

DATE: February 3, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-00017

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

Camille F. Sarrouf, Esq.

Mary R. Rosenfeld, Esq.

**SYNOPSIS**

Applicant did not pay his local real estate taxes for tax year 1997, and the municipality filed a lien against his property in June 1998. Applicant subsequently satisfied his 1997 tax delinquency, but made only partial payments at his convenience on his real estate taxes for 1998 through 2001, choosing instead to allocate assets to his retirement funds. In July 2001, surprised his real estate tax debt had reached about \$31,200.00, Applicant established a plan to pay off his delinquent taxes. He satisfied his delinquent taxes in March 2002. As of November 2002, Applicant was current on his financial obligations, including his 2003 real estate taxes, and committed to avoiding any conduct in the future which raises even an appearance of wrongdoing. Clearance is granted.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated June 19, 2002, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on guideline F, financial considerations, related to real estate tax indebtedness, accrued because of a failure to timely pay his local real estate taxes for tax years 1997 through 2000.

On July 10, 2002, Applicant, acting *pro se*, responded to the allegations set forth in the SOR, admitting late payment of his 1997 local real estate tax obligation, for which a lien of \$5,820.01 was placed on his primary residence in 1998. Applicant acknowledged slow payment of his tax obligations, which had been satisfied as of March 21, 2002, but he denied tax liens had been assessed for tax years 1998 through 2000. Applicant requested a hearing before a DOHA

Administrative Judge, and on September 3, 2002, the case was assigned to me to conduct a hearing and render a fair and impartial common sense decision. On October 2, 2002, counsel for Applicant entered his appearance. Pursuant to formal notice dated October 22, 2002, a hearing was scheduled for November 15, 2002.

At the hearing held as scheduled on November 15, 2002, the Government submitted eight documentary exhibits, seven of which were admitted into the record. To conform to the evidence of record reflected in the Government's exhibits, Department Counsel then moved to amend SOR subparagraph 1.a. to reflect a real estate tax lien was placed in the amount of \$5,820.71 rather than the \$11,000.00 originally alleged. Counsel for Applicant having no objection thereto, the motion was granted. Applicant's case consisted of eleven documentary exhibits, and the testimonies of the Applicant, his spouse, a coworker, and his minister. With the receipt on November 25, 2002, of the transcript of the hearing, the case is ripe for a decision.

### FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 54-year-old product development manager/technical project leader who has been employed by the same defense contracting firm since February 1980. Applicant seeks to retain a top secret security clearance, which he has held since September 1982.

In conjunction with a periodic reinvestigation into his continued eligibility for security clearance, Applicant executed a security clearance application (SF 86) on September 21, 1999. <sup>(1)</sup> A subsequent SF 86 was prepared on October 4, 1999, on which Applicant responded "Yes" to question 36 ["In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?"] and listed an \$11,000.00 debt of May 30, 1997, for unpaid real estate taxes. <sup>(2)</sup> In further explanation, Applicant stated, "I unfortunately missed the May 30<sup>th</sup> payment deadline; payment was made during the following week and the lien was released." A subsequent investigation by the Defense Security Service, which included interviews of the Applicant on June 21, 2000, June 27, 2001, and August 16, 2001, confirmed a \$5,820.81 tax lien had been assessed for unpaid local real estate taxes for tax year 1997 and that Applicant was delinquent in his local real estate tax payments. The salient facts concerning Applicant's handling of the real estate taxes assessed on his primary residence are as follows:

In August 1975, Applicant and his spouse, a college professor, purchased their home (hereafter primary residence) for \$58,000.00, taking out a fixed rate mortgage of \$46,400.00. In October 1984, they used the equity in their primary residence to acquire real estate in a neighborhood where they had spent several summer vacations. In order to finance this vacation home at a cost of \$149,900.00, Applicant took out a second mortgage on their primary residence, a fixed-rate fifteen year mortgage of \$48,600.00. On their vacation home, they secured a non conventional three year interest only mortgage of \$134,000.00, privately financed by the seller. In December 1986, Applicant and his spouse refinanced the second mortgage on their primary residence, taking out an adjustable rate twenty-five year mortgage with a cash out payment to them of \$3,690.00. Less than a year later, they again refinanced the second mortgage on their primary residence, taking out a new loan of \$150,024.98, and acquired a conventional mortgage loan of \$145,000.00 on their vacation home. Local real estate taxes were covered under both mortgages. With the cash out balances from the two loans, Applicant and his spouse retired the former second mortgage on their primary residence and the non conventional balloon loan used to buy the vacation home. They also financed the construction of a \$70,000.00 addition to their vacation home.

