

DATE: December 28, 2006

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 06-14063

## DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

### APPEARANCES

#### FOR GOVERNMENT

Caroline B. Jeffreys, Esq., Department Counsel

Richard Stevens, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant has a history of financial delinquencies and unwillingness to pay his debts. He has two unpaid federal tax liens, one unpaid state tax lien, and one credit card bad debt, which he says he will not pay. From 1993 to 2003, Applicant failed to pay his state taxes. He did not pay his federal taxes for at least the years 1998 through 2003. While self-employed, he willfully failed to report income to federal and state taxing authorities. He deliberately failed to provide truthful answers to Questions 36, 38, and 39 on his security clearance application. He failed to mitigate Guideline J, F and E security concerns. 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. On June 21, 2006, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Directive. Applicant filed an answer to the SOR on August 18, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me September 26, 2006. On November 6, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, offered three exhibits (Ex.) for admission to the record (Ex. 1 through 3), and submitted two state tax statutes and one federal tax statute for administrative notice. The documents containing the specific state and federal tax statutes were marked as Government Documents I, II, and III. All Government exhibits and documents were admitted to the record without objection. Applicant testified on his own behalf and called no other witnesses. He submitted 21 exhibits, which were identified as Applicant's Ex. A through U, and admitted to the record without objection. At the conclusion of the hearing, I left the record open until close of business November 13, 2006, so that Applicant could, if he wished, submit additional information for the record. Applicant timely filed 16 additional exhibits, which were identified and

marked as Applicant's Ex. V, W, X, Y, and Z and A-1 through K-1. Applicant's post-hearing exhibits were admitted to the record without objection. On November 28, 2006, DOHA received the transcript (Tr.) of the proceeding

### **FINDINGS OF FACT**

The SOR contains 18 allegations of disqualifying conduct under Guideline J, Criminal Conduct, four allegations of disqualifying conduct under Guideline F, Financial Considerations, and five allegations of disqualifying conduct under Guideline E, Personal Conduct. In his answer to the SOR, Applicant admitted all Guideline J and Guideline F allegations. He admitted two Guideline E allegations and denied three. His admissions are incorporated as findings of fact.

Applicant is 49 years old, married, and employed as a security guard by a government contractor. He and his wife have one child, and Applicant is step-father to a child from his wife's former relationship. Applicant and his wife have lived together and shared household expenses since 1999. From 1994 to 1999, Applicant lived with his mother. He did not pay rent or utilities, but did give his mother money to buy food. (Ex. 1; Tr. 55-59.)

Applicant is a high school graduate and is trained as a draftsman. In 1977 he took a job as a draftsman with an employer for whom he worked until 1991. During those years, Applicant timely filed his federal and state income taxes. From 1981 to 1983, Applicant attended college and aspired to become an engineer. His employer provided him with on-the-job training in engineering, and he transferred from the drafting department to the engineering department. In 1991, Applicant was laid off when his employer downsized the engineering department. (Tr. 62-63, 79-81.)

In 1992, Applicant took a job selling life insurance on commission. In 1992 and 1993, he earned very little money, and in order to survive financially, he drew money from the 401(K) plan he had established while employed with the drafting/engineering company. He did not pay taxes on his withdrawals because he did not have the money to do so. In 1994, he was employed to do painting and other handyman work for home-improvement businesses. In 1995, while continuing to work for others on occasion as a painter or handyman, he established his own home-improvement business and became self-employed. He admitted willful failure to report to the IRS self-employment income for the tax years 1995 through 2003. He also admitted willful failure to report to his state taxing authority self-employment income earned for tax years 1995 through 2003. In 1996, Applicant was arrested and charged with Theft: Less \$300 Value. The charge was later dismissed. (Ex. Q; Tr. 13, 61-62, 89-90.)

Applicant provided business records from 1997 to 2003 showing proposals he made to clients for home repair projects. (Ex. V.) In 2003, he took a part-time job as a security guard and worked 24 hours per week. In 2004, Applicant began working full-time as a security guard and also worked part-time at his business. His annual salary as a security guard is \$38,000. In the past three years, he earned approximately \$23,000 from his home-improvement business. (Tr. 55-57, 59.)

Applicant failed to file his state income tax returns from 1993 to 2003. He failed to pay his federal income taxes from 1998 to 2003. <sup>(3)</sup> In 2004, Applicant was interviewed by an authorized investigator regarding his application for a security clearance. Applicant and the investigator discussed Applicant's tax delinquencies. In that interview Applicant stated he would notify the state and federal governments of his failure to file returns from 1993 through 2003, and he would seek legal counsel to help him file his delinquent returns. One year later, in September 2005, Applicant was again interviewed by an authorized investigator and admitted he had not taken action on his delinquent taxes. He said he knew failure to file federal and state income tax returns was a crime, and he attributed his failure to do so to procrastination. (Tr. 65-68.)

