASENO: 03-13857.h1

DATE: 03/06/2006

DATE: March 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13857

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant knowingly and deliberately refused to file federal income tax returns between 1992 and 1996, or to pay his taxes, in violation of federal law. He persisted in his refusal until jailed for contempt of court by a federal judge in 1997. Applicant filed his tax returns properly since then. He has been unable to make payments toward the resulting \$17,816.00 tax delinquency, although the Internal Revenue Service has reduced the debt by seizing other funds. Applicant failed to mitigate the security concerns arising from his financial difficulties and history of criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 5, 2001, Applicant submitted a security clearance application. 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 Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On April 25, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically, Guideline F, Financial Considerations, and Guideline J, Criminal Conduct.

Applicant answered the SOR in writing on June 7, 2005, with attachments. He elected to have a hearing before an administrative judge.

I received the case assignment on August 1, 2005. I originally scheduled the hearing for November 2, 2005, but Applicant was not properly notified. With the concurrence of Applicant and Department Counsel, I convened the hearing on December 8, 2005. Applicant affirmatively waived his right to 15 day's notice. At the outset of the hearing, Department Counsel moved to amend the SOR, ¶ 2.a by striking the word "felony" and substituting the word "misdemeanor." Applicant did not object and I granted the motion. The government introduced Exhibits 1 through 3. Applicant provided Exhibits A through H, and testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on December 21, 2005.

FINDINGS OF FACT

Applicant denied the factual allegations in the SOR. (Applicant's Answer to SOR, June 7, 2005.) After a complete and thorough review of the evidence in the record, I make the following findings of fact.

In about 1992, Applicant attended a seminar espousing the view that individuals were not required to file income tax returns or pay federal income taxes. (Answer to SOR, *supra*, at 3; Ex. 2 at 3; Tr. at 15.) After researching this matter, he decided not to file tax returns or pay income taxes in 1992, 1993, 1994, and 1996. (Ex. 2 at 3.)

In late 1996 or early 1997, the Internal Revenue Service (I.R.S.) contacted Applicant on multiple occasions and instructed him to file his tax returns and pay any taxes due. (Ex. 2 at 3; Tr. at 15, 16, 27.) Applicant refused. (Tr. at 15.) In 1997, the I.R.S. garnished Applicant's wages for unpaid taxes. (Ex. 2 at 3.)

In 1997, the I.R.S. brought Applicant into federal court—a federal judge ordered Applicant to provide the I.R.S. the information necessary to file his back tax returns, but Applicant refused. (Ex. 2 at 3.) The judge ordered Applicant jailed for contempt. Applicant spent a very uncomfortable weekend in confinement. (Tr. at 15-16.) The following Monday he filed the tax returns as required. (Tr. at 16.) The federal judge released Applicant from confinement and dismissed the action.

The I.R.S. calculated the unpaid taxes at \$17,816.00. (Ex. 3 at 1.) Applicant was unable to pay the debt, because he was recently married and had children to support. (Ex. 2 at 4-5.) The I.R.S. withheld available funds from tax returns in subsequent years to pay the debt. (Exs. A-E.) He properly filed all his tax returns and paid his federal income taxes since 1997. (Tr. at 16.) Applicant testified the outstanding debt was reduced to just under \$8,000.00 at the time of the hearing. (Tr. at 17.)

Applicant worked for a defense contractor in the aerospace industry from June 2001 until September 2005. (Ex. 1 at 2.) His manager and supervisor praise his honesty, loyalty, and trustworthiness. (Ex. F; Ex. G.)

At the hearing, Applicant acknowledged his obligation to pay federal income taxes. (Tr. at 38-40.) On further questioning, he indicated he thought the laws are misleading (Tr. at 40), unfair (Tr. at 41), and immoral (Tr. at 54). When the I.R.S. took action to compel Applicant to file his returns and pay his taxes, he felt it was morally wrong. (Tr. at 51.) He now recognizes they were simply fulfilling their responsibilities. (*Id.*) He claims he will comply with the requirements of the tax laws in the future. (Tr. at 60.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline F, Financial Considerations: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (Directive ¶ E2.A6.1.1.)

