

KEYWORD: Personal Conduct, Criminal Conduct

DIGEST: Applicant is 36 years old and is the lead software engineer for a defense contractor. He held a security clearance from 1983 to 1988, when he went into business for himself. It was not a successful venture and he had about 11 delinquent tax liens filed against him since he filed his tax forms but did not send payment for taxes owed. Applicant deliberately falsified questions on his security clearance application because he did not consider his outstanding taxes or tax liens as outstanding delinquent debt. All of the liens have since been paid in full. Applicant has not mitigated security concerns arising from his personal and criminal conduct. Clearance is denied.

CASE NO: 03-17061.h1

DATE: 06/16/2006

DATE: June 16, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-17061

**DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Bank, Esq., Department Counsel

## **FOR APPLICANT**

Richard Murray, Esq.

### **SYNOPSIS**

Applicant is 36 years old and is the lead software engineer for a defense contractor. He held a security clearance from 1983 to 1988, when he went into business for himself. It was not a successful venture and he had about 11 delinquent tax liens filed against him since he filed his tax forms but did not send payment for taxes owed. Applicant deliberately falsified questions on his security clearance application because he did not consider his outstanding taxes or tax liens as outstanding delinquent debt. All of the liens have since been paid in full. Applicant has not mitigated security concerns arising from his personal and criminal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 24, 2001, Applicant applied for a security clearance and completed a Security Clearance Application (SF 86). <sup>(1)</sup> On November 5, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, 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. The SOR detailed reasons under Guideline E (Personal Conduct) and Guideline 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 a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated November 19, 2004, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on May 5, 2005. A Notice of Hearing was issued on May 17, 2005, scheduling the hearing for June 7, 2005. An Amended Notice of Hearing was issued on May 25, 2005, changing the time of the hearing on June 7, 2005. The hearing was conducted as scheduled. During the hearing, the Government submitted 11 exhibits (Ex.) marked as Exs. 1-11. Applicant testified. Applicant submitted four exhibits marked as Exs. A-D. I held the record open until June 17, 2005, for Applicant to submit additional documents. The transcript (Tr.) was received on June 14, 2005. On June 16, 2005, Applicant submitted four additional documents, marked and admitted as Exs. E-H. <sup>(2)</sup>

### **FINDINGS OF FACT**

Applicant denied all of the factual allegations pertaining to personal conduct under Guideline E (subparagraphs 1.a. through 1.b.(11)), and criminal conduct under Guideline J (subparagraph 2.a.). After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is 36 years old and currently works for a defense contractor as a lead software engineer working with spacecraft systems. He has a Bachelor's degree in Electrical Engineering.<sup>(3)</sup> At the time of the hearing, he was a Master's candidate in Systems Engineering, scheduled to graduate in 2006. Married since 1988, he has two children, aged 12 and 7.<sup>(4)</sup>

From 1983 to 1988,<sup>(5)</sup> Applicant held a security clearance. In 1988, he went into business for himself in the financial services industry.<sup>(6)</sup> He was not very successful during this endeavor.<sup>(7)</sup> In September 1999, he left the business because debts were mounting and he was not making much money.<sup>(8)</sup> In September 1999, he was employed as an engineer with an organization, and stayed in that position for approximately one year.<sup>(9)</sup> He was then employed at a company that worked on videoconferencing equipment. He continued there for a year and one-half, when the business went bankrupt. Unemployed for a month, he was then hired by his current employer.<sup>(10)</sup>

While self-employed, Applicant knew he owed state and federal taxes for a number of years. He contends that it was not until he received the SOR that he became aware that numerous tax liens had been imposed against him.<sup>(11)</sup> Between 1988 and 1999 when he was self-employed, he and his wife always filed their tax returns. However, they submitted their taxes without payment because they did not have the money to send with their returns. Over the years, penalties and interest accrued.