On November 3, 2006, three days before his hearing, Applicant filed an amended federal income tax return for 1997 and individual federal income tax returns for 1998, 1999, 2000, 2001, 2002, and 2003. He also filed an installment agreement request (Form 9465) and offered to pay \$150 a month on a total delinquency of \$6,508.05, exclusive of interest and penalties. (Ex. A through H, Ex. W, X, Y, Z, and A-1 through D-1.)

Also on November 3, 2006, Applicant filed state income tax returns for 1994, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. (Ex. I through P; Ex. E-1 through K-1.) He claimed he was not required to file a state tax return in 1993 because

his income was below the requisite threshold. Applicant claimed he planned to amend his 1995 and 1996 state tax returns. (Tr. 53.) He paid income taxes in 2004 and 2005. Applicant's tax refund for 2004 was applied to his 1995 tax delinquency. His tax refund for 2005 was applied to his 1994 tax delinquency. (Tr. 97-98.)

The tax code of Applicant's state of residence requires that a person residing in the state file a tax return or an estimated income tax declaration whether or not the person owes income tax. Additionally, the tax code defines willful failure to file a required tax return as a misdemeanor crime, which upon conviction subjects a person to a fine not exceeding \$10,000 or imprisonment not exceeding five years or both. Willfulness is defined as "an intentional and voluntary violation of a legal duty." *Allnutt v. State*, 1984, 478 A. 2d 321, 59 Md. App. 694, cert. denied, 484 A.2d 274, 301 Md 639, appeal dismissed, 105 S. Ct. 2108, 471 U.S. 1050, 85 L. Ed.2d 474. (Government Documents for Administrative Notice I and II.) Willful failure to file a federal income tax return is also defined as a misdemeanor crime which, upon conviction, subjects a person to a fine of not more than \$25,000 or imprisonment for not more than a year, or both, together with the costs of prosecution. (Government Document for Administrative Notice III.)

Applicant owes the federal Internal Revenue Service (IRS) approximately \$7,112 in taxes, penalties and interest on a federal tax lien filed against him in 1993 for non-payment of his tax debt. He also owes the IRS approximately \$67 in taxes, interest and penalties on a federal tax lien levied against him in 1997. As of January 2006, neither debt had been satisfied. Applicant admitted the debts and asserted he was not obliged to pay them because they were more than ten years old. For that reason, he said he did not intend to pay them. (Tr. 69-70.)

Applicant admitted a credit card debt of approximately \$1,863 on an account placed for collection in about October 1998. Applicant stated the original debt dated to 1994. He had not attempted to satisfy the debt, and he did not intend to pay it. ( Answer to SOR; Tr. 71-72.)

Applicant also admitted owing a state tax lien filed against him in 1999 for non-payment of a 1992 tax debt of \$4,177. As of June 2004, the debt totaled \$5,286.94 in taxes, interest and penalties. Applicant asserted he intended to pay the state tax lien in a future settlement that would include payment of his other state tax delinquencies. (Tr. 49-50.)

Applicant completed and signed a security clearance application (SF-86) on October 17, 2003. He did not review his credit report before completing the SF-86. (Tr. 75.) Question 36 on the SF-86 reads as follows: "Your Financial Record - Tax Lien. In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" Applicant answered "no" to Question 36. He claimed he thought his tax liens were more than seven years old. (Answer to SOR; Tr. 74-75.)

In his answers to Questions 38 and 39 on his SF-86, Applicant denied financial delinquencies of over 180 days in the last seven years and any current financial delinquencies of over 90 days. Applicant claimed he thought his financial delinquencies dated to time more than seven years in the past. He denied any current delinquencies of over 90 days. (Answer to SOR; Tr. 74-75.) Applicant denied participating in personal or business financial counseling. (Tr. 98.)

## 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 has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal 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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. 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.

## CONCLUSIONS

### **Guideline J - Criminal Conduct**

In the SOR, DOHA alleged Applicant had a history or pattern of criminal activity which was demonstrated by his willful failure to file his State income tax returns for the years 1993 through 2003 (¶¶ 1.a., 1.b., 1.c., 1.d., 1.e., 1.g., 1.i., 1.k., 1.m., 1.o., and 1.q.); his willful failure to file his federal income tax returns for the years 1998 through 2003 (¶¶ 1.f., 1.h., 1.j., 1.l., 1.n., and 1.p.), and by his arrest on April 9, 1996, and charge of Theft, Less than \$300 Value, which was later dismissed (¶ 1.r.).

