

DATE: August 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-00343

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant willfully failed to file state and federal tax returns for a number of years as required by applicable law. Clearance is denied.

STATEMENT OF THE CASE

On October 25, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ^(u) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct) and Guideline F (financial considerations). Applicant submitted a response to the SOR that was received by DOHA on December 19, 2005, and requested a clearance decision based on the written record without a hearing. Applicant admitted all SOR allegations.

Department Counsel prepared a File of Relevant Material (FORM) on March 9, 2006, that was mailed to Applicant on March 10, 2006. Applicant acknowledged receipt of the FORM on March 15, 2006. Applicant responded to the FORM by submitting eight documents that were received by DOHA on April 28, 2006, marked as Applicant's Exhibits (AE) 1-8, and admitted into the record over Department Counsel's objection. The case was assigned to me on April 28, 2006.

PROCEDURAL MATTERS

Department Counsel filed a *Motion to Amend Statement of Reasons* on March 10, 2006, with proof of service of said motion having been sent to Applicant the same date. Applicant did not object to or otherwise respond to the motion. The motion seeks to add additional statutory citations to the allegations contained in SOR subparagraphs 1.a, 1.b, 1.c and 1.d, and to modify the subparagraph number of one of the citations already contained in each of those subparagraphs. The motion is allowed except as to the request to modify the subparagraph number listed in the citation contained in SOR subparagraph 1.a. The applicable state law cited in each of the subparagraphs was amended effective October 1,

1994, thus making the citation as listed in SOR subparagraph 1.a correct.

Department Counsel submitted a pleading entitled *Department Counsel's Objection to Applicant's Answer and Supplemental Material and Motion to Strike* on May 1, 2006, with proof of service of said pleading having been sent to Applicant the same date. Applicant did not respond to the pleading. The only basis for Department Counsel's objection to admission of Applicant's additional submissions is that Applicant's response was received 13 days after it was due. Department Counsel has not asserted the government was in anyway prejudiced by the late submission nor has he sought additional time to respond or claimed he needed additional time to respond to Applicant's submissions. Accordingly, Department Counsel's objection is overruled and his motion to strike is denied.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. Additionally, after a thorough review of the record, I make the following findings of fact:

Applicant is a 50-year-old woman who has been employed by a defense contractor since May 2001. She was previously employed outside the defense industry as an inventory technician from June 1992 until May 2001. Applicant served in a national guard organization from August 1980 until August 2000, and attained the rank of Sergeant (paygrade E-5). Although the dates of service strongly indicate she most likely retired from the national guard in August 2000, the file does not contain information to confirm that assumption. Applicant has never been married, but does have at least one child who is approximately 13 years old and for whom she receives \$230.00 per month as and for child support.

Applicant filed for protection under Chapter 13 of the bankruptcy code in July 1999. A repayment plan was confirmed on October 4, 1999, that required an initial deposit be made in the amount of 403.42 followed by 54 monthly payments in the amount of \$201.71. Applicant successfully completed the plan in or about May 2003. Applicant attributes her need to file for bankruptcy protection to the costs of child daycare she experienced beginning in 1997 in order to permit her to continue working.

The SOR alleges Applicant willfully failed to file state income tax returns for the tax years 1993, 1995, 1996, and 2002, and a federal income tax return for tax year 2002. The willful failure to file state and federal tax returns are criminal offenses. (2) Applicant failed to provide any explanation for her failure to file tax returns in the years alleged. In her response to the SOR, Applicant indicated she was awaiting receipt of W-2 forms before she could file the delinquent returns. The FORM contains a 1995 state income tax return that purports to have been signed on September 19, 1999, although there is no proof the return was actually filed (Item 9).

Applicant filed her 2002 state income tax return on March 22, 2006, and received a refund in the amount of \$477.00 (AE 2). She filed her 2003 state income tax return the same day and had a balance due owing to the state in the amount of \$764.00 (AE 3). On April 5, 2006, Applicant obtained a cashier's check in the amount of \$1,038.90 payable to the state comptroller (AE 4) which represented the total amount she owed the state for tax year 2003, presumably including interest and penalties for late filing (AE 5).

Applicant submitted AE 1 which consists of photo copies of a business card from a revenue agent employed by the state comptroller's office, a telephone message whose meaning is unclear, and a certified copy of a statement that indicates Applicant's total balance, including penalty and interest, for an unidentified account as of the 22nd day of an undisclosed month in 2006 was -0.40. Applicant claims to have paid all back taxes owing the state and it would appear that this exhibit is most likely a woefully inadequate attempt to document that assertion.

