

KEYWORD: Criminal Conduct; Personal Conduct; Financial; Drugs

DIGEST: Applicant is a 53-year-old defense contract employee. He willfully failed to file federal and state tax returns from 2001 until 2003. Despite subsequent filings and payments in 2005, Applicant did not mitigate the criminal conduct concern, personal conduct, and financial considerations. Applicant also has a history of illegal drug use. Despite a 1996 drug treatment program, he did not mitigate the security concerns arising from his drug involvement. Clearance is denied.

CASENO: 04-10601.h1

DATE: 04/14/2006

DATE: April 14, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-10601

**DECISION OF ADMINISTRATIVE JUDGE**

**NOREEN A. LYNCH**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant is a 53-year-old defense contract employee. He willfully failed to file federal and state tax returns from 2001 until 2003. Despite subsequent filings and payments in 2005, Applicant did not mitigate the criminal conduct concern, personal conduct, and financial considerations. Applicant also has a history of illegal drug use. Despite a 1996 drug treatment program, he did not mitigate the security concerns arising from his drug involvement. Clearance is denied.

### STATEMENT OF THE CASE

On July 7, 2005, the Defense Office of Hearings and Appeals (DOHA), 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, 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 for Applicant, because of security concerns arising under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline H (Drug Involvement).

In a sworn written statement, dated August 30, 2005, Applicant responded to the allegations in the SOR. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the government's written case on October 31, 2005. Department Counsel provided a complete copy of the file of relevant material (FORM) <sup>(1)</sup> to Applicant, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on November 9, 2005. Applicant submitted additional information on December 8, 2005. The case was assigned to me on December 19, 2005.

## FINDINGS OF FACT

Applicant admitted the factual allegations pertaining to drug involvement under Guideline H (subparagraphs 4.a. through 4.o) of the SOR. Those admissions are incorporated as findings of fact. He denied all factual allegations under SOR subparagraphs 1, 2, and 3, (Guidelines J, E, and F respectively). After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is a single, 53-year-old employee of a defense contractor seeking to obtain a security clearance. On July 14, 2003, he submitted his security clearance application.<sup>(2)</sup> In 1973, Applicant held a security clearance while working for the Air Force.<sup>(3)</sup>

In 1985, he registered a business in his state which constituted a primary source of income from 1985 until 1989, and a large source of income for 2000 and 2001. The business is still active but amounts to 2% of his income. State law requires filing a semiannual gross receipts statement. Applicant did not file his statement for the period of January 1, 2001 to June 30, 2001 on a timely basis.<sup>(4)</sup>

Applicant failed to file federal income tax returns for years 2000 through 2003 in a timely manner. The IRS notified Applicant numerous times to comply with the law.<sup>(5)</sup> In addition, Applicant did not file his state income tax returns for the same time period. As of February 10, 2005, Applicant by his own admission, had not filed.<sup>(6)</sup>

The summary and status of Applicant's federal and state income tax returns for 2001 until 2003 is as follows:

For tax year 2000, Applicant owed the Internal Revenue Service (IRS) \$3,900.0. He did not file a return, nor did he pay the tax (\$5,140.00 interest and penalty) until December 5, 2005, well after he received the SOR.<sup>(7)</sup>

For tax year 2000, he also owed the state \$450.00. He filed the state tax return in 2005, but has not paid the tax.<sup>(8)</sup>

For tax year 2001, Applicant did not file his federal tax return. He filed in 2005 and received a refund of \$1,881.00. [\(9\)](#)

For tax year 2001, Applicant did not file his state tax return. He owed the state \$11.45. He filed in late 2005 and paid the tax liability of \$11.45 on November 28, 2005. [\(10\)](#)

For tax year 2002, Applicant received a refund of \$1,964.00 from the IRS. In 2003, he requested an extension for filing tax year 2002 return. In 2002, he made a payment to the IRS in the amount of \$1,800.00. He filed state tax for tax year 2002 in late 2005. He is awaiting a refund. [\(11\)](#)

For tax year 2003, Applicant filed his federal and state tax return in 2005. He received a refund from the state for \$1,033.00 in 2005. [\(12\)](#)

