

KEYWORD: Criminal Conduct; Financial

DIGEST: The Applicant failed to file his Federal and state tax returns in a timely fashion from 1996 through 2002. All of these returns were filed in 2003, when the Applicant was being reinvestigated for a security clearance. He continues to procrastinate concerning his tax liabilities and filed late returns for the 2003 and 2004 tax years, showing that he has not learned his lesson. He also failed to resolve some small, but telling, long-standing debts. Sufficient mitigation is not shown. Adverse inference is not overcome. Clearance is denied.

CASENO: 04-03355.h1

DATE: 11/03/2005

DATE: November 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03355

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

Jeff Nagel, Esquire, Department Counsel

FOR APPLICANT

Thomas M. Abbot, Esquire

Robert Bohn, Esquire

McKenna, Long and Aldrich,

SYNOPSIS

The Applicant failed to file his Federal and state tax returns in a timely fashion from 1996 through 2002. All of these returns were filed in 2003, when the Applicant was being reinvestigated for a security clearance. He continues to procrastinate concerning his tax liabilities and filed late returns for the 2003 and 2004 tax years, showing that he has not learned his lesson. He also failed to resolve some small, but telling, long-standing debts. Sufficient mitigation is not shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On March 24, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which 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 for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on April 19, 2005, and requested a hearing. The case was received by the undersigned on June 13, 2005, and a Notice of Hearing was issued on June 22, 2005.

A hearing was held on July 13, 2005, at which the Government presented eight documentary exhibits (Government Exhibits 1 through 8). Testimony was taken from the Applicant, who also submitted 33 exhibits (Applicant's Exhibits A through AE). The transcript was received on July 21, 2005.

FINDINGS OF FACT

The Applicant is 62 and single. He is employed by a defense contractor as an Integration Manger, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The Applicant failed to file his Federal tax return in a timely fashion for tax years 1996 and 2000 (SOR 1.a and 1.f). The Applicant finally filed the 1996 return on August 12, 2003, and the 2000 return at an unknown date later that year. (Applicant's Exhibit H at 1 and 5.) The record also shows that the Applicant also filed late tax returns for the tax years 1997, 1998, 1999, 2001 and 2002 on August 12, 2003. (Applicant's Exhibit H at 2-4 and 6-7.) The Applicant testified that he did not file his 2003 or 2004 Federal income tax returns in a timely fashion. He stated that taxes for those two years were paid in a timely fashion. (Transcript at 57-59, 67.)

The Applicant also wilfully failed to file his state income tax returns in a timely fashion for the tax years 1996 through 2002. (SOR 1.b., 1.c., 1.d., 1.e., 1.g., 1.h., and 1.i.) The record shows that the Applicant filed late tax returns for all of those tax years on August 12, 2003. (Applicant's Exhibit N.) The Applicant did not file his 2003 and 2004 state income tax returns in a timely fashion. He stated that the applicable taxes were paid in a timely fashion. (Transcript at 57-59, 67.)

In explanation for his tardiness, the Applicant stated that, in 1996, he made a lot of stock trades that required him to obtain considerable paperwork in order to complete the return. He procrastinated in 1997, did not complete his state or Federal returns in a timely fashion, and the problems just began to snowball over the following years. (Government Exhibit 2 at 3 and Transcript at 24-26.) He further stated that he was very busy at work, couldn't find the time to complete his taxes and that, eventually, he just got "stubborn" about it. (Transcript at 61-65.) The Applicant also testified, "There is a means of separation of my work ethics and my work diligence at the office versus my home finances and things like that." (Transcript at 66.) The record shows that the Applicant took at least two, week long, vacations during the seven year period when he was not filing his tax returns. (Transcript at 41-44.)

The Applicant states that, in late 2002, he began the process of being reinvestigated for his security clearance. At that time, he finally got the impetus to begin resolving his tax situation. He retained a professional tax preparer and was able

to complete and file his delinquent tax returns as described above. (Transcript at 30-31.)

Paragraph 2 (Guideline F - Financial concerns). The Government alleges in this paragraph that the Applicant is financially overextended and therefore at risk of having to engage in illegal acts in order to generate funds.

2.a. The Applicant denied owing the Federal Government \$136,000.00 in back taxes for the year 1996. Applicant's Exhibits L and M show that, as of September 29, 2003, the IRS still stated the Applicant owed them \$136,275.04 for the 1996 tax year. Applicant's Exhibits J and K show that, after he filed his delinquent tax return for 1996, the Federal Government reassessed his taxes with the result that the Applicant received a refund of \$30,761.92 for that year in July 2004. Based on the available evidence, I find that the Applicant does not owe the IRS back taxes in the amount alleged in this subparagraph.

2.b. and 2.f. The Applicant denied owing a hospital \$74.00 and \$851.00 on two accounts since 1999. The Applicant testified that he had surgery in 1999. He was in a dispute with his insurance company about who should pay these debt. (Transcript at 33-36.) Two credit reports prepared in 2003 show that the debts existed. (Government Exhibits 6 and 7.) A 3-in-1 Credit Report obtained by the Applicant on July 9, 2005, does not show these debts. (Applicant's Exhibit X.) The Applicant testified that he does not believe he owes these debts, but has no memory of paying them and no other evidence that they have been paid. (Transcript at 69-70.)

