

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 58-year-old senior project engineer who has worked for various federal contractors for over 25 years. Applicant willfully failed to file his federal and state tax returns from 1997 to 2003. Applicant did not divulge his failure to file tax returns, and provided misleading information in a sworn statement during the investigation. Applicant failed to mitigate the security concerns regarding his criminal and personal conduct. Clearance is denied.

CASENO: 03-16958.h1

DATE: 10/28/2005

DATE: October 28, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16958

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 58-year-old senior project engineer who has worked for various federal contractors for over 25 years. Applicant willfully failed to file his federal and state tax returns from 1997 to 2003. Applicant did not divulge his failure to file tax returns, and provided misleading information in a sworn statement during the investigation. Applicant failed to mitigate the security concerns regarding his criminal and personal conduct. Clearance is denied.

STATEMENT OF CASE

On May 9, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct.

In a statement dated June 3, 2005, Applicant responded to the SOR allegations, admitting all of them. Applicant elected to have his case decided on the written record. A file of relevant material (FORM) was submitted by Department Counsel on July 22, 2005, and received by Applicant on August 12, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM, and provided an additional statement of explanation for consideration. Department Counsel did not object and it was included in the record. The case was assigned to me on October 7, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is a 58-year-old senior project engineer for a federal contractor. Applicant has worked for several federal contractors over a 25-year period, except for an eleven month period from November 1999 to October 2000 when he was self-employed. Applicant has a Ph.D. in electrical engineering. Applicant was granted a secret security clearance in 1980. It is unclear whether he continuously held the clearance.

Applicant willfully failed to file his federal income tax returns in 1997, 1998, 1999, 2000, 2001, 2002, and 2003, in violation of Title 26 U.S.C. § 7203, a misdemeanor.⁽²⁾ Applicant failed to file his state's income tax returns for 1997, 1998, 1999, 2000, 2001, 2002 and 2003, a misdemeanor violation of the state's revenue and taxation code.⁽³⁾

Applicant made a signed sworn statement dated June 23, 2003 to a Defense Security Service (DSS) agent and disclosed he had failed to file his state income tax returns for the tax years 1997, 1998, and 2002.⁽⁴⁾ Applicant failed to disclose that he also did not file state income tax returns for the tax years 1999, 2000, 2001, and 2003.⁽⁵⁾ Applicant failed to disclose that he had not filed his federal income tax returns for the tax years 1997 through 2002.⁽⁶⁾ Applicant's concealment was in violation of Title 18 U.S.C. § 1001, a felony. In the same statement Applicant indicated he would file the delinquent returns within four months.⁽⁷⁾ Applicant admits his wages were garnished by his state for tax years 1997, 1998 and 2000.⁽⁸⁾

Applicant provided sworn answers to interrogatories dated December 12, 2003, where Applicant indicated he had yet to file his state income tax returns for the tax years 1997 through 2002, and his federal tax returns for the tax years 1997 through 2002.⁽⁹⁾ Applicant claimed filing was now "a very high priority."⁽¹⁰⁾

Applicant provided a sworn statement on December 8, 2004 stating "I have not filed my federal or state taxes for tax years 1997 through 2003."⁽¹¹⁾ Applicant claimed he was actively pursuing obtaining documentation to complete the filing and had hired an accountant. Applicant went on to say "I have intent to have my federal and state taxes filed for tax years 1997-2003 in Jan[uary] [20]05. I did not keep the original commitment stated in my previous statement dated Jun[e][20]03, however I plan to keep the Jan[uary] [20]05 commitment."⁽¹²⁾ Applicant claims "I did not list any federal taxes because I am in a non-filing status not a non-payment status, however I thought my federal taxes were listed."⁽¹³⁾

Applicant's explanation for his failure to advise the DSS agent about his failure to file his state and federal income tax was:

"My understanding at that time was that if I was in financial trouble and the taxes due were part of it then I was

obligated to report that fact. However, if my finances were sufficient to pay the back taxes, then there was no issue hence no requirement for reporting . To me it was like a business deal gone bad. If it resulted in a financial[ly] stressing situation I would be required to report it. If not then there was no reporting requirement." (14)

Applicant provided copies of federal tax return forms for 1997 through 2003. (15) The forms are not signed by him, nor dated, and only the 2003 form is signed by his tax preparer, albeit not until December 29, 2004, past the filing date. No document was provided to show if Applicant applied for an extension. Some of the tax returns indicate Applicant owes taxes. Other forms indicate Applicant is entitled to a refund. No documented information was provided by Applicant indicating that his delinquent taxes had been filed, paid, or that a final adjudication was made by the Internal Revenue Service (IRS), and that the matters were fully resolved. There was no information provided that addressed whether any penalties, late fees or interest were required.

Applicant provided copies of state tax return forms. None of the forms were signed by Applicant or his tax preparer. All but one year indicates Applicant owes money to his state. The tax form for 2001 was blank. Three of the years did address penalties, late fees and interest. However, there is no documented verification that any of these forms were actually filed, and if a report of final adjudication by the state was made.

