

DATE: December 17, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0731

DECISION OF ADMINISTRATIVE JUDGE

JEROME H SILBER

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's bankruptcy three and a half years ago discharged Federal and state tax claims for tax years 11+ years ago and was mitigated by his current financial stability and the passage of time; he was unaware of tax liens filed against him 7+ years ago when he filed his security clearance application two and a half years ago, denying he had had tax liens within the prior seven years. Clearance is granted.

STATEMENT OF THE CASE

On March 7, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated March 26, 2001, the Applicant responded to the allegations set forth in the SOR and elected to have his case decided on a written record, in lieu of a hearing.

The Applicant received a complete copy of the file of relevant material (FORM) dated September 13, 2001, and received an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant responded to the FORM on October 4, 2001, and his response was admitted into evidence without objection on October 11, 2001. The Department Counsel submitted on November 16, 2001, a memorandum in response to the FORM response.⁽¹⁾ The record in this case closed on November 16, 2001. The undersigned Administrative Judge received the case assignment on November 26, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1,

Guideline F (financial considerations), and paragraph 2, Guideline E (personal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 52-year-old ship's engineer employed by a U.S. Government contractor since April 1997. He applied for a Secret personnel security clearance when he was employed in 1993-94 by a predecessor firm to his current employer. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant was married during 1967-82; the couple has two daughters, ages 33 and 31. The Applicant married again in 1984. FORM item 4. From 1980 to 1986 the Applicant owned a video rental business in the United States. On his annual tax returns he claimed a 10% investment tax credit on items purchased for the business. In 1987/88 the Internal Revenue Service (IRS) audited the firm's books and disallowed the 10% investment tax credits. This resulted in a claim by the IRS of over \$200,000 in additional taxes for tax years 1983-85. FORM item 5. In August 1987 the Applicant and his wife purchased a house in the Bahamas and applied for permanent residence there. FORM item 4, page 5. He and his attorney vigorously contested the IRS claim and were in continuous negotiation with the IRS until about 1990 when he settled the claim for about \$80,000 and sold his U.S. house and business. FORM item 5. The Applicant sold the rest of his property in the United States in 1990. SOR answer. The state taxation authority in the state of his former residence also claimed an unknown amount of back taxes for tax years 1983-1990. FORM item 7, page 20. When he was hired in April 1993 in the Bahamas, the IRS revived its tax claim against the Applicant--this time for about \$60,000 or less--for tax years 1983-85 and tax year 1990. In 1994 he and his attorney again settled the IRS claim for about a \$2,000 to \$4,000 payment. In 1997 the IRS again revived its tax claim against the Applicant, now claiming \$206,000 for tax years 1983-85 and 1990 and started the process to garnish his wages (\$6.40 per hour). Principally to forestall the garnishment action that was about to commence and to discharge him from these Federal and state tax claims, the Applicant and his wife filed for Chapter 7 bankruptcy in November 1997. Their bankruptcy petition, listing the above-mentioned Federal and state tax claims, was granted in March 1998. FORM item 5. A year later in March 1999, the Applicant filled out and signed a security clearance application (SF-86). The SF-86 listed the November 1997 bankruptcy petition; the Applicant answered "no" to the other financial questions on the SF-86, namely, no garnishments, repossessions, tax liens, unpaid judgments, significantly delinquent debts, or civil court actions since March 1992. FORM item 4, pages 8-9. He did not report any garnishments because his wages had not yet been garnished when in filed the bankruptcy petition. FORM response, page 3.

The Applicant was interviewed in July 1999 by a Defense Security Service (DSS) agent concerning his bankruptcy and four Federal tax liens that a credit report produced by the agent⁽²⁾ apparently showed were filed against the Applicant "from Dec[ember] 93 to Jul[y] 94." FORM item 5, page 1. The Applicant signed a statement for the DSS agent that said:

With regards to the Federal Tax Liens that are included in my credit bureau report, I want to make clear that I had no knowledge of those liens until I was informed of them during this interview. Those liens should have been removed as a result of the bankruptcy.

FORM item 5, page 2.

The SOR was issued on March 7, 2001, alleging bankruptcy (¶ 1.a), past due Federal and state taxes (¶ 1.b through ¶ 1.f), a personal financial statement showing a \$2,298 net monthly remainder (¶ 1.g), and deliberate falsification with intent to conceal Federal tax liens on the Applicant's arch 1999 security clearance application (¶ 2.a). The Applicant's SOR answer denied all allegations with explanations⁽³⁾ and enclosed, *inter alia*, a copy of their Application for Taxpayer Assistance Order (Form 911), asking the IRS to inform DOHA that he and his wife were current on their Federal taxes as of December 31, 1999. On April 23, 2001, the IRS wrote a letter to DOHA stating that "[b]ased on" the discharge in bankruptcy, the couple's 1040 tax liabilities for 1983, 1984, 1985, and 1990 "were discharged" and that the IRS has adjusted their records "to reflect that these periods have been discharged." FORM item 10.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered

in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE F - FINANCIAL CONSIDERATIONS

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Conditions that could raise a security concern and may be disqualifying include:

[1st] A history of not meeting financial obligations;

Conditions that could mitigate security concerns include:

[1st] The behavior was not recent;

GUIDELINE E - PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

[2nd] The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns include:

None applicable.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. [\(4\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. [\(5\)](#)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline F.