In 2004, Applicant paid \$850.00 in state taxes. In April 2004, he paid \$6,747.00 to the IRS for tax year 2000. [\(13\)](#)

In summary, Applicant filed and paid his federal and state income tax for the tax years 2001-2003. He also received refunds in 2005, and filed and paid his 2001 semiannual business receipts for 2001 in 2005. Applicant denies this was willful failure because he is not a good record-keeper, throws receipts into boxes, and returned to school part-time in 2000. He also claims he was in touch with the federal and state tax agents concerning the filings over the years. [\(14\)](#)

Applicant has an extensive history with illegal drugs by his own admission. He admits to use, purchase and cultivation of marijuana. In 1981 he used cocaine, hash, opium, peyote, psilocybin, amphetamines, LSD, as well as other recreational drugs. His drug use spans a period of thirty years between 1970 and 2002. Applicant abstained for certain periods of time during the years. [\(15\)](#)

In 1996, Applicant participated in an eight-week drug treatment program after testing positive for marijuana in an Employer random drug test. His stated reason for the participation is threat of termination from employment. After that, he elected to continue marijuana use. [\(16\)](#) He did not receive counseling or treatment after 1996. He acknowledged his recreational drug use in the 1970's occurred when he was working for the U.S. Air Force, with a clearance, in his home state. He believes there was no policy concerning drug use at that time.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2, Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision.

The Adjudicative Process factors to consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interest of national security.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines pertinent to an evaluation of the facts of this case:

**Guideline J- Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

**Guideline E- Personal Conduct: 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 F - Financial Consideration: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.**

**Guideline H -Drug Involvement: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.**

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information.<sup>(17)</sup> If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation, or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.<sup>(18)</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of national security.<sup>(19)</sup>

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of the Executive Order 10865 specifically provides that industrial security clearance decisions shall be, "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty or patriotism.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the following with respect to each allegation set forth in the SOR.

### **Criminal Conduct**

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Willingness to abide by rules is essential for one who is granted access to the nation's secrets.

The government established its case as to allegations 1.a. through 1.d. Applicant's willful failure to file his federal income tax returns for tax years 2000-2003 is a violation of 27 U.S.C. § 7203. Under Guideline J, 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 offenses*) apply.

Applicant did not pay the taxes or file his tax returns for 2000-2003 until December 2005, after the SOR allegations to determine whether his security clearance should be continued. The IRS sent notices over the years to Applicant, but he did not supply any information or comply with the law until late 2005. Applicant is a mature adult who has been employed and subject to federal and state income taxes for most of his adult life. He offered no explanation or excuse for his failure to file timely federal tax returns other than the fact he was a poor record keeper and could not afford to pay his taxes because he returned to school full time in 2000. I infer this is willful failure.

Criminal Conduct Mitigating Condition 1 (CC MC) E2.A10.1.3.1 (*the behavior was not recent*) does not apply. Nor does CC MC E2.A10.1.3.2 (*the crime was an isolated incident*) apply.

Applicant's pattern of not paying taxes continued for four years. CC MC E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*) does not apply despite the subsequent filing. Applicant was motivated by the SOR allegations and impact on his security clearance.

### **Personal Conduct**

Applicant also did not file his state taxes for 2000-2003 until 2005. He violated a state statute, which requires residents to file a complete tax return on an annual basis. The government established its case under Guideline E, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*). Applicant presented no information to mitigate the personal conduct concern. I conclude the substantial evidence is reliable and shows highly questionable judgment and unwillingness to comply with the law. PC MC 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*) also applies in this case.

## **Financial Considerations**

The government established its case under Guideline F. Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*) apply. Applicant failed to resolve his tax liabilities until late 2005. He did not file federal or state returns from 2000 until 2003, nor pay his tax until 2004 and 2005.

I considered Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.1 (*the behavior was not recent*) and FC MC E2.A6.1.3.2 (*the behavior was an isolated event*). Neither applies in this case for the reasons already discussed under Guideline J above.

I considered FC MC E2.A6.1.3.3 (*the conditions that resulted in the behavior were largely beyond the person's control*). Applicant's time management challenges concurring with part time employment, and poor record keeping were clearly within his control. I conclude this FC MC does not apply in this case.

