

KEYWORD: Personal Conduct; Financial

DIGEST: Applicant has a history of federal and state filing failures associated with tax years 1998 through 2002. While he is able to document his recent filing of his federal returns for tax years 2000 through 2003, he provides no documentation of his filing federal returns for tax years 1998 and 1999 (as he claims he did) or his state returns for the tax years of 1998 through 2002. Besides his failure to file timely federal and state tax returns, Applicant has accumulated large tax accruals for the tax years in question, in addition to a consumer debt identified in his credit report, which he has failed to address in any documented way. Applicant fails to mitigate security concerns associated with his accumulated tax and consumer debts. Clearance is denied.

CASENO: 03-29963.h1

DATE: 05/05/2005

DATE: May 5, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20063

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of federal and state filing failures associated with tax years 1998 through 2002. While he is able to document his recent filing of his federal returns for tax years 2000 through 2003, he provides no documentation of his filing federal returns for tax years 1998 and 1999 (as he claims he did) or his state returns for the tax years of 1998 through 2002. Besides his failure to file timely federal and state tax returns, Applicant has accumulated large tax accruals for the tax years in question, in addition to a consumer debt identified in his credit report, which he has failed to address in any documented way. Applicant fails to mitigate security concerns associated with his accumulated tax and consumer debts. Clearance is denied.

STATEMENT OF CASE

On June 22, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on July 16, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on November 10, 2004. Applicant responded to the FORM within the 30 days afforded him to provide supplement documentation regarding the issues. The case was assigned to me January 20, 2005.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have (a) failed to file federal income tax returns for the tax years of 1998 through 2002, (b) had his wages levied against by the IRS in April 2000 in the amount of \$15,518.26 for unpaid taxes for the tax years of 1995 through 1997, and (c) expressed uncertainty if he had ever filed his State income tax returns for the tax years of 1998 through 2002.

Under Guideline F, Applicant is alleged to have (i) failed to file tax returns and has his wages levied against as alleged under Guideline E and (ii) accumulated delinquent debts with two creditors exceeding \$5,000.00.

For his response to the SOR, Applicant admitted his failure to file tax returns and having his wages levied against by the IRS, but denied being delinquent with the two creditors covered by subparagraphs 2.b and 2.c. Applicant claimed the IRS levy has since been paid off and that he has since paid his back taxes owed for tax years 1998 and 1999. He claimed his tax returns for tax years 2000 and 2001 are being by State and Federal taxing authorities. Applicant he got behind with his taxes and other creditors after he was reclassified into a lower paying position by the acquiring company in 1996 before finally being placed back into his old position in 1998. Applicant claims his accumulated delinquent debts with tax authorities and his other two creditors were the result of tight economic times, which he no longer experiences. Applicant claimed honesty, excessive spending on his daughter's wedding, and willingness to correct his past mistakes.

FINDINGS AND FACTS

Applicant is a 52-year supply technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant's finances tightened considerably in 1996 after his company at the time (Company A) lost its contract. The surviving company terminated his job and offered him a new one at substantially reduced hourly rates. With his reduced pay and two girls in high school/college, Applicant overspent on appliances and other things to help his oldest daughter and her fiance start a household. Shortly after that, his youngest daughter decided on marriage, which prompted his buying appliances to help them set up a household. Adding to his financial burdens was the pregnancy of his oldest daughter.

Beginning in 1996, Applicant encountered difficulty paying his state and federal income taxes. After failing to pay his federal income tax accruals for the tax years of 1995 through 1997, the IRS, in April 2000, issued a wage levy against Applicant's wages to cover taxes owed for the tax years of 1995 through 1997 in the aggregate sum of \$15,518.26. Applicant has since paid these back federal taxes and obtained a release of levy in December 2003.

Unable to pay his past due federal and state taxes for 1998, as well as for previous years (*i.e.*, 1995 through 1997), Applicant did not file state and federal tax returns for tax year 1998. When he didn't hear from the IRS as he expected, he didn't file any state or federal tax returns for tax years 1999 through 2002 either. Applicant documents his filing federal tax returns for tax years 2000 through 2003, but not for 1998 and 1999. He provides no documentation either for his filing his state tax returns for tax years 1998 through 2002.