The SOR alleges Applicant owed delinquent state income taxes in the amounts of \$734.73 for tax year 1999 (SOR subparagraph 2.b), and \$1,207.67 for tax year 2000 (SOR subparagraph 2.d). It also alleges she is indebted to the same state for delinquent taxes, penalties and interest in the amount of \$2,009.00, and that a lien was filed against her for those unpaid taxes in about March 2004 (SOR subparagraph 2.e). The only documentation contained in the FORM pertaining to these alleged delinquencies is a *Notice of Income Tax Assessment* for tax year 2000, dated September 16, 2003, showing a balance due in the amount of \$1,198.79 (Item 12). The limited circumstantial evidence presented by the pleadings and exhibits in the FORM is sufficient to find that SOR subparagraph 2.e is a compilation of the debts

alleged in subparagraphs 2.b and 2.d.

The SOR also alleges that Applicant was indebted for delinquent federal income taxes in the amount of \$2,136.59 for tax year 1999 (SOR subparagraph 2.c). The documentation contained in the FORM pertaining to this debt discloses that as of September 12, 2003, Applicant owed delinquent federal income taxes for the years 1999 and 2000 in the total amount of \$4,745.46, and, on September 19, 2003, the IRS agreed to a repayment plan requiring monthly payments in the amount of \$100.00 to satisfy the delinquent taxes for both years (Item 11). Further, the documentation establishes that as of April 4, 2005, the total balance owing for tax year 2000 was \$3.46, consisting solely of accrued interest (Item 8).⁽³⁾

Applicant admits to being indebted to a gym in the amount of \$265.00 (SOR subparagraph 2.f) and claims to have attempted to obtain information about the debt only to be told they do not have any record of her account. She was delinquent in paying a cell phone charge in the amount of \$260.20 (SOR subparagraph 1.g), received a settlement offer from a collection agency for that account in the amount of \$169.13 if payment was made by February 25, 2003 (Item 13), and claims to have paid the debt although she failed to present any documentation in support of that assertion.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁶⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

Criminal conduct under Guideline J is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break rules.

Applicant willfully failed to file state income tax returns in 1993, 1995, 1996 and 2002. She willfully failed to file a federal income tax return in 2002. Each of those willful failures constituted a criminal offense under applicable statutes. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant did not finally file her 2002 state income tax return until March 22, 2006, a mere five months ago and not until after she received the FORM. Although she claims to have filed all her delinquent returns, she did not submit any documentation in support of those claims with the exception of a 1995 state tax return that was signed in 1999, and may or may not have been actually submitted to the state. Based upon the evidence before me, I am unable to conclude that Applicant has filed any of the delinquent tax returns other than the 2002 state return. Accordingly, I am unable to conclude that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; or MC 6: *There is clear evidence of successful rehabilitation* apply.

Applicant has not provided any explanation for her failure to file any of the tax returns in question. Instead, in response to interrogatories propounded to her before the SOR was filed, she indicated she had either filed the returns or was uncertain if she had filed the returns, and, in any event, she did not possess any paperwork that might shed any light on the subject. In her response to the SOR, Applicant admitted she hadn't filed any of the returns and was awaiting receipt of copies of W-2 forms in order to file the returns, with exception of the 1993 state tax return for which she claimed records were unavailable. In her April 28, 2006 response to the FORM, Applicant submitted verification of filing only one of the delinquent returns. Based on the above statements and actions of Applicant, I cannot find that MC 3: *The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*; or MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* apply. MC 5: *Acquittal* has no application to the facts of this case. Guideline J is decided against Applicant.

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant filed for Chapter 13 bankruptcy protection in 1999, owed delinquent state and federal income taxes in excess of \$4,000.00 for tax years 1999 and 2000, and allowed two relatively minor bills to become delinquent. Disqualifying Conditions (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply.

Applicant explained the reason she experienced financial difficulties in the late 1990s was due to the cost of day care for her child in order to allow her to work. She successfully completed the bankruptcy plan, has either satisfied the delinquent federal taxes or was, as of April 2005, current in making agreed upon payments, and paid one of the two other delinquent debts. Her explanation for not paying the one remaining debt is credible. Although the documentation she submitted in support of her claim to have repaid the alleged delinquent state taxes is seriously wanting, her efforts to satisfy her other creditors and the documentation she submitted establishing satisfaction of more recent state tax indebtedness provide sufficient verification of her claim to have satisfied the delinquent state taxes.

MC 3: *The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*; and MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply. Guideline F is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against her and satisfy her ultimate burden of persuasion to demonstrate it is clearly consistent with the national interest to grant or continue her access to classified information.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-e: Against Applicant

SOR ¶ 2-Guideline F: For Applicant

Subparagraph a-j: For 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.

Henry Lazzaro

Administrative Judge

1. ⁰ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2.

⁰ See: Md. Ann. Code Tax-Gen. § 10-804; Md. Ann. Code Tax-Gen. § 13-1001; 26 U.S.C. 7203.

3. ⁰ It is apparent from the contents of Item 8, that, although the government did not include the entire account transcript disclosing all of Applicant's payments to the IRS, Applicant either has successfully fulfilled the repayment agreement she entered into with the IRS in September 2003 or, as of April 2005, was current in making payments.

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

5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

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

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. *Id* at 531.

13. *Egan*, Executive Order 10865, and the Directive.