Applicant's admitted criminal conduct raises security concerns under Disqualifying Conditions (DC) E2.A10.1.2.1 and E2.A10.1.2.2 of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. ¶ E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant admitted willful failure to pay his state income taxes for ten years. He also admitted willful failure to pay his federal income taxes for six years. During this time in 1996 he was also arrested and charged with Theft, Less than \$300 Value. Applicant's admissions of these acts of criminal conduct raise a security concern under conduct under Disqualifying Condition (DC) E2.A10.1.2.1. of Guideline J. Applicant's criminal conduct consisted of multiple lesser offenses, thus raising a security concern under DC E2.A10.1.2.2.

These criminal acts were recent. They were not isolated events but instead demonstrated a pattern of criminal conduct. Thus, neither Mitigating Condition (MC) E2.A10.1.3.1. nor MC E2.A10.1.3.2. of Guideline J applies to Applicant's Guideline J conduct. Additionally, no other mitigating conditions under Guideline J are applicable to the facts of Applicant's case.

### **Guideline F-Financial Considerations**

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting his financial obligations, and he has not demonstrated a willingness to satisfy his debts. These conditions raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. DOHA's Appeal Board has concluded that "[a] person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810 at 4 (App. Bd. June 8, 2000).

In the SOR, DOHA alleged that Applicant was indebted to the IRS for a tax lien filed against him in 1993 for \$7,112 and for a tax lien filed against him in 1997 for \$67.00. The amounts of the tax liens included taxes, interest, and

penalties. (¶¶ 2.a. and 2.b.) DOHA also alleged that Applicant was indebted to his state taxing authority for a lien filed against him in 1999 on a 1992 tax debt of \$4,177, and, as of June 2004, the debt, including taxes, interest, and penalties had grown to approximately \$5,286.94 and remained unpaid (¶ 2.c.). Additionally, DOHA alleged Applicant owed approximately \$1,863 on a credit card debt placed for collection in about October 1998, and the debt had not been paid as of May 2004 (¶ 2.d.).

Applicant admitted each of the four debts and asserted that because the debts were old, he no longer had an obligation to pay them.

The Government has established, through Applicant's admissions and the record evidence, a *prima facie* case that Applicant is financially overextended. Applicant provided no persuasive evidence to rebut the financial concerns specified in the SOR and identified as disqualifying conditions under ¶¶ E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. (4)

There are several conditions that could mitigate the security concerns raised by Applicant's financial delinquencies. Applicant's delinquencies date to at least 1992, and his refusal to pay or settle these debts is on-going. The debts form a pattern of delinquency and are not isolated incidents. Thus, neither mitigating condition E2.A.6.1.3.1. nor mitigating condition E2.A6.1.3.2. applies. (5)

If a person's financial delinquencies were largely caused by conditions beyond his or her control, then mitigating condition E2.A6.1.3.3. might apply. The record shows that Applicant's financial problems were not caused solely by his job loss in 1991 and his subsequent periods of unemployment and under-employment. His loss of a good job in 1991, while unfortunate, does not explain or mitigate his long-standing financial difficulties and his unwillingness to timely pay his creditors. His financial problems do not appear to be entirely the result of conditions beyond his control. Thus, mitigating condition E2.A6.1.3.3. applies only in part.

Applicant has not sought counseling for his financial problems. There is no indication in the evidentiary record that he has developed and implemented a practical plan for resolving his current debts and avoiding further indebtedness. Thus, mitigating conditions E2.A6.1.3.4. and E2.A6.1.3.6. do not apply. (6)

## **Guideline E - Personal Conduct**

In the SOR, DOHA alleged Applicant deliberately falsified his answers on his SF-86 to Questions 36, 38, and 39 by failing to acknowledge the pending tax lien alleged in ¶ 2.b. of the SOR (¶3.a.); by deliberately failing to disclose that in the previous 7 years he had been over 180 days delinquent on the debts set forth in ¶¶ 2. b. and 2.d. of the SOR (¶ 3.b.); and by failing to acknowledge he was currently over 90 days delinquent on debts set forth in ¶¶ 2.a., 2.b., and 2.d. of the SOR (¶ 3.c.). DOHA also alleged Applicant wilfully failed to report self-employment income he earned in tax years 1995 through 2003 to the IRS and to his state taxing authority (¶¶ 3.d. and 3.e.). Applicant denied willful falsification of his answers to Questions 36, 38, and 39. His reasons for failing to supply the correct information - that he thought he was not required to report it since he believed, incorrectly, that seven years had passed - were not credible. He admitted his failure to report his self-employment income for eight years to his state taxing authority and the IRS.