In February 1989, Applicant and his spouse took out a new second mortgage on their primary residence, which enabled them to consolidate outstanding installment debt. In January 1990, they used the equity in their primary residence to secure a new thirty year mortgage of \$275,000.00 on their primary home, which they used to retire the two mortgages existing on the property (the first mortgage acquired in 1975 and the second mortgage acquired that February). Their local real estate tax obligation on the primary residence was not included in the new mortgage. With this last refinancing, Applicant and his spouse had an aggregate monthly mortgage obligation of approximately \$4,000.00.

In July 1990, Applicant opened a \$25,000.00 line of credit with a credit union, originally using the funds for home improvement. Applicant has been timely in his \$542.00 monthly payments on the loan. His account had an outstanding

balance of about \$24,000.00 as of November 2002.

During and after the refinancing of their real estate assets, Applicant and his spouse made substantial contributions over the years to their respective retirement accounts. By November 2002, they had accumulated \$1,106,900.00 in retirement assets. While they always had significant positive net worth, their real estate transactions and aggressive savings approach led to cash flow problems. Applicant and his spouse fell behind in their payments on some obligations in the 1990s. Circa 1995/96, Applicant and his spouse, who filed joint federal income tax returns, decided to segregate their financial assets and maintain separate bank accounts. Neither Applicant nor his spouse timely paid the local real estate taxes on their primary residence in 1997, and the municipality in late June 1998 filed a lien against them for delinquent real estate taxes for 1997 in the amount of \$5,820.71.<sup>(3)</sup> In late July 1998, Applicant paid his delinquent real estate tax obligation for 1997. With local real estate taxes of \$6,568.98 owing on their primary residence for tax year 1998 and a lien already filed on their property,<sup>(4)</sup> Applicant and his spouse elected to give priority to those debts being actively pursued by creditors.<sup>(5)</sup> Payments of the local real estate taxes on their primary residence for 1998 and subsequent tax years were partial and made at Applicant and his spouse's convenience. Interest continued to accrue on unpaid tax balances, which resulted in a substantial tax delinquency.

Applicant made a partial payment in December 1998 of \$3,505.82 toward his \$6,568.98 real estate tax debt for 1998. He made no payment of his 1999 taxes, assessed at \$7,256.02, or of his 2000 taxes of \$5,969.70. In mid-June 2000, the city issued a municipal lien certificate for unpaid balances of \$7,077.68, the amount of his 2000 real estate tax debt plus interest and water and sewer liens. The total of his outstanding tax obligation for tax years 1998 and 1999 was reported to be \$12,810.12.

On June 21, 2000, Applicant was interviewed by the Defense Security Service (DSS) about his unpaid tax debt and other financial issues. Applicant acknowledged an outstanding indebtedness of around \$2,000.00 to the city water department for a 1998 repair to a water line, and \$7,000.00 in real estate taxes on his primary residence for 1999. Applicant related his spouse was responsible for payment of the mortgage and real estate taxes from her separate financial accounts. Segregation of their financial assets and allocation of household responsibilities was described by Applicant as a "radical step" to gain control of their assets and focus on past due bills. Applicant expected over the next year to repay their bills and to achieve "currency with newly assessed tax and water bills." Applicant acknowledged unpaid federal income tax obligations, indicating he would satisfy a \$6,000.00 assessment for 1998 over the next year.

By March 2001, the balance of Applicant's real estate tax debt for 2000 had reached \$7,753.84. On June 27, 2001, Applicant was reinterviewed by the DSS. Applicant had satisfied his delinquent water debt, but had made no payments on his overdue local real estate taxes. Having allocated an additional \$200.00 per month to accelerate retirement of an automobile loan, Applicant related he would begin payment in September 2001 of at least \$1,000.00 per month to his real estate tax debt, having decided he would no longer wait for his spouse to allocate funds to the taxes.

