

DATE: December 28, 2007

In re:)
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 -----) ISCR Case No. 07-00313
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 55-year-old employee of a defense contractor. Applicant's financial problems resulted due to his dairy farm loss. He incurred eight delinquent debts and a tax lien in 1995. Applicant has demonstrated he is financially responsible by resolving the debts. He received information that the tax lien has expired and is no longer collectible. Applicant has mitigated the financial considerations concern. He did not knowingly falsify his security clearance application. Thus, he has mitigated the security concerns under personal conduct. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 20, 2007, DOHA issued a Statement of Reasons¹ (SOR) detailing the basis for its decision—security concerns raised under Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on June 8, 2007, and elected to have a hearing before an administrative judge.² The case was assigned to me on October 10, 2007.³ I scheduled a hearing for December 7, 2007.

The hearing was convened as scheduled on December 7, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Government exhibits (GE 1-6) were admitted. Applicant's exhibits (AE A-D) were admitted into the record without objection. Testimony was taken from Applicant. The record was held open until December 14, 2007 for Applicant to submit additional material. Applicant did submit a packet of information that was marked AE E. The transcript (Tr.) was received on December 14, 2007.

FINDINGS OF FACT

As to the factual allegations under Guidelines F and E, Applicant admitted that he was responsible for the nine debts listed on the SOR, but also explained he paid all the debts except the tax lien, which he believed had expired, and he did not owe.⁴ His admissions are incorporated herein as findings of fact.

Applicant is a 55-year-old employee of a defense contractor who graduated from high school in 1970. Applicant married his first wife in 1970. As a result of that marriage they had two children who are now adults. He divorced his wife in 1973. Applicant has worked overseas since 2004 and has been with his current employer since 2007.⁵

Applicant earned his living as a dairy farmer for more than 20 years. He supported his family and paid his debts. However, he sold the family farm in 1983 due to financial problems but leased it back from the new owner. In 1991, Applicant sold the dairy herd. In 1993-1994 the owner sold the

¹Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive).

²Initially, when Applicant responded, he stated he did not believe a hearing would help him.

³Applicant works out of the country. This was the first date that Applicant was in the U.S. and available for a hearing. Also, initially Applicant requested a review on the record.

⁴Applicant's answer to the SOR, dated May 16, 2007.

⁵GE 1 (Security Clearance Application, dated June 1, 2004).

farm. Since Applicant spent his entire life doing business as a dairy owner, he did not have other transferrable work skills. He took jobs with low wages and offshore work in another state after the farm was sold.⁶ He did not make a substantial income.

After Applicant's former spouse died in 1993, Applicant started living with a lady friend. They lived together for a number of years (1993 until 2003). She had multiple health problems and he paid for her medical bills and surgeries.⁷ While he was working in another state, he sent money to his friend so that she could pay his bills. However, she did not do so. Thus, unknown to Applicant he had delinquent bills.⁸ Also, his friend would use his name and order various services such as pay-for-view movies. Applicant's friend sometimes used Applicant's money to pay her bills rather than his.⁹

In the summer of 1994, Applicant received a tax notice from the IRS stating that he owed money for tax years 1990, 1991, 1992 and 1993. He had just lost the rental use of the farm and had no money to pay the IRS approximately \$10,000. Also, he did not believe that he owed any money to the IRS due to the low wages that he made. Applicant had a dispute about the taxes owed due to his deductions for the dairy farm. He had documents relating to tax deductions and his income in a shed on the remainder of his property. The documents were lost. He did not receive any offer of a payment plan and he had no money to pay the full amount. The IRS filed a tax lien against Applicant in 1995.¹⁰

Applicant asked a local attorney about the tax issue and was told that after seven years the lien would expire or it would be uncollectible. Applicant was told that due to the Statute of Limitations (SOL) the tax was no longer owed. In 1995, the IRS issued a Federal Tax Lien in the amount of \$11,000.¹¹ They never attempted to collect the money or garnish his pay.