FC MC E2.A6.1.3.6 (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) is a possible mitigating condition. Applicant did not file returns until well after the DSS investigation and SOR. He did make two payments in 2004, but his reliance on the 2004 payments is not sufficient to mitigate the security concerns. His tax liability was outstanding, and Applicant chose to file and pay only after he feared a loss of security clearance. This is not a good faith effort. Applicant did not mitigate the financial considerations. Allegations 3.a. to 3.d. are concluded against Applicant.

## **Drug Involvement**



Applicant's record is replete with experimental illegal drug use by his own admission. (DI DC) E2.A8.1.2.1 (*any drug abuse*), and DI DC E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution*) apply. DI DC E2.A8.1.2.3 (*diagnosis by a credentialed medical professional*) does not apply in this case. There is no record of such a diagnosis here.

From 1970 until at least 2002, Applicant was involved with illegal drugs. Drug Involvement Mitigating Conditions (DI MC) E2.A8.1.3.1 (*the drug involvement was not recent*) and DI MC E2.A8.1.3.2 (*the drug involvement was an isolated or aberrational event*) do not apply. Applicant ended his written responses to the SOR with the statement, "I do not intend future use." Given his history and disregard for rules, I find this insufficient proof of intent. DI MC E2.A8.1.3.3 (*a demonstrated intent not to abuse any drugs in the future*) does not apply. DI MC E2.A8.1.3.4 (*satisfactory completion of a prescribed drug treatment program, including rehabilitation and after care requirement, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional*) do not apply. Applicant did not receive any after care treatment. Also, there is no reliable information concerning successful completion of the 1996 employer referral program.

Applicant asserts his drug use was experimental and a result of youthful indiscretions. He also noted this occurred many years ago, including a time in the 1970's when he worked for the U.S. Air Force and had a security clearance. However, his marijuana use continued until 2002 when he was approximately 50 years old. Applicant is now a mature man. Considering all the evidence in this case, I find Applicant has failed to overcome the drug involvement concerns in the SOR. Accordingly, allegations 4.a through 4.o of the SOR are concluded against Applicant.

I carefully considered all the circumstances in light of the "whole person concept." I conclude Applicant is not eligible for eligible 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 J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2, Guideline E. AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Paragraph 3, Guideline F. AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Paragraph 4, Guideline H. AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: Against Applicant

Subparagraph 4.c: Against Applicant

Subparagraph 4.d: Against Applicant

Subparagraph 4.e: Against Applicant

Subparagraph 4.f: Against Applicant

Subparagraph 4.g: Against Applicant

Subparagraph 4.h: Against Applicant

Subparagraph 4.I: Against Applicant

Subparagraph 4.j: Against Applicant

Subparagraph 4.k: Against Applicant

Subparagraph 4.l: Against Applicant

Subparagraph 4.m: Against Applicant

Subparagraph 4.n: Against Applicant

Subparagraph 4.o: 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 a security clearance for Applicant. Clearance is denied.

Noreen A. Lynch

Administrative Judge

1. The government submitted sixteen items in support of its contentions.
2. Item 4 (Applicant's Security Clearance Application (SF 86), dated July 14, 2003) at 1.
3. *Id.* at 9.
4. Item 3 (Applicant's Answer, dated August 30, 2005) at 3.
5. Item 11 (Department of Treasury Internal Revenue Service Request for Tax Return, dated June 10, 2002); Item 12 (Department of Treasury Internal Revenue Service Request for Tax Return, dated December 31, 2001); Item 13

(Department of Treasury Internal Revenue Service Request for Tax Return, dated June 7, 2002); Item 14 (Department of Treasury Internal Revenue Service Request for Tax Return, dated August 5, 2002).

6. Item 15 (Applicant's Statement, dated February 11, 2005.)

7. Applicant's Answer to FORM, dated December 5, 2005.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Item 10 (Statement of Applicant, dated February 26, 2004) at 1.

14. *Id.*

15. Item 7(Statement of Applicant, dated February 27, 2004 at 1-10.

16. *Id.*

17. ISCR Case No. 96-0277 (July 11, 1997) at 2.

18. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Para E3.1.15.

19. Directive, Enclosure 2, Para. E2.2.2