In July 2001, Applicant inquired of the municipal tax assessor's office as to his outstanding tax balances. Including the first quarterly tax assessment for 2002, Applicant's total real estate tax debt amounted to about \$31,200.00, significantly more than the \$16,000.00 he thought he owed. Applicant established a plan for repayment of the taxes.

On August 16, 2001, Applicant was interviewed by the DSS about why the household income was not devoted to payment of his real estate taxes. Applicant attributed their failure to address the tax issue to the separation of financial resources, which prevented him from seeing the whole financial picture, to having two mortgages, and the exclusion of the real estate taxes from his current mortgage on his primary residence. Having deliberately not paid the taxes in an effort to get his household in better financial shape, Applicant related he had since changed his position as the consequences of nonpayment were becoming too great. The day of his interview, Applicant paid \$8,500.00 (\$1,488.19 for 1998, \$1,879.83 for 1999, and \$5,171.98 for 2000) toward his delinquent real estate taxes. In December 2001, Applicant paid \$2,000.00 toward his real estate taxes for 2002, assessed at \$6,359.96. For tax year 2001, Applicant and his spouse's joint adjusted gross income was \$294,789.00, an increase of \$63,623.00 over the previous year.

On January 4, 2002, Applicant paid another \$2,500.00 to the city, \$2,088.62 of which went toward the delinquent balance for 1998 and \$411.38 to the 2000 tax bill. Largely through curtailing contributions to retirement funds, Applicant and his spouse satisfied their delinquent real estate taxes owed on their primary residence with a payment to

the city of \$24,671.01 in March 2002. On March 28, 2002, the city acknowledged satisfaction of the tax title account.

A credit check run by the DSS on April 19, 2002, reflects Applicant was current on his financial obligations, including his two mortgages and the line of credit with his employer, which had a \$24,487.00 balance.

On June 19, 2002, DOHA issued an SOR to Applicant alleging financial considerations related to his failure to timely pay his real estate taxes on his primary residence for tax years 1997 to 2000, with an outstanding tax debt of \$31,200.00 as of August 2001. On receipt of the SOR, it became clear to Applicant that his handling of his tax matters, which may have been acceptable from a financial business strategy, raised significant security concerns. Applicant intends to avoid any conduct in the future which presents even an appearance of impropriety.

On October 11, 2002, Applicant and his spouse refinanced the mortgage on their primary residence, acquiring a \$500,000.00 fifteen year mortgage which includes real estate taxes. This new mortgage allowed them to pay off their prior mortgage on the property as well as the mortgage on their vacation home. With a payment of \$3,484.63 in 2003 real estate taxes due on their primary residence on November 1, 2002, their tax obligations were brought up to date. Applicant and his spouse realized cash out of \$149,698.48, \$144,000.00 of which Applicant and his spouse had on deposit as of late November 2002. Applicant plans to use the funds for construction improvements to their primary residence, which has a market value of \$670,000.00 based on sales of comparable properties, and to retire the line of credit with the credit union. With a joint annual income of about \$262,400.00, Applicant and his spouse can afford their new mortgage payment, which is about \$4,200.00 per month.

Dedicated to his defense-related work, Applicant has merited assignments of significant responsibility over the years. He has held a top secret security clearance from 1982 without adverse incident. For his contributions as project leader/development product manager of a new planning and execution system for deployment operations worldwide, Applicant received a company program recognition award in June 2002. Since May 2002, Applicant has been working on a combat communications system for the military in the capacity of combat support architecture lead. The company's director of information systems, who has worked with Applicant over the last fifteen years, has found Applicant to be very professional and of high moral character.