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) 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 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline F, Financial Considerations

Paragraph E2.A6.1.2.1 of the Directive provides that it may be a disqualifying condition if the evidence reveals "[a] history of not meeting financial obligations." Similarly, ¶ E2.A6.1.2.3 indicates that an "[i]nability or unwillingness to satisfy debts" may be disqualifying. Applicant's refusal to pay his federal income taxes generated a large debt he was unwilling or unable to pay for many years. Although the I.R.S. has seized some funds and applied them to the outstanding debt, a substantial balance remains. I conclude the available evidence raises both these potentially disqualifying conditions.

The security concerns arising from Applicant's financial difficulties can be mitigated. Under the Directive, ¶ E2.A6.1.3.1, it may be mitigating where "the behavior was not recent." Although Applicant's debt to the I.R.S. arose between 1992 and 1997, it remains unpaid; therefore, I find Applicant's inability to pay his debt to the I.R.S. is recent. This potentially mitigating condition does not apply.

Paragraph E2.A6.1.3.2 of the Directive provides that it may be mitigating where the financial difficulty "was an isolated incident." Applicant's debt for unpaid tax assessments arose over many years-it was not an isolated incident. This mitigating condition does not apply.

Under ¶ E2.A6.1.3.3, it may be mitigating where, "[t]he conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)." The financial problem at issue here-the unpaid taxes-arose from Applicant's voluntary decision not to pay his taxes, rather than from circumstances beyond his control. This potentially mitigating condition does not apply.

Proof that "[t]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control," may be mitigating, under ¶ E2.A6.1.3.4 of the Directive. Applicant did not present any evidence that he sought or obtained financial counseling. The I.R.S. has seized funds and applied them to reduce the outstanding balance, but a substantial debt remains. Applicant's willingness and ability to satisfy this debt in the future is speculative. I cannot find his debt is under control or that it is being resolved. I conclude this mitigating condition does not apply.

Finally, it may be mitigating where "[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." (Directive, ¶ E2.A6.1.3.6.) Applicant has not paid or begun to repay the tax debt; he simply allows the I.R.S. to withhold funds that would otherwise be refunded. I conclude this mitigating condition does not apply.

I considered the potentially disqualifying and mitigating circumstances in light of the "whole person" concept. Applicant is a mature individual. He knowingly and deliberately refused to file his tax returns or pay his income taxes for many years, despite repeated attempts by the I.R.S. to make him comply. He finally filed his taxes only after being jailed for contempt. He has not satisfied the outstanding tax debt; there have been no payments other than the funds the I.R.S. has seized. Applicant's current financial circumstances do not permit him to pay this debt at this time. I conclude Applicant financial circumstances create a security risk, and he has failed to mitigate the concern.

Guideline J, Criminal Conduct

Paragraph E2.A10.1.2.1 of the Directive provides an "admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's failure to file his federal income tax returns for the years 1992, 1993, 1994, and 1996, in violation of Title 26 U.S.C. § 7203, a misdemeanor, constitutes multiple lesser offenses. His criminal conduct shows a disregard for the law and an unwillingness to abide by legal requirements, creating a potential security concern.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." Applicant's offenses occurred more than ten years ago, and he has properly filed his federal tax returns since then. I conclude this conduct is not recent; therefore, this potentially mitigating condition applies.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." Applicant failed to file the taxes for several years in a row. Thus, I cannot find that this was an isolated incident. I conclude this mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Applicant persisted in his steadfast refusal to file or pay his taxes until he was jailed for contempt; at that point he decided to comply. I find the factors leading to his offenses are not likely to recur because of his fear of adverse governmental action.

Under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant readily admits his error in failing to file his income taxes. He has faithfully filed all his tax returns since 1997 and intends to do so in the future. I find this potentially mitigating condition applies.

I balanced all the potentially disqualifying and mitigating conditions in light of the "whole person" concept. Applicant's deliberate, repeated, and continuing refusal to file and pay his taxes, and his unwillingness to comply with the law even to the point of contempt of court, creates real doubt about his judgment and reliability. He still harbors strong concerns about the morality of the tax laws. I considered carefully Applicant's testimony and demeanor during the hearing. I have reservations about Applicant's attitude about his obligations and his feelings toward the government arising from these circumstances. I conclude Applicant has not mitigated the security concerns arising from his history of criminal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of 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.

Michael J. Breslin
Administrative Judge