Applicant had about 11 delinquent federal tax liens filed against him totaling approximately \$54,116.39. These liens were for the tax years 1989 to 1994 and 1996 to 2000. The tax liens for 1989 to 1991 were filed on July 18, 1994. The tax lien for 1992 was filed on July 21, 1994. The tax lien for 1993 was filed on July 25, 1995. He was unemployed for the tax year 1995. The liens for tax years 1994 and 1996 to 2000 were filed against him in March 2002. The SOR alleges further that as of June 18, 2003, the tax liens for the years 1989 to 1992, have not been satisfied. Seven liens for the tax years 1992 to 1994 and 1996 to 2000 were released in March 2004 upon being paid off.

Applicant denied that he deliberately falsified information on his SF 86 in Questions 38 (*Your Financial Delinquencies - 180 Days In the last 7 years, have you ever been over 180 days delinquent on any debt(s)*), and 39 (*Your Financial delinquencies - 90 Days Are you currently over 90 days delinquent on any debt(s)*). He answered "no" to both. He stated: "I always thought, when I saw that, I just did not think about IRS debt. I totally thought about revolving debt, installment debt."<sup>(12)</sup>

Applicant denied that he deliberately falsified information on his SF 86. He replied "no" to Question 36 (*Your Financial Record - Tax Lien In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts*). He stated:

[my wife and I] bought our first property in 2000, June of 2000, July 1st, 2000, and when we went to closing, the title company said that the only thing that we had to pay off was this one lien that was from 1993. We paid that off and closed on the house. There was no mention of any other judgments that kept us from buying our house. [\(13\)](#)

So my only thought then was that those were more than seven years old at the time, because how did we get into our property.

In a letter addressed to Applicant from the title and escrow company, dated September 22, 2000, a copy of a cancelled check for \$1,352.00 was enclosed "for the payoff of the tax lien." [\(14\)](#) There was a release of federal tax lien for \$1,352.24 for tax year 1993. [\(15\)](#) However, there is a discrepancy. The amount of \$3,125.72 is indicated as owed for tax year 1993. Applicant stated that he learned thereafter from the IRS that the amount he paid, \$1,352.24, did not include taxes and penalties, explaining why there is a discrepancy in the amounts.

Applicant said that at the end of February 2004, he settled on a refinance loan and paid in full all of his taxes and tax liens. The total amount for disbursement for tax-related items totaled approximately \$40,395.17. [\(16\)](#)

In a budget submitted with his sworn statement on April 29, 2003, Appellant has a positive net remainder of \$1,283 each month. [\(17\)](#)

## **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. 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.<sup>(18)</sup> The government has the burden of proving controverted facts.<sup>(19)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(20)</sup> 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.<sup>(21)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(22)</sup>

No one has a right to a security clearance<sup>(23)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(24)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(25)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(26)</sup> 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 E (Personal Conduct):** *The Concern:* 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):** *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

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

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards.

### **Personal Conduct**

The SOR was issued under the personal conduct guideline and not under the financial considerations guideline. Personal conduct under Guideline E is always a security concern because it asks the central question of whether a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

Here, the question is the falsification of the SF 86. The evidence shows that Applicant knew he owed money for his taxes for a number of years. Simply put, Applicant had tax debt. He answered "no" to Question 36 (have you had a lien placed against your property for failing to pay taxes). Question 36 should have triggered in Applicant's mind that there was a tax debt issue. At a minimum, Question 38 (delinquent debts over 180 days), and Question 39 (delinquent debts over 90 days), should have been answered "yes." The Government has established its case. Thus, Personal Conduct Disqualifying Condition 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*) applies.

However, various conditions can mitigate security concerns arising from personal conduct. When Applicant answered Questions 36, 38, and 39, he claims he thought about revolving debt, that is, installment debt, rather than debt with the IRS. He denied intentionally falsifying questions on the SF 86. Because he interpreted the questions as requesting information about installment debt, when he answered it, he believes he did not make a deliberate omission, concealment, or falsification of a material fact. Moreover, Applicant and his wife testified about always filing taxes but never having the money to send with their tax forms.