The Applicant has a history of not meeting his financial obligations to the IRS. This falls within the scope of DC #1, which is identified on page 4 *supra*. However, this was not due to his inability to meet them, but he was unwilling to pay IRS claims without argument, IRS claims that were repeatedly compromised by the IRS for less than its original

claims. Whether those claims were wholly justified or not is not addressed in this decision. Security clearance procedures do not involve the interpretation--or the enforcement--of the IRS Code of 1954 or the IRS Code of 1986. Nevertheless, the IRS recognizes (FORM item 10) that any 1040 tax liabilities it asserted regarding tax years 1983-85 and 1990 against the Applicant and his wife were discharged in March 1998. In mitigation, the Federal and state tax claims listed in their 1997 bankruptcy petition were extinguished over 3½ years ago. This falls within the scope of MC #1, which is also identified on page 4 *supra*. More importantly, the evidence shows that the Applicant has little debt now and is current in his payments on it (see footnote 2 on page 3 *supra*). An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. The Applicant is clearly not such an individual. Therefore SOR ¶ 1.b through ¶ 1.g are concluded favorably to the Applicant.

The Applicant and his wife filed for bankruptcy four years ago, not because their lifestyle exceeded their wealth or for other financially irresponsible reasons, *e.g.*, gambling, substance abuse, profligate spending, *etc.*, but principally to clear up their tax liabilities from the time they lived in the United States. Absent other present security concerns, it is unlawful to deny or revoke a personnel security clearance **solely** because of a single bankruptcy. *See* 11 U.S.C. §525. On the other hand, the exercise by an applicant of his or her right to seek the protection of the bankruptcy laws of our country does not preclude consideration of the security significance of his or her overall history of financial difficulties. ISCR Case No. 98-0349 (February 3, 1999) at 3; ISCR Case No. 00-0516 (December 7, 2001) at 5; ISCR Case No. 00-0345 (December 12, 2001) at 3. This Applicant does not have an overall history of financial difficulties that has *present* security significance. Therefore SOR ¶ 1 (financial considerations) is concluded favorably to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Applicant successfully refuted and overcame the Government's case with regard to Guideline E.

SOR ¶ 2 (personal conduct) alleges that when the Applicant signed his SF-86 in March 1999, he "knew well and sought to conceal" that he had tax liens placed against him since October 1993. While the Applicant is clear in his DSS statement (FORM item 5, July 1999) and in his SOR answer (FORM item 2, March 2001) that he did not know of the existence of any Federal or state tax liens, his statements do not preclude a contrary finding of fact, even though they are unrebutted, if based upon reasonable inferences from facts in evidence. The tax liens were placed during the October 1993-July 1994 period when the Applicant was living in the Bahamas. FORM item 6. No levy was effected on those liens. The Applicant understood in November 1997 that the IRS was attempting to garnish his wages, not that the attempt logically involved tax liens. If the Applicant had known about the tax liens and had sought to conceal them in March 1999, common sense suggests that he would not have listed his 1997 bankruptcy on the SF-86 that in turn identified back taxes for over 90% of the total liabilities. FORM item 7. Moreover, he had little motivation a year later to "conceal" prior tax liens that should have been released upon his discharge in bankruptcy in March 1998 consistent with 11 U.S.C. §523(a)(1)(A). Common sense and an applicant's motivation must be considered in making clearance decisions. *See* Section 6.3 of the Directive. DC #2 under Guideline E (personal conduct), identified on page 5 *supra*, requires that errors made on personnel security questionnaires must be "deliberate" in order to raise a security concern and be potentially disqualifying. Here the omission of listing prior tax liens--that should have been released anyway--on a March 1999 SF-86 was clearly inadvertent, unknowing, and not deliberate. Therefore, SOR ¶ 2 (personal conduct) is concluded favorably to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 5-6 *supra*. The nature and extent of the Applicant's alleged back tax obligations are less serious when viewed in the context of the surrounding circumstances. The lack of recency of these tax obligations, his financial stability, and his motivation weigh in his favor.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

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

Jerome H. Silber

Administrative Judge

1. A copy of the November 16, 2001 memorandum and the first two pages of FORM item 4 were provided to the Applicant on November 28, 2001, by the Chief Department Counsel.
2. The credit report is referred to in the Applicant's statement (FORM item 5) but is not part of the FORM. FORM item 6 is another credit report, dated in August 2001. The Applicant estimated during the July 1999 DSS interview that the couple's monthly income averaged \$4,020, that their average monthly expenses were \$1,112, that they paid \$600 on their current credit cards, and that their net monthly remainder was \$2,298 on average.
3. The SOR answer noted that the Applicant was "totally unaware of any tax liens, Federal or State [when he signed his SF-86 in March 1999]." The answer added that the Applicant doubted that tax liens could legally be placed against his property in 1993-94 since he had owned no property in the United States since 1990. The Applicant is understandably unaware that tax liens, unlike some other liens, are applicable to "after acquired property or income" anywhere in the world. Title 26 U.S.C. §6321.
4. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).
5. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