After Applicant lost the lease on his farm, in addition to farming small grain, he worked as an electrician and worked in the local area for a period of time. He received training and decided to work overseas building embassies for the U.S. Government to increase his income.

Applicant had \$2000 in delinquent debt listed on the SOR.¹² Applicant has paid the delinquent bills in allegations 1.b, through 1.i.. He did this when he was overseas by sending money orders/traveler's checks. He proved he paid the SOR debts with copies of the checks at the hearing.¹³

⁶Tr. 61.

⁷Tr. 28.

⁸Tr. 51.

⁹Tr. 52.

¹⁰Tr. 25.

¹¹GE 2 (Notice of Federal Tax Lien, dated March 10, 1995).

¹²GE 3 (Credit Report dated August 8, 2004)).

¹³AE (Traveler's checks dated September 2007).

Applicant's current net monthly income is \$4,700. He earns more if there is overtime. He has few expenses because his company overseas pays his housing as a benefit. He pays for his food and incidental expenses. He is current on all his bills. He also sends money to savings, which is now in excess of \$160,000 because his work overseas pays well and he has few expenses.¹⁴

On June 6, 2004, when Applicant completed his security clearance application, he was working 12-14 hour days away from home. He did not have any records with him. He answered "no" to Questions 27 and 28 concerning financial delinquencies and tax liens because he believed the tax lien had expired. In addition, he believed because he was now receiving a refund from his federal tax returns that the matter was settled. He also, at the time of the application, did not have knowledge about the delinquent debts.¹⁵ The fact that he admitted they were his debts at the hearing, after seeing the SOR, does not render his answers unreasonable and his testimony incredible. Applicant has received refunds from his federal tax filings from 2002-2005. He produced his latest refund check. He believes that the IRS would not send him refund checks if he actually owed them money.¹⁶ He paid the delinquent debts as soon as he discovered them.

Applicant's current employer praises his work and positive attitude. He rates him as trusted and reliable. He endorses Applicant with respect to his professionalism, character, and reliability. He recommends him for a security clearance.¹⁷

POLICIES

"[N]o one has a 'right' to a security clearance."¹⁸ 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."¹⁹ The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."²⁰ An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.²¹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such

¹⁴Tr. 42.

¹⁵Tr. 14.

¹⁶Tr. 27.

¹⁷AE B (Letter from Superintendent, dated December 4, 2007).

¹⁸*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁹*Id.* at 527.

²⁰Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

²¹ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

sensitive information.²² The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. 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.²³

The revised Adjudicative Guidelines (AG) set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each 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 adjudicative process factors listed in the Directive and AG ¶ 2(a).

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline F: Financial Considerations

*Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.*²⁴

Applicant's history of delinquent debts establishes Financial Considerations Disqualifying Condition (FC DC) 19(a) (*inability or unwillingness to satisfy debts*) and FC DC 19(c)(a) (*history of not meeting financial obligations*). His admissions and credit reports confirm the delinquent debts.

Applicant did not believe he had to file income tax for the years 1990-1993 due to his low wages and the sale of the farm. However, there is substantial evidence of FC DC 20(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of same*).

I have considered all the Financial Considerations Mitigating Conditions (FC MC), and especially considered FC MC 20(a) (*the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*), FC MC 20(b) (*the conditions that resulted in the financial problem 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 the individual acted responsibly under the circumstances*), FC MC 20(c) (*the person received or is receiving counseling for the problem and/or there are clear indications that*

²²*Id.*; Directive, ¶ E2.2.2.

²³Exec. Or. 10865 § 7.

²⁴AG ¶ 18.

the problem is being resolved or is under control), and FC MC 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts).