Applicant claims he has paid all of his taxes. (16) No documented verification from the IRS or Applicant's state's taxation and revenue department were provided to prove his claim. No documented verification was provided by Applicant showing he actually made any payments or resolved the matter with the different agencies. Applicant claims he is financially solvent. No documented evidence was provided to support the claim.

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 J, criminal conduct, and Guideline E, personal conduct considerations, 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 determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁷⁾ The government has the burden of proving controverted facts.⁽¹⁸⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽²⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²¹⁾

No one has a right to a security clearance⁽²²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁴⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁵⁾ 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 the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J-Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J and Guideline E.

Based on all the evidence 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*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant willfully failed to file his federal income taxes for tax years 1997 through 2003 in violation of the law. Applicant willfully failed to file his state income tax returns for tax years 1997 through 2003, a misdemeanor under his state's criminal statute. In a sworn statement Applicant revealed limited information on his failure to file tax returns and concealed from the DSS agent all of the years that he had not filed.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*), CC MC E2.A10.1.2.2 (*The crime was an isolated incident*), CC MC E2.A10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Applicant willfully failed to file his federal tax returns and state tax returns for seven years. There is no documentation to verify that these matters have been successfully resolved by the appropriate agencies and therefore the conduct is recent. Applicant's repeated criminal conduct regarding both federal and state tax returns is clearly not isolated. Applicant's conduct was voluntary and there is no clear evidence that he has resolved the matter. Applicant's actions reflect a cavalier, irresponsible and uninterested attitude towards his civic and legal responsibility, and shows that he is oblivious to the fact that he has repeatedly and willfully violated both federal and state law. Applicant has failed to mitigate the security concerns regarding his criminal conduct.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), PC DC E2.A5.1.2.3 (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*), PC DC E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), and PC DC 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*) all apply in this case.

Applicant failed to divulge all of his transgressions with regard to his tax returns to the DSS agent in his sworn statement. PC DC E2.A5.1.2.2 and PC DC E2.A5.1.2.3 applies. Applicant provided statements claiming he would take care of the matter, but failed to do as he claimed. Based on Applicant's statements it is apparent that he does not view filing his tax returns as important. Applicant's excuse in not divulging his tax issues was it was merely a

misinterpretation about what he thought was important in reporting. Applicant claims, because he was financially solvent, the matter was not reportable. Applicant's excuse is not credible. He went through great pains to explain why filing his taxes and failure to report it was just "a business deal gone bad." He also takes the position that he is a "non-filer" and not a "non-payer" and that this is somehow mitigating. It is not. Applicant appears to be void of understanding that filing income taxes is mandatory and not voluntary, and failure to do so is a criminal violation. Obviously the federal and state revenue services can not make an adjudication whether a person has paid (or not) taxes until the person files their return. Applicant never gave the IRS or state revenue service an opportunity to make that determination. Applicant makes the assumption that all of his numbers are correct, but he failed to file his taxes so an official determination could not be made. Applicant's personal conduct increases his vulnerability to coercion and exploitation. Applicant is a highly educated senior engineer and his conduct may affect his professional and personal standing which may make him susceptible to blackmail. PC DC E2. A5.1.2.4 applies.

Applicant's repeatedly violated the law, and equally as important is that when notified of the seriousness of his actions he delayed resolving it, despite its criminal implications. PC DC E2.A5.1.2.5 applies. Applicant's questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations are clear indications of serious issues regarding his security worthiness.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant provided a misleading statement and concealed the full extent of his tax issues in a sworn statement. He did not voluntarily set the record straight until he was later sent interrogatories. PC MC E2.A5.1.3.2 and PC MC E2.A5.1.3.3 do not apply. Applicant has not provided any verifiable proof that he has resolved his tax issues. The documents provided were incomplete. No documents were provided showing the revenue authorities had determined a final adjudication. Applicant's attitude and lack of resolve makes him vulnerable to exploitation. PC MC E2.A5.1.3.5 does not apply. I find none of the mitigating conditions apply under Guideline E. Applicant has failed to mitigate the security concerns with regard to his personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in the record. I have considered the number of years Applicant failed to file his tax returns in violation of the law. I have also considered Applicant's statements and actions when confronted with the issues when considering the whole person. Applicant history of unwillingness to comply with rules, in violation of the law, dishonesty, lack of candor, and questionable judgement raise serious security concerns. Applicant has failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security

clearance. Accordingly, Guidelines J and Guideline E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1: Criminal Conduct (Guideline J) 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

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. Against the Applicant

Subparagraph 1.m. Against the Applicant

Subparagraph 1.n. Against the Applicant

Subparagraph 1.o. Against the Applicant

Paragraph 2: Personal Conduct (Guideline E) 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 Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Item 3.

3. *Id.*

4. Item 5.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Item 7.

10. *Id.*

11. Item 6.

12. *Id.*

13. *Id.*

14. Additional document provided by Applicant.
15. Item 3.
16. *Id.*
17. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
18. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
19. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
20. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
21. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
22. *Egan*, 484 U.S. at 531.
23. *Id.*
24. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
25. Executive Order 10865 § 7.