

DATE: December 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-05030

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant did not timely file federal income tax returns for tax years 1993 through 2001 or state returns for tax years 1993 through 2002. He started addressing his federal tax issues after a tax lien was filed against him in June 2002, but he took no action to file his delinquent state returns until June 2006. His belated efforts at rectification are not sufficient to overcome ten years of knowing disregard of his tax filing obligation. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on June 14, 2005, detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR on July 11, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on January 6, 2006.

Pursuant to notice of June 9, 2006, I convened a hearing on June 26, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> Five government exhibits (Ex. 1-5) and five Applicant exhibits (Ex. A-E) were admitted and testimony was taken from the Applicant, as reflected in a transcript received July 14, 2006. At the government's request, I agreed to take administrative notice of pertinent state statutes and information (tax instructions and forms) for filing state income tax returns.

The record was held open until July 17, 2006, for Applicant to submit additional documentation, and for the government to submit a signed copy of Applicant's security clearance application (SF 86) if available. By certified mail on July 17, 2006, Applicant forwarded copies of his federal and state tax returns for tax years 2003, 2004, and 2005, which he asserted were timely filed with all tax liabilities paid. By Order dated July 20, 2006, copies were provided to the government for review and comment by July 31, 2006. On July 27, 2006, Department Counsel advised of no objections to admission. Accordingly, the documents were marked and entered as Exhibits F, G, H, I, J, and K. The government did not submit a signed copy of Applicant's SF 86.

## FINDINGS OF FACT

DOHA alleged under Guideline J, and cross-referenced under Guideline E, that Applicant failed to file his state income tax returns for tax years 1993 through 2002. Applicant admitted the allegations. His admissions are incorporated as findings of fact. After a thorough review of the pleadings, exhibits, and transcript, I make the following additional findings:

Applicant is a 47-year-old senior engineer who has been employed by a defense contractor since May 1988. He seeks to retain the secret-level security clearance that he has held since December 1988.

In the early 1990's, Applicant and his first wife divorced.<sup>(2)</sup> Applicant was awarded primary custody of their two sons born in February 1985 and June 1987, respectively, and he worked full-time to support them.

For several years in the 1990s, Applicant did not file timely federal income tax returns. Due to insufficient tax withholding from his wages, he discovered he owed federal taxes. He elected to not file his returns as he did not have the funds to pay the taxes owed. In April 1998, he was granted a Chapter 7 bankruptcy discharge of his debts. In July 1998, the Internal Revenue Service calculated an unpaid tax liability of \$2,833.26 for tax year 1993 and \$2,806.41 for tax year 1994. In June 2002, a federal tax lien was filed against him to collect the \$5,639.67 assessment balance. Applicant subsequently filed returns to more accurately reflect the taxes owed after allowable deductions for tax years 1993 and 1994. Before October 2003, he also filed his federal returns for tax years 1997 through 2002. Overpayments of federal taxes for 1999, 2000, 2001, and 2002 were intercepted by the IRS and applied to the 1993 and 1994 assessed liabilities.

In August 2002, the IRS filed a notice of levy to attach his wages to repay outstanding federal taxes. In lieu of enforcement, the IRS agreed to accept \$100 per week, and his wages were garnished in that amount until December 2002. The IRS then filed another levy as he had not complied with IRS requests to file all his delinquent returns. By mid-December 2002, he filed his late returns with the exception of those federal returns for tax years 1995 and 1996, and the IRS agreed to accept \$200 per month in repayment of his delinquent federal taxes. Applicant made the payments as required. As of October 2003, Applicant had not filed his state income tax returns for the past ten years, although taxes were withheld from his pay every week.<sup>(3)</sup> At least initially, he elected to not file his state return because of lack of funds to pay the taxes owed. For subsequent years, he feared the consequences of his failure to file (Tr. 61).

On June 5, 2002, Applicant completed a security clearance application (SF 86) in an update of his secret-level clearance. He listed his November 1997 bankruptcy filing listing debt of about \$200,000 and a \$400 delinquent property tax debt incurred in June 2001. A check of Applicant's credit on September 16, 2003, disclosed some delinquent debts incurred after the bankruptcy as well as the \$5,639 federal tax lien filed in June 2002.

On October 14, 2003, Applicant was interviewed by a Defense Security Service special agent about his bankruptcy, his federal tax debt, his failure to timely file state and federal returns, and the debts listed as delinquent on his recent credit report. Applicant admitted he had not timely filed his federal returns but detailed steps taken to rectify his federal tax situation. He admitted he had not filed his state income tax returns for about ten years for which he offered no explanation.