Although FC MC 20(a) does not provide a temporal or specific definition of what constitutes “recent” conduct, Applicant’s overall conduct with creditors in resolving his debts shows he is now reliable, trustworthy and has good judgment. He has shown sufficient unusual circumstances to establish that his financial problems are “unlikely to recur” due to the loss of the dairy farm and his low wages for a long period of time, under 20(a). He thought he did not owe any tax for the years in question and then later he inquired and learned that the SOL in effect made the tax lien legally unenforceable. Moreover, Applicant began paying his non-tax related delinquent bills as soon as he learned of them. He reasonably expected his friend to pay his bills, as he directed her. He acted in a responsible manner. I find that FC MC 20(b) is applicable. FC MC 20(c) is applicable for the reasons stated above. Even though, Applicant did not receive counseling, he has resolved the problem. He receives partial credit under FC MC 20(d) because he paid 8 of 9 debts. For the tax lien, he did not make any effort to pay the IRS and does not receive credit for acting in good faith.²⁵ He has paid the majority of the debts listed in the SOR. The tax lien has expired.²⁶

Guideline E: Personal Conduct

*Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.*²⁷

²⁵The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

²⁶

A levy must be made or proceeding in court begun to collect a federal tax lien within 10 years after a tax assessment is made. *See* 26 U.S.C. § 6502; *United States v. Galletti*, 541 U.S. 114, 119 (2004). The running of the statute of limitations is tolled during a bankruptcy proceeding, *see United States v. Doe*, 438 F. Supp. 2d 796 (S.D. Ohio 2006), by agreements (made before Dec. 20, 2000), *see United States v. Ryals*, 480 F.3d 1101, 1106 (11th Cir. 2007), or while an offer in compromise (made on or after Dec. 31, 1999) is pending. *Id.* There was no evidence of record about levies, judicial collections, agreements, offers in compromise, or bankruptcy. I infer that collectibility of the federal tax lien is currently barred by the 10-year statute of limitations.

²⁷AG ¶ 15.

On June 1, 2004, Applicant, in response to Question 28 a. and b. concerning financial delinquencies (90 or 180 days overdue) answered “no.” When he responded to the questions, he firmly believed he did not owe the tax lien. At first in 1995, he honestly believed he did not owe the taxes. In 2004, he understood that the lien had expired. He did not intentionally falsify his security clearance application. As to the other small debts on the SOR, he was not aware of them. Appellant has refuted the allegations of falsification.

Under DC 16 (a), the government established that Applicant omitted a material fact from his answers to Question 28. He denied that he deliberately or knowingly falsified an answer to his security clearance application. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an Applicant’s intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence regarding an Applicant’s intent or state of mind at the time the omission occurred. For DC 16 (a) (*deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire.....*) To apply, the government must establish that Applicant’s omission was deliberate. I find that Appellant has mitigated the allegation under MC 17 (f) (*the information was not substantiated*). Applicant did not intentionally falsify his security application.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating Applicant’s case, I have considered the adjudicative process factors listed in the Directive and AG ¶ 2(a). I have also considered all the evidence, and every finding of fact and conclusion discussed above.

Applicant had a history of good credit and no financial problems until his dairy farm was sold. Applicant paid eight of nine debts in the SOR as soon as he was made aware of the situation. He is current on all his bills. The ninth debt is a tax lien. It is addressed in the next paragraph.

Applicant talked with an attorney and was told that the tax lien had expired and was no longer in effect. He had no money to pay at the time. He expected that his wages would be garnished but that did not happen. He did not fraudulently answer questions on the security clearance application in 2004 because at the time he filled out the SF 86, he did not have any delinquent debt. I found him reasonable, forthright and candid at the hearing.

He has the endorsement of his employer and has been working overseas since 2004. He has a good position and is deemed reliable and trustworthy.

In sum, Applicant paid 8 of 9 delinquent debts. The ninth debt is not legally collectible and does not currently have any security significance. Applicant is not financially overextended, and therefore he is not at risk of having to engage in illegal acts to generate funds. See AG ¶ 18.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his financial issues, and personal conduct. He is eligible for a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F:	FOR APPLICANT
Subparagraph 1.a-1.i:	For Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraph 2.a-2.b:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Noreen A. Lynch
Administrative Judge