

DATE: June 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-12448

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

Edward Loughran, Esq., Department Counsel

FOR APPLICANT

Laura Anderson, Esq.

SYNOPSIS

Applicant's failure to file federal income tax returns from 1993 to 2003 generates a security concern regarding his judgment, reliability and trustworthiness. In light of the length of time he ignored this responsibility, his recent filing of the delinquent returns is insufficient to mitigate this concern. Clearance is denied.

STATEMENT OF THE CASE

On August 10, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. The SOR, which is in essence the administrative complaint, alleged a security concern under Guideline J for criminal conduct. Applicant answered the SOR on September 8, 2005, and requested a hearing.

The case was assigned to me on December 7, 2005. A notice of hearing was issued on February 13, 2006, and the hearing was held as scheduled on March 15, 2006. During the hearing, I received 5 government exhibits, 17 Applicant exhibits, and the testimony of 2 Applicant witnesses. The transcript (Tr.) was received on March 23, 2006.

At the conclusion of the hearing, Applicant's counsel moved to leave the record open to submit a post-trial brief. I granted the motion. Applicant's counsel submitted a brief on May 3, 2006, and Department Counsel submitted a reply brief on May 17, 2006.

FINDINGS OF FACT

Applicant admits all of the SOR allegations regarding his failure to file income tax returns, but denies that he did so willfully. His admissions are incorporated into the findings of fact.

Applicant is a 57-year-old single man who works as a radar analyst. He earned a bachelor of science degree in electrical engineering in 1972, and has held a security clearance since 1973.

Applicant failed to file his federal income tax returns from 1993 through 2003. He attributed this failure to his preoccupation with a series of bad financial investments he made between 1985 and 1997. As the losses from these investments increased, he became overwhelmed with their complex tax implications. In addition, he acknowledged being undisciplined and disorganized, and was aware of his legal duty to file his income tax returns, "but did not have the luxury of time to complete [them]" (Ex. 4, Applicant's statement, dated April 22, 2004, at 1).

In 1996, a Department of Defense Security Services (DSS) agent interviewed Applicant about his failure to file his tax returns. The tax returns for tax years 1993 and 1994 were then delinquent. Applicant promised the agent that he would file these returns, but failed to do so (Tr. at 81).

In April 2004, Applicant met with another DSS agent. He promised to organize his financial information and retain a professional tax preparer to help him file the returns (Ex. 4 at 2). In September 2005, approximately three weeks after the issuance of the SOR, Applicant met with a tax preparer for the first time (Answer, dated September 8, 2005, at 6). With the assistance of the tax preparer, he organized his finances and filed all of his delinquent returns.

Applicant was entitled to refunds for all of the years he did not file returns, but had to forfeit them because of his failure to file the returns on time. The amount forfeited was approximately \$27,000 (Answer at 7; Tr. at 31-36). Applicant filed his 2004 and 2005 income tax returns on time, and has developed a filing system to facilitate the ongoing management of his finances. He intends to continue working with a professional tax preparer to ensure he does not become overwhelmed with financial management in the future.

Applicant is heavily involved in charitable activities, often volunteering at a local prison ministry, helping the disabled, and feeding the homeless (Answer at 12-13; Ex. 4 at 1). He has given thousands of dollars to charities in the past 20 years.

POLICIES

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

An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied along with the factors set forth in the Adjudicative Process provision in Section E2.2, Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching 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. 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.

The relevant guideline to be applied here is Guideline J (Criminal Conduct). Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest" (*See*

Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

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 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 an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides 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."

CONCLUSIONS

Having considered the record evidence in light of the appropriate legal precepts and factors, I conclude the following.

Under 26 U.S.C. §7203 (2005), "[a]ny person required under this title . . . or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations shall, in addition to other penalties provided by law, be guilty of a misdemeanor." The Supreme Court defines 'willfulness' as "the voluntary, intentional violation of a known legal duty" (*United States v. Cheek*, 498 U.S. 192, 201 (1991)).

I conclude that Applicant's admitted failure to file his federal income taxes from 1993 through 2003 was willful, and that each failure constituted a federal misdemeanor under 26 U.S.C. §7203. Under Guideline J, "a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (Directive ¶ E2.A10.1.1). Both DC 1, "admission of criminal conduct," and DC 2, "multiple lesser offenses," apply (Directive ¶¶ E2.A10.1.2.1, and E2.A10.1.2.2).

I considered carefully all of the potential mitigating conditions, and conclude that MC 4, "the factors leading to the violation are not likely to recur," and MC 6, "clear evidence of successful rehabilitation," apply (Directive ¶¶ E2.A10.1.3.4, and E2.A10.1.3.6). Applicant has exhaustively organized his finances, and manages them on an ongoing basis instead of neglecting them, as he did in the past. He filed all of the delinquent returns, and filed his two most recent returns on time. He intends to continue using a professional tax preparer to avoid becoming overwhelmed with his tax returns in the future.

Upon balancing the applicable disqualifying and mitigation conditions along with the whole person concept, I conclude that Applicant's past criminal conduct continues to pose an unacceptable security risk. Applicant is a mature adult who knew he had a legal duty to file his income tax returns. He was aware of the negative security implications of failing to file his income tax returns as early as 1996, but failed to file them for nine successive years. Also, he credited an April 2004 meeting with a DSS agent with helping him to appreciate the urgency of the need to organize his finances and file his tax returns, but did not seek a professional tax preparer for help until after the SOR was issued 16 months later. Although he is a highly competent employee with a strong sense of civic duty who has made commendable progress towards rehabilitation, these factors are outweighed by the extent and recency of the criminal conduct. 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: 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

Subparagraph 1.k: 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.

Marc E. Curry

Administrative Judge