The IRS released the federal tax lien on August 4, 2004. Applicant timely filed his federal and state income tax returns for tax years 2003, 2004, and 2005. For 2003 and 2004, he filed as head of household claiming his younger son as a dependent on those returns. For tax year 2003, he underpaid his federal taxes by \$2,269 on wages of \$71,891. For tax year 2004, he underpaid by \$865 on wages of \$82,104. As for his state returns, he showed a refund due him of \$427 for 2003 and that his withholding equaled his tax liability for 2004. Applicant married his second wife in August 2004. He and his new wife, a teacher, filed jointly for tax year 2005. They underpaid their federal taxes by \$4,101 and their state taxes by \$776 on joint wages of \$141,672.

On May 15, 2006, Applicant was sent a notice by the state department of revenue services of an assessed tax debt of \$2,144.80 for failure to file a timely return for tax year 2001. Applicant completed his state resident income tax return

for 2001 on June 16, 2006, claiming a tax underpayment of \$5.69. On June 21, 2006, Applicant filed his state tax return for 2002, claiming he was due a tax refund of \$208.63. Applicant intends to file his federal and state returns on time in the future. When asked to explain his failure to address the state tax filings before June 2006, Applicant responded:

Well, just getting ready to get married last August and I put it on the back burner. And between getting married and moving and trying to get things unpacked, I'm still looking through boxes of paper work trying to pull together these records, and it took me several weeks just to get through to find the '01 stuff when I received that letter.

From the 2001 time frame I moved out of [city omitted], I moved to--I was asked to move out from [city omitted], the woman I was renting a place from told me that her son was moving back from Colorado. I was given very short notice to find another place to live. The only place I could find was a seasonal rental down in [city omitted].

Over the course of the next three years I moved twice a year every year. I'd move in September and move out end of May. I stayed in that place generally so that my son could continue in the same high school he was in and I lived in a travel trailer and a campground in the summer. So I never really landed anywhere for an extended period of time to get things sorted out. (Tr. 69)

Applicant corrected the record to reflect he moved in 2002 rather than 2001 after being confronted with SF 86 address information. (Tr. 70)

Applicant's work performance has consistently improved since May 1988. As an engineering assistant in his employer's nuclear components section, Applicant's work was characterized by completeness, accuracy, and timeliness. During the April 1991 to February 1992 reporting period, he was reclassified as a senior engineering assistant. Over the March 1993 to April 1994 ratings period, his performance rated as fully satisfactory. He improved in several areas (organizing daily work schedule, managing under pressure, acting on own initiative) over the next year, as he continued to exercise good judgment, above average technical accuracy, and ability to work with minimal supervision. As of April 1997, he was considered for advancement contingent on maintaining competence and achieving development goals. For the first time, he was rated as exceeds job requirements for the April 1997 to March 1998 reporting period, as he exhibited the highest quality of work and had acquired expertise in his assigned components. Applicant managed to keep up his superior performance while pursuing a bachelor's degree in engineering in the evenings in 2000/01. Subsequent to March 2001, his job was reclassified to provisioning design technician. In January 2005, he earned his B.S. degree and was subsequently reclassified as a senior engineer and selected for an engineering position in the reactor plant fluids section. At his three-month review in February 2006, he was assessed as meeting expectations.

### POLICIES

"[N]o one has a 'right' to a security clearance." Department of the Navy v. Egan, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." Id. at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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).

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. See Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

### CONCLUSIONS

A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. ¶ E2.A10.1.1. As alleged, Applicant did not timely file federal or state income tax returns for several years when his income exceeded the minimum threshold for filing. While he began addressing his federal tax returns and tax delinquency after the IRS filed a tax lien in June 2002, and filed his federal and state returns on time for subsequent tax years (2003, 2004, and 2005) he made no effort to file his delinquent state returns until June 2006, after the state assessed a tax liability for failure to file his 2001 return. His failure to comply with his known obligation to file timely tax returns has been punishable as a misdemeanor under pertinent state law.<sup>(4)</sup> His pattern of criminal conduct raises significant security concerns under Guideline J, regardless of whether he remains subject to criminal prosecution or whether he has any state tax liability at present (Tr. 46).<sup>(5)</sup> Disqualifying Condition ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, clearly applies.