Applicant had a history of financial delinquencies dating back to at least 1992, and he was not unfamiliar with the demands of creditors for payment. On October 17, 2003, Applicant signed his SF-86 and attested to the truthfulness, completeness, and correctness of his statements. Truthful answers to Questions 36, 38, and 39 are important because an applicant's financial history is material to a determination of his security worthiness. In failing to disclose his last tax liens and long-standing financial delinquencies, he concealed information that increased his vulnerability to coercion, exploitation, or duress.

Applicant's conduct thus falls under disqualifying conditions E2.A5.1.2.2. and E2.A5.1.2.4. of Guideline E. His failure to provide accurate information about his financial situation and his tax liabilities was pertinent to a determination of his judgment, trustworthiness and reliability. The falsifications were recent and not isolated incidents, and Applicant did not subsequently provide correct information voluntarily. He did not make prompt, good-faith efforts to correct the falsification before being confronted with the facts, and he has not taken positive steps to significantly reduce or

eliminate his vulnerability to coercion, exploitation, or duress. Thus, mitigating conditions E2.A5.1.3.1., E2.A5.1.3.2., E2.A5.1.3.3., and E2.A5.1.3.5. do not apply. His deliberate misrepresentations cause serious security concerns. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

## **Whole Person Analysis**

Paragraph E2.2 of the Directive requires that the adjudicative process in a security clearance case not only assess conduct under the adjudicative guidelines, but it must also reflect a careful weighing of a number of variables known as the whole person concept. The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct (E2.2.1.1); the circumstances surrounding the conduct, to include knowledgeable participation (E2.2.1.2); the frequency and recency of the conduct (E2.2.1.3); the individual's age and maturity at the time of the conduct (E2.2.1.4.); the voluntariness of participation (E2.2.1.5.); the presence or absence of rehabilitation and other pertinent behavioral changes (E2.2.1.6); the motivation for the conduct (E2.2.1.7); the potential for pressure, coercion, exploitation, or duress (E2.2.1.8.); and, the likelihood for continuation or recurrence (E2.2.1.9).

Applicant's willful failure to report his self-employment income to state and federal taxing authorities and his willful failure to pay his state and federal income taxes for many years raise serious security concerns. Additionally, his refusal to pay his just debts and his falsification of his SF-86 to avoid reporting those debts raise additional security concerns. Applicant, a high school graduate with approximately two years of college education, was a mature man in his mid-30s when he failed to report income and pay taxes on his self-employment earnings. He attributed his failure to procrastination. He intentionally violated his legal duty to pay state and federal income taxes on his earnings from his home improvement business. Applicant's unwillingness to acknowledge and carry out his legal duties suggests he may not take his legal duty to protect classified information seriously.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended.

With respect to the Guideline J, Guideline F, and Guideline E conduct alleged in the SOR, the Government has established its case. Accordingly, the allegations in subparagraphs 1.a. through 1.r. under Guideline J of the SOR are concluded against the Applicant. The allegations in subparagraphs 2.a through 2.d. under Guideline F of the SOR are concluded against the Applicant. The allegations in subparagraphs 3.a. through 3.e. under Guideline E of the SOR are concluded against the Applicant.

## **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

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Subparagraph 1.o. Against Applicant

Subparagraph 1.p.: Against Applicant

Subparagraph 1.q.: Against Applicant

Subparagraph 1.r.: Against Applicant

Paragraph 2.: Guideline F: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Paragraph 3.: Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

Subparagraph 3.e.: Against Applicant

### **DECISION**

In light of all of 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Applicant said there were federal records showing income for him in 1993, 1994, 1995, and 1997, but he had no recollection of filing federal tax returns in those years. (Tr. 88-89.)
4. Disqualifying Condition E2.A6.1.2.1. reads: " A history of not meeting financial obligations." Disqualifying Condition E2.A6.1.2.3. reads: "Inability or unwillingness to satisfy debts."
5. Mitigating Condition E2.A6.1.3.1. reads: "The behavior was not recent." Mitigating Condition E2.A6.1.3.2. reads: "It was an isolated incident."
6. Mitigating Condition E2.A6.1.3.4. reads: "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Mitigating Condition E2.A6.1.3.6. reads: "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."