Claiming he paid back federal taxes owed for 1998 and 1999, he provides no payment documentation to support his assertion. Nor does he provide any proof of payment or settlement plans entered into with the IRS or State to cover computed taxes owed for any of the tax years between 1998 and 2002. Applicant's only evidence of settlement with the responsible state and federal tax authorities is a Form F-4 indicating \$100.00 additional withholding from each paycheck (*see* Applicant's response, ex. 3). By itself, this is not enough to credit Applicant with paying his tax debts with the respective tax authorities. Absent documentation of payment or payment plans with the taxing authorities, Applicant cannot be credited with resolving his tax debt obligations for any of the underlying tax years.

Besides his accrued tax debts, Applicant also accumulated a consumer debt with a hospital (creditor 2.b) in the amount of \$1,158.00, which he has since paid. He accumulated a \$3,901.00 delinquent debt with a bank as well (creditor 2.c), based on a June 2004 creditor report (ex. 7). Absent any probative evidence this latter debt is not of his making, he cannot avert drawn inferences the listed debt covered by subparagraph 2.c is Applicant's unpaid debt.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

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.

Financial Considerations

The Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with security significant issues pertaining to his many of years of his failing to file federal and state tax returns and accumulated delinquent federal and state taxes for the years covered by his filing failures, as well as delinquent consumer-related debts.

Applicant's non-filing tax issues

Applicant presents a troubling history of failing to file his federal and state tax returns over a four-year period (1998-2002 on both his federal and state returns). He provides little in the way of specifics about his filing failures: Distractions in general attributable to recurrent financial strains in the family, uncertainty over what he owed, and complacency comprise the rough essentials of his claimed collective failures to address his federal and state tax returns. By all reasonable accounts, though, his multiple filing omissions meet the wilful test traditionally espoused by the courts. *See United States v. Weninger*, 624 F.2d 163, 167 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1981)(good faith disagreement over taxes owed, no matter how earnest, cannot avert a conclusion of wilful failure to file).

A taxpayer's wilful failure to file federal and state income tax returns (as here) constitutes criminal conduct of a misdemeanor nature under both the federal and State A statutory schemes, punishable by fine and imprisonment. *See* Sec. 7203 of Title 28 (U.S.C.A.) and State A's Rev. & Tax Code, Secs., *et seq*, respectively. While criminal conduct is not alleged, Applicant's filing omissions still reflect serious judgment lapses covered by the Personal conduct guidelines of the Directive. One disqualifying condition of the Adjudicative Guidelines for personal conduct: E2.A5.1.2.5 (*A pattern of dishonesty or rule violations*) is applicable here.

Although Applicant has since filed his federal tax returns for tax years 2000 through 2003, he provides no documentation of his filing either delinquent federal tax returns for tax years 1998 and 1999, or his state returns for tax years 1998 through 2002. His unexcused filing failures constituted not only criminal misdemeanors under both the federal and state statutory regimes in place, but serious lapses in demonstrated judgment and reliability.

Considering the number of years of filing omissions in Applicant's case (five in all under the governing federal and state requirements in place, which have been only partially addressed before the close of the record), the number of jurisdictions involved (federal and state), the imputed wilful nature of the filing omissions and the absence of any convincing explanations in the record to temper the manifest wilfulness in Applicant's conduct, this is clearly an appropriate case for applying Guideline E in appraising Applicant's overall security eligibility. On this record, Government makes its initial case.

Of some extenuating value is Applicant's years of financial strains, highlighted by job reductions and financial help extended to his children. While his job disruptions and ensuing financial strains merit empathy, his experiences provide

inadequate cover for why he failed to timely file his federal and state tax returns for the years in question. His explanations for failing to follow through on filing his tax returns for all of the years in question (both federal and state returns) lack coherency and deprive him of any meaningful extenuation credits.