Applicant offers in mitigation that he found himself as the sole financial support for his two sons after his divorce. Yet, financial stressors do not adequately explain his failure to address his tax filings in 1998 after he had been afforded a fresh start in bankruptcy. Albeit prompted by an IRS tax lien, he filed his delinquent federal returns in or after August 2002 with the exception of 1995 and 1996. As of October 2003, Applicant had no information about those years (Ex. 2). He provided no evidence to show that he had filed for those years or even that the IRS had filed substitute returns for those years, but he made sufficient effort to resolve his federal tax issues to where the government did not consider them of current security concern. However, with respect to his state tax returns, he took no action to file his delinquent returns until June 2006, after he received notice of an assessed tax liability for 2001 (Tr. 62). Even then, he filed only those delinquent state tax returns for tax years 2001 and 2002.

Applicant has apparently ordered the income tax return forms from the state for those tax years where he has yet to file a return (1993, 1994, 1995, 1996, 1997, 1998, 1999, and 2000). Yet, considerable doubts persist as to his commitment to rectify the situation in the near future, given his inaction between the time of his DSS interview in October 2003 and May 2006. Claims of frequent relocation leaving him little to no opportunity to locate required documents (Tr. 69) are not extenuating where he managed to address his federal tax issues during that time. His timely compliance with his filing obligation for tax years 2003, 2004, and 2005, does not relieve him of his obligation to file his delinquent returns. Under the circumstances, I find he has not met his burden of persuasion in support of the mitigating conditions, including either ¶ E2.A10.1.3.1. *The criminal behavior was not recent* or ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*.

Moreover, Applicant exhibited poor judgment within the context of Guideline E in not filing his state returns. 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. ¶ E2.A5.1.1. DC ¶ E2.A5.1.2.5. *A pattern of dishonesty or rule violations, including violations of any written or recorded agreement made between the individual and the agency*, is implicated as he knowingly violated the requirements of the state's tax code. The fact that he had monies withheld from his pay shows no intentional evasion of taxes but as he acknowledges, it was an error in judgment to not file the returns. (Tr. 47)

Under guideline E, there is no corresponding mitigating condition addressing a proven pattern of violations that remains pertinent to a determination of judgment, trustworthiness, or reliability. To his credit, Applicant has exercised good judgment in responding appropriately to IRS and state tax authorities' notices of delinquency. Yet, the government must be assured that those persons granted access can be counted on to comply with their obligations and do the right thing before they are under pressure, whether legal or financial, to take action.

## Whole Person Analysis

"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." ¶ E2.2.1. Applicant's failure to comply with his known obligation to file timely returns continued despite an improved personal financial situation and after he was on notice of the government's concerns (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*). His recent filing of his 2001 and 2002 state returns is some evidence of reform (¶ E2.2.1.6. *The presence or absence of rehabilitation and other pertinent behavioral changes*), and under the "whole person" concept, his work record weighs in his favor. Yet, Applicant has

also held a secret-level clearance since 1988. The government can reasonably require those individuals in a fiduciary relationship to fulfill their obligations as citizens, including filing timely tax returns and paying taxes owed. Applicant's failure to take timely action to file his delinquent state tax returns, especially after the SOR had been issued, casts considerable doubt as to whether it is clearly consistent with the national interest to continue his clearance.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

### **DECISION**

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

Elizabeth M. Matchinski

Administrative Judge

1. The original of the notice of hearing was forwarded to Applicant through his employer with a copy of the notice mailed to his address of record. Applicant did not sign for the notice sent through company until October 24, 2006, well after his hearing was held. His employer provided no information to explain the delay.
2. His SF 86 (Ex. 1) indicates Applicant was married in 1980 and divorced in December 1991. At his hearing, he testified he was divorced in December 1990. The discrepancy was not addressed at the hearing so it remains unclear when Applicant was divorced.
3. Applicant testified that beginning with the 2001 tax year, so in 2002, he "caught up on everything." (Tr. 60) However, the record confirms steps taken at that time to rectify only his federal tax situation. He subsequently admitted he had not filed state returns for tax years 1993 through 2000 as of June 26, 2006 (Tr. 62).

4. *See* Conn. Gen. Stat. Ann. § 12-737. Effective 1991, any person required under this chapter to pay any tax, or required under this chapter or by regulations adopted in accordance with the provisions of this chapter to make a return . . . who willfully fails to pay such tax, make such return . . . at the time required by law or regulations, shall, in addition to any other penalty provided by law, be fined not more than one thousand dollars or imprisoned not more than one year or both.

5. Effective July 1, 1997, § 12-737 was amended as follows: "Notwithstanding the provisions of section 54-193, no person shall be prosecuted for a violation of the provisions of this subsection committed on or after July 1, 1997, except within three years next after such violation has been committed."