## **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

### **Financial Considerations**

E2.A6.1.1. The Concern: 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.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations

E2.A6.1.3. Conditions that could mitigate security concerns include:

E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's 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 can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline F:

Financial decisions made by Applicant and his spouse in the 1980s, primarily the acquisition of a vacation home and the multiple refinancing of the mortgage on his primary residence, led to a tight financial situation in the 1990s. Having lost control over their spending and asset allocation in relation to their incomes, Applicant and his spouse separated their financial accounts and household responsibilities in the 1995/96 time frame. Neither Applicant nor his spouse paid the 1997 real estate taxes on their primary residence. Whether or not Applicant and his spouse had agreed that real estate taxes would be her responsibility (which is now apparently a matter of some debate between them), Applicant made no effort at that time to ensure that the taxes were paid. Indeed, he subsequently told a DSS agent that he and his spouse decided instead to pay those creditors who were demanding payment. After a lien was placed against his property in late June 1998, Applicant paid the delinquent 1997 taxes. Starting in 1997, Applicant and his spouse experienced "a dramatic upward shift in personal income."<sup>(6)</sup> While Applicant made a partial payment in December 1998 of the taxes assessed for that year, he made no real estate tax payments in 1999 or 2000, knowing as of June 2000 that the Department of Defense was at least somewhat concerned about his outstanding tax delinquency. In June 2001, he admitted to the DSS he had made a conscious decision to wait until his spouse started to allocate funds to the real estate taxes. By August 2001, he and his spouse owed about \$31,200.00 to the city.

Applicant denies he was ever financially overextended within the context of guideline F, citing his real estate equity and retirement assets. Had the city threatened to place his home "on the block," Applicant maintains he would have paid the delinquent taxes "right away." Applicant's decision to continue his aggressive retirement savings plan at the expense of

his civic obligation to timely pay his local real estate taxes raises significant concerns for his financial judgment and reliability (*see* E2.A6.1.2.1. a history of not meeting financial obligations).

To Applicant's credit, he began to make payments on his delinquent real estate taxes in August 2001, and satisfied all past due taxes in March 2002-prior to the issuance of the SOR. A good faith effort to repay overdue creditors or otherwise resolve debt is potentially mitigating under guideline F (see E2.A6.1.3.6). While the debt has been eliminated, and Applicant is unlikely to fall behind in his real estate taxes given they are rolled into his current mortgage, an assessment must be made as to whether Applicant can be counted on to exercise financially sound judgment in the future. Prior to his receipt of the SOR, Applicant viewed his real estate tax obligation as just another debt which could accumulate without a problem, provided he could pay it off. Applicant now understands he was wrong not to pay his taxes on time, and there are national security issues raised by conduct which presents even an appearance of wrongdoing. As of November 2002, Applicant and his spouse were current in their obligations and they had the financial resources to continue to meet their expenses. Financial considerations having been adequately mitigated, subparagraphs 1.a. and 1.b. of the SOR are resolved in Applicant's favor.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline F: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

### **DECISION**

In light of all 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.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Missing from the September 21, 1999, application (the only SF 86 of record to bear Applicant's signature) is the privacy section of the questionnaire.
2. Applicant testified at his hearing he thought the balance of his unpaid real estate taxes was \$11,000.00, and that he did not learn of a tax lien until he was presented documentation by the DSS agent. (Transcript pp. 123-25).
3. Applicant testified the tax problem was caused in large part by the separation of finances in 1995, and a remortgage around that time with the real estate taxes being excluded from the new mortgage. (Transcript p. 154). Applicant's answer to the SOR, in which he set forth in detail his multiple refinancing, reflects no mortgage transactions around 1995. Applicant claims to have lost track of the taxes for a couple of years. While Applicant told the Defense Security Service in June 2000 that he and his spouse had agreed to have her pay taxes and mortgages from her accounts, he indicated at his hearing in November 2002 there was a debate about that. Applicant had a responsibility to ensure his spouse was making the real estate tax payments. (Transcript p. 161).
4. Municipal real estate tax assessments for years after 1997 reflect liens for unpaid taxes because of the lien filed in court on June 30, 1998.

5. Applicant had a very cavalier attitude toward his tax obligation, as evidenced by the following:

-the [city] taxes as a system, there were statements, there were other people who were asking for their money, [the city] was not. At times it was the use of the money that could have paid [the city] as almost a loan. [The city] had my

property. If they wanted to get their money they could come at me and say we're going to put it on the block and they'd get paid right away. There was no reason why it would not be paid. It will be paid. I just used the flexibility, my wife and I used the flexibility, to pay down the debt that we had on other creditors, and other things. (Transcript pp. 150-51).

6. *See* Ex. 2.