2.c. and 2.d. The Applicant denied owing a medical consultation group \$199.00 and \$247.00 on two accounts since 1999. Two credit reports prepared in 2003 show that the debts existed. (Government Exhibits 6 and 7.) A 3-in-1 Credit Report obtained by the Applicant on July 9, 2005, does not show these debts. (Applicant's Exhibit X.) The Applicant testified that he does not believe he owes these debts, but has no memory of paying them and no other evidence that they have been paid. (Transcript at 69-70.)

2.e. The Applicant denied owing an anesthesia group \$880.00 on an account since 1999. This debt is also connected to the Applicant's surgery in 1999. Two credit reports prepared in 2003 show that the debt existed. (Government Exhibits 6 and 7.) A 3-in-1 Credit Report obtained by the Applicant on July 9, 2005, does not show the debt. (Applicant's Exhibit X.) The Applicant testified that he does not believe he owes the debt, but has no memory of paying it and no other evidence that they it has been paid. (Transcript at 69-70.) The Applicant also believes this debt is the same one described in 2.g., below.

2.g. The Applicant denied owing a creditor \$416.00 for a judgment obtained in August 2001. Applicant testified that he was out of state when the suit was filed and unable to defend himself. There was a judgment issued and it was paid out of his bank account. (Transcript at 34-35.) Applicant's Exhibit Y is the docket of the case showing that a Writ of Execution was issued and returned on the case.

2.h. The Applicant denied owing his state taxing authority \$28,411.67 for unpaid taxes. The evidence concerning what he may, or may not, currently owe his state taxing authority is very confusing. The evidence shows the state taxing authority forwarding thousands of dollars to the IRS in 2003 (Applicant's Exhibits T through W), and then refunding the Applicant thousands of dollars in 2004 (Applicant's Exhibits O through S). Based on the available evidence, I find that the Applicant does not owe the state taxing authority unpaid taxes in the amount alleged in this subparagraph.

The Applicant's own credit report shows a collection account in the amount of \$244.00, opened in May 2004. (Applicant's Exhibit X at 4.) The Applicant testified that he has no recollection of this debt. (Transcript at 73.)

MITIGATION.

The Applicant's financial situation is stable. The record shows that he has considerable money in investments. (Applicant's Exhibits B through G, AC and AG.)

Several co-workers have submitted declarations on the Applicant's behalf. They describe him as being "reliable and conscientious" (Applicant's Exhibit A); "trustworthy and honest (Applicant's Exhibit AA); "talented and dedicated" (Applicant's Exhibit AD). On his most recent job evaluation the Applicant was found to have Exceeded Expectations (Applicant's Exhibit AF).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal acts and financial problems that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has failed to file his tax returns in a timely fashion, in violation of state and Federal criminal law (Guideline J); and that he has financial problems (Guideline F).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. Under Paragraph 2 (Guideline F), subparagraphs 2.a. and 2.h. are found for the Applicant as the evidence shows he is no longer indebted to the Federal or state governments as alleged in the SOR. Subparagraph 2.g. is found for the Applicant as the evidence shows that this judgment has been paid.

The Applicant was wilfully delinquent in filing his Federal and state tax returns from 1996 through 2002. Only when his security clearance was being reinvestigated did he finally knuckle down and complete the returns. He had no viable excuse, stating it was procrastination and stubbornness. His argument that he was too busy at work is rejected. Many other employees with security clearances are as busy as the Applicant, yet the vast majority of them find the time to complete and file their tax returns in a timely fashion. Beyond that, the Applicant also was delinquent in filing his 2003 and 2004 tax returns. In other words, his habit of procrastination continues. Other than his less than compelling testimony, there is little evidence that the Applicant, even today, understands the consequences of his acts.

Disqualifying Conditions E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. None of the Mitigating Conditions apply. Specifically, I find that the conduct is recent (Mitigating Condition E2.A10.1.3.1.), is not isolated (Mitigating Condition E2.A10.1.3.2.), and that there is no clear evidence of successful rehabilitation (Mitigating Condition E2.A10.1.3.6.). Paragraph 1 is found against the Applicant.

Regarding his debt situation, the Applicant failed to show that he has paid all of the past due debts alleged in the Statement of Reasons. The Applicant admits that he has no evidence or recollection of paying these debts. He submits that their absence from his most recent credit report means they have been resolved. This allegation is rejected. The Applicant submitted considerable documentary evidence showing that he is financially astute (Applicant's Exhibits D through H). Yet, when it comes to a few, relatively small, debts he is unable to provide evidence showing they have been paid.

Disqualifying Conditions E2.A6.1.2.1. (*A history of not meeting financial obligations*) and E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*) apply. None of the Mitigating Conditions apply. Specifically, I find that the conduct is recent (Mitigating Condition E2.A6.1.3.1.), is not isolated (Mitigating Condition E2.A6.1.3.2.), and that he has not initiated a good-faith effort to repay overdue creditors or otherwise resolve debts (Mitigating Condition E2.A6.1.3.6.). Paragraph 2 is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3

of the Directive, are:

Paragraph 1: 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.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.b.: Against the Applicant.

Subparagraph 2.c.: Against the Applicant.

Subparagraph 2.d.: Against the Applicant.

Subparagraph 2.e.: Against the Applicant.

Subparagraph 2.f.: Against the Applicant.

Subparagraph 2.g.: For the Applicant.

Subparagraph 2.h.: For 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 the Applicant.

Wilford H. Ross

Administrative Judge