Mitigation is unavailing, too, to Applicant. Not only did he fail to file his federal and state tax returns for a considerable number of years, but he failed to take advantage of the opportunity afforded him by his 2003 DSS interview to furnish documented filed returns for all of the tax years and jurisdictions in issue before the close of the record. To this date, he has failed to demonstrate that he filed all of his covered delinquent federal and state returns, much less convince that he has taken care of any federal and state tax delinquencies. Without more to show for his three-year efforts (at least since July 2003) at honoring his federal and state tax filing obligations than he has demonstrated so far, he is not well positioned to surmount the evidence of his failure to file his federal and state tax returns for the covered years.

Applicant's collective filing failures and still unresolved old federal and State A tax debts reflect poor judgment, unreliability and untrustworthiness. Protecting classified defense information is much too important to be left to uncertainty over an applicant's disposition for inspiring trust and confidence. More seasoning is needed to appraise Applicant's use of judgment in federal and state filing/payment compliance situations before safe predictions can be made about his trust and dependability in handling both his tax filing/paying responsibilities and the nation's security interests. Applicant fails at this time to carry his mitigation burden relative to the poor judgment allegations ascribed to his multiple tax filing failures. Conclusions warrant, accordingly, that the allegations covered by subparagraphs 1.a and 1.c under Guideline E are concluded unfavorable to Applicant. By his documented release of the federal tax levy following evidenced payment of unpaid taxes for tax years 1995 through 1997, Applicant mitigates security concerns associated with subparagraph 1.c.

Applicant's financial issues

Applicant accrued considerable delinquent debt between 1995 and 2003, most of it related to unpaid federal and state taxes. His accrued federal tax obligations for tax years 2000 through 2003 alone account for over \$16,000.00. For lack of any documented returns and payments regarding his federal tax liabilities for tax years 1998 and 1999, his accrued federal taxes for these years remain unaccounted for as well. Further, without state filing documentation for the unaccounted years in question (*i.e.*, tax years 1998 through 2002), it is not known how much he owes the state in back taxes. Doubts about the status of his state taxes preclude the drawing of any favorable inferences about his being up to date with his state tax obligations. And he is still of record in owing almost \$4,000.00 on a consumer account reflected in his 2004 credit report, which he claims (*sans* any documented proof) he does not owe.

Based on Applicant's considerable accumulation of delinquent debt, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for Guideline F apply: E2.A6.1.1 (*A history of not meeting financial obligations*) and E2.A6.1.3 (*Inability or unwillingness to satisfy debts*). While his accrued debts are accompanied by some extenuating circumstances (*viz.*, reduced job status and increased financial needs of his two children), for the most part his finances have permitted modest attempts to pay on his old creditors with the resources available to him since at least July 2003.

Applicant's debts are neither extenuated nor mitigated enough to enable him to take advantage of any of the mitigating conditions at this time. His past job reductions and accompanying parental responsibilities, while problematic, were relatively short in duration and do not appear to have inhibited his ability to address his debts after he regained his prior job status in 1998. Significant delinquent debt attributable to an applicant that is neither extenuated nor mitigated by good-faith resolution raises implicit security risks over the potential for needed funds and recurrent judgment lapses. The government does not have to wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *Cf. Adams v. Laird*, 420 F.2d 230, 238-39 (DC Cir. 19969), *cert. denied*, 397 U.S. 1039 (1970).

Taking into account all of the circumstances surrounding Applicant's accumulated tax and consumer debts over the past 10 years, the absence of sufficient attention he has shown with his tax filing responsibilities and associated debts in the past, and his failure to follow through on his filing and repayment commitments made in his 2003 DSS interview, Applicant fails to mitigate the Government's security concerns at this time. Unfavorable conclusions warrant, accordingly, with respect to subparagraphs 2.a and 2.c. of the allegations governed by the Adjudicative Guidelines pertinent to Guideline F. Favorable conclusions are warranted with respect to subparagraph 2.b, which Applicant mitigates with his demonstrated payment of the listed debt.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E2.2.1 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: 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.

Roger C. Wesley

Administrative Judge