

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 51-year-old senior field service representative for a defense contractor. From 2001 through 2004, he violated federal and state law by wilfully failing to file federal and state tax returns. Other than an allusion to vague medical problems interfering with his ability to file for two years, and unsubstantiated claims that he has since filed for those years, he has presented no facts to mitigate security concerns arising from his criminal conduct. Clearance is denied.

CASE NO: 04-10809

DATE: 06/19/2006

DATE: June 19, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10809

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 51-year-old senior field service representative for a defense contractor. From 2001 through 2004, he violated federal and state law by wilfully failing to file federal and state tax returns. Other than an allusion to vague medical problems interfering with his ability to file for two years, and unsubstantiated claims that he has since filed for those years, he has presented no facts to mitigate security concerns arising from his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On September 20, 2002, Applicant applied for a security clearance and submitted an electronic version of Security Clearance Application (SF 86).⁽¹⁾ On October 28, 2005, 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*, 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 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 denied or revoked.

In a notarized statement, dated November 21, 2005, Applicant responded to the SOR by admitting all allegations.⁽²⁾ He also elected to have his case decided on the written record in lieu of a hearing. Department Counsel prepared the government's written case on March 28, 2006. A complete copy of the file of relevant material (FORM)⁽³⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by May 24, 2006. Applicant chose not to respond to the FORM. The case was assigned to me on June 14, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. After a thorough and careful review of the evidence and exhibits, I make the following additional findings of fact:

Applicant is a 51-year-old senior field service representative for a defense contractor. He started working for his current employer in October 1980, after nearly eight years in the United States Marine Corps. Applicant has three years of post-secondary education. Currently single, he and his wife divorced in February 2001 after nearly 26 years of marriage. He has two adult children who turned 18 years old in June 1997 and April 2002, respectively.⁽⁴⁾

As of March 2004, Applicant earned approximately \$30,000 per year.⁽⁵⁾ He had his taxes deducted from his monthly paycheck⁽⁶⁾ by his employer for tax years 2001 through 2004. He unambiguously admits, however, that he wilfully failed to file tax returns on both the federal and state level during those years. Applicant gives no reason for his failure to file tax returns except that he "did not file the last two years due [sic] my medical problems."⁽⁷⁾ He does not elaborate on what his medical problems were.

Although he admits to his failure to file the federal and state tax returns at issue, Applicant claims that he has since filed his federal income tax returns for tax years 2001 through 2004, and is waiting for the Internal Revenue Service to contact him. He also asserts that he has increased his federal tax withholding by \$350 per month. Regarding his state income taxes, he argues that he has since filed his state income tax returns for tax years 2001 through 2004, and is waiting for the state tax board to contact him. He similarly claims he has increased his state tax withholding by \$250 a month. He did not provide any evidence or documentation, however, with regard to these assertions.

Under the Internal Revenue Code, "[e]very individual having for the taxable year gross income which equals or exceeds the exemption amount" must file a federal income tax return.⁽⁸⁾ The "exemption amount" is defined as \$2,000 plus adjustment for inflation; it was \$3,100 for tax year 1994.⁽⁹⁾ Moreover, any person required to file a federal income tax return or to pay any estimated tax, who *wilfully* fails to do so, is guilty of a misdemeanor.⁽¹⁰⁾

Under the laws of the state in which Applicant resides and works, every married individual subject to the state's taxing jurisdiction must file a state income tax return if their gross income exceeds \$16,000.⁽¹¹⁾ For a single individual, the filing requirement applies if the individual's gross income exceeds \$8,000.⁽¹²⁾ Under state law, subject to a few exceptions, anyone who is required to file state income tax returns and does not do so is similarly guilty of a misdemeanor.⁽¹³⁾

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.⁽¹⁴⁾ The government has the burden of proving controverted facts.⁽¹⁵⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁶⁾ 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.⁽¹⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁸⁾

No one has a right to a security clearance⁽¹⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²²⁾ 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 security clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.⁽²³⁾

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has asserted, and Applicant admits, that Applicant wilfully failed to file federal and state income tax returns for several years. In light of his income level and in view of both federal and applicable state law, such failures constitute federal and state misdemeanors. (24) Consequently, under Guideline J, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*[a]llegations 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 lessor offenses*) apply.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant admits that he wilfully failed to file federal and state income tax returns from 2001 through 2004. Therefore, neither CC MC E2.A10.1.3.1 (*[t]he criminal behavior was not recent*) nor CC MC E2.A6.1.3.2 (*[t]he crime was an isolated incident*) applies.

Citing to no acts of force or subtle inducements, Applicant fully admits that he wilfully neglected to file the federal and state tax returns at issue. Therefore, CC C E2.A10.1.3.3 (*[t]he person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) does not apply. For similar reasons, and in absence of a any indication as to what motivated him not to file federal and states taxes or corroborative evidence demonstrating that he subsequently filed for the years at issue, neither CC MC E2.A10.1.3.4 (*[t]he person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) nor CC MC E2.A10.1.3.6 (*[t]here is clear evidence of successful rehabilitation*) applies.

Finally, there is no indication that Applicant has been formally charged for his failures to file federal or state tax returns. Therefore, CC MC E2.A10.1.3.6 (*[a]cquittal*) does not apply. In view of the above, and particularly in light of his full admission and his failure to present facts upon which mitigation might be based, Applicant has uniformly failed to mitigate security concerns arising from his criminal conduct.

I have considered both the record evidence and Applicant in light of the "whole person" concept. He is a mature, unmarried, professional who has maintained steady employment with the same company for over a quarter of a century. Although he had federal and state taxes deducted from his monthly pay, he chose not to file annual tax returns at the federal and state levels from 2001 through 2004. Other than a brief allusion to medical problems impacting his decision

not to file for two of those years, and unsubstantiated assertions that ameliorative action has been taken, no mitigating reason or explanation is offered for his conduct. Left with the scant facts of record, Applicant's conduct raises serious questions regarding his judgment, reliability, and trustworthiness, factors that strike to the heart of Guideline J (Criminal Conduct). Consequently, clearance is denied.

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 (Criminal Conduct): 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

DECISION

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

Arthur E. Marshall, Jr.

Administrative Judge

1. A prior, non-electronic version was signed on August 23, 2002, with substantially similar answers.
2. Applicant admitted he wilfully failed to file federal and state income taxes from 2001 through 2004.
3. The government submitted 11 items in support of its contentions.
4. The record does not indicate whether these children were, during the tax years at issue, considered dependents for tax purposes, nor does Applicant argue that they were.
5. Item 7 (Applicant's signed, sworn statement, dated March 11, 2004) at 5.
6. *Id.* at 3.
7. *Id.*
8. 26 U.S.C. § 6012.
9. 26 U.S.C. § 151(d).
10. 26 U.S.C. § 7203.
11. Cal. Rev. & T. Code § 18501(a)(2).
12. Cal. Rev. & T. Code § 18501(a)(1).
13. Cal. Rev. & T. Code § 19701.
14. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
15. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
16. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
17. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
18. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
19. *Egan*, 484 U.S. 518, at 531.
20. *Id.*
21. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
22. Executive Order 10865 § 7.
23. Directive, Enclosure 2, ¶ E2.A10.1.1
24. Applicant divorced in February 2001 and has been single since that time. There is no claim by Applicant that his children were treated as dependents during the relevant tax years. Therefore, it is highly unlikely his exemption amount

equaled or exceeded his income. If it did so, however, Applicant failed to raise the issue. As for the state income thresholds, Applicant's income exceeds the benchmarks as both a married and single individual.