The SOR lists taxes owed for the years 1989 to 1992, having had tax liens filed for those years on July 18, 1994. Whereas, the taxes owed for the year 1993 indicates the tax lien was filed on May 15, 1995. Applicant became aware of a tax lien when purchasing a home in 2000 and had to pay off the lien before the sale could be completed. The lien that he paid off was for tax year 1993 for \$1,352. This differs from the amount indicated in the SOR, due to interest and penalties. I conclude that Applicant's testimony was not credible. I cannot reconcile the answers he gave to the three questions on his SF 86 when he knew for a number of years that he owed for taxes filed without payments. Questions 38 and 39 asked about debt over 180 or 90 days. It is incredible that Applicant assumed this questions were asking about installment debt. His assumption, of course, was incorrect. I think the questions were as straightforward as they could be. It is unreasonable for Applicant to think that debt related to taxes and tax liens are not debt for practical purposes. Applicant is an educated man. He is not naive about financial matters. As a matter of fact, he has become quite adept at handling his finances and has been able to refinance his home to eventually pay in full all of the tax liens. I conclude that none of the Personal Conduct Mitigating Conditions apply. Under these circumstances, Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a. through 1.b.(11) of the SOR are concluded against Applicant.

## **Criminal Conduct**

Since Applicant falsified his security clearance application, he violated 18 U.S.C. § 1001, which is a federal criminal law. The evidence established potentially criminal conduct disqualifying conditions under Guideline J. For a 10-year period, he tried a new venture, which was unsuccessful. Although he filed his taxes every year, he was unable to send in the money owed due to insufficient income. Here, he had a history of not paying taxes from 1989 to 1994 and 1996 to 2000. Liens were attached for most of those years. He was negligent in not paying his tax debt which forced the attachment of liens. Consequentially, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*allegations or admission 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 offenses*) apply. No Criminal Conduct Mitigating Conditions apply. Under these circumstances, Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with doubts as to Applicant's security eligibility and suitability. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

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 not clearly consistent with the national interest to grant Applicant a security clearance. Applicant deliberately falsified questions on his SF 86 and he cannot be trusted with the nation's secrets. For the reasons stated, I conclude Applicant is not suitable for access to classified information.

## **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. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b.(1) Against Applicant

Subparagraph 1.b.(2) Against Applicant

Subparagraph 1.b.(3) Against Applicant

Subparagraph 1.b.(4) Against Applicant

Subparagraph 1.b.(5) Against Applicant

Subparagraph 1.b.(6) Against Applicant

Subparagraph 1.b.(7) Against Applicant

Subparagraph 1.b.(8) Against Applicant

Subparagraph 1.b.(9) Against Applicant

Subparagraph 1.b.(10) Against Applicant

Subparagraph 1.b.(11) Against Applicant

Paragraph 2. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

**DECISION**

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

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Jacqueline T. Williams

Administrative Judge

1. Government Ex. 1 (Security Clearance Application, dated October 24, 2001).
2. Ex. E (Attorney's cover letter, dated June 16, 2005, 1 page); Ex. F (Letter, dated October 9, 2001, 2 pages); Ex. G (Certificate of Release of Federal Tax Lien, dated March 17, 2004, 1 page); Ex. H (Email, dated October 12, 2001, 2 pages).
3. Tr. 15.
4. *Id.* 16-21.
5. *Id.* 17.
6. *Id.*
7. *Id.* 18.
8. *Id.* 19.
9. *Id.* 20.
10. *Id.* 21.
11. *Id.* 26.
12. *Id.* 23-25.
13. *Id.* 22-23; ¶ 1.b.(5) "[y]ou were indebted to the Internal Revenue Service . . . in the approximate amount of \$3,125.72 in taxes, penalties and interest for the tax year 1993. A note of Federal Tax Lien was filed against you on May 15, 1995, for nonpayment of your federal tax debt. This lien was released in March 2004." *See also* Government Ex. 6 (Interrogatories, dated December 16, 2003).
14. Ex. D (Letter, dated September 22, 2000).
15. Ex. G (Certificate of Release of Federal Tax Lien, dated March 17, 2004).
16. Tr. 50; *see also* Government Ex. 6 (Interrogatories, dated December, 2003; Settlement Statement, dated February 24, 2004).
17. Government Ex. 11 (Sworn Statement, dated April 29, 2003).
18. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
19. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
20. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

21. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
22. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
23. *Egan*, 484 U.S. at 531.
24. *Id.*
25. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
26. Executive Order 10865 § 7.