

DATE: June 25, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03113

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Failure to file or pay Federal income taxes for four successive years, resulting in IRS tax liens, by an Applicant because, unknown to her, her husband did not mail the joint returns or make payment in a timely fashion is no bar to the grant or continuation of her personal security clearance; omission of the tax liens from her SF-86 clearance application was innocent and not deliberate. Clearance is granted.

STATEMENT OF THE CASE

On February 6, 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 10, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on April 17, 2001, and a notice of hearing was issued on April 27, 2001. The undersigned held a hearing on May 31, 2001. The Department Counsel presented five exhibits ("exhs") but no witnesses. The Applicant's case consisted of the presentation of one exhibit and the testimony of two witnesses besides her own testimony. The Applicant submitted a second document ("exh. B"), dated June 5, 2001, which was admitted without objection on June 13, 2001. The record in this case closed on June 13, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on June 8, 2001.

SOR AMENDMENT

SOR ¶ 2.a. was amended at the hearing on Department Counsel's motion to conform to the evidence in accordance with item E3.1.17 of the additional procedural guidance (encl. 3 to the Directive) by substituting "May 24, 1999" for "April

24, 1999" as the date of the Question-naire for National Security Positions (SF-86). Tr pages 120-122.

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 56-year-old receptionist and secretary employed for the past four years in the security department of a university under contract with the U.S. Government. The Applicant seeks to upgrade her Secret personnel security clearance to a Top Secret one.

The Applicant has been married for 35 years. The couple has three children, ages 30, 24, and 21. From 1987 to 1997 she was entrusted with safeguarding very high dollar value inventories when she worked for a department store in jewelry sales. Exh. 1; tr pages 111, 118-119. Her immediate supervisor, the Top Secret Control Officer for the university, knows the Applicant as "somewhat of a perfectionist," a person of "high integrity," and one with "an outstanding record of compliance with security regulations." Tr pages 82-84, 101-103.

The Applicant's husband works as a manufacturer's representative and operates under a business name as a sole proprietorship out of their home as its only employee. He is compensated solely by commissions the amount of which (and the timing of their receipt) vary to a large extent. He controls the operation of his business exclusively, and the Applicant herself does not normally have access to its books, papers, check registers, *etc.* All income, expenses, and deductions from his business are reported on the couple's joint income tax returns along with her salary. Typically, her husband's accountant prepares the returns, her husband gives the completed returns to the Applicant for her signature, and then her husband signs and mails the tax returns--along with his check on the business' checking account if an amount is due. Tr pages 112-113.

However, the Applicant's husband was strapped for cash when the couple's joint Federal income tax returns were prepared for tax years 1995-98. The Applicant's husband took those tax returns, once prepared, to the Applicant and secured her signature on them; he neither mailed them to the Internal Revenue Service (IRS) nor did he write checks on the business' checking account for the amounts due. Tr pages 41, 54-55, 60. The Applicant was unaware that the returns she signed were not mailed and no Federal income taxes had been paid for those four tax years. Tr pages 70-71, 123-126, 147-148. Because her husband was too embarrassed to tell the Applicant, he deliberately concealed their tax troubles from her. SOR response.

During April and May 1999 the Applicant's husband was called by an IRS officer for several interviews (exh. A). The Applicant herself was unaware of these interviews. Tr pages 113-114. The IRS officer was satisfied that the couple did not have enough funds with which to submit an Offer in Compromise to the IRS and recommended that the case be reported as "currently not collectible." The officer's recommendation was approved by the IRS. Unless subsequently waived, the tax obligations remain valid--though collection activity is suspended temporarily. A tax lien was filed by the IRS against the couple for tax years 1995 and 1996 on May 7, 1999 (exh. 4). A tax lien was filed by the IRS against the couple for tax year 1997 on July 21, 1999 (exh. 5). A tax lien was filed by the IRS against the couple for tax year 1998. Tr page 43. The Applicant herself was unaware of these liens until April 2000 when she was confronted by a Defense Security Service (DSS) agent with her credit report, dated February 2000 (exh. 3), that revealed these tax liens.

On May 24, 1999, the Applicant signed her Questionnaire for National Security Positions (SF-86) in connection with a possible promotion to a document control officer position in the security department. Being ignorant of the truth, she answered "no" in response to a question on the form whether in the last seven years she had had a lien placed against her property for failure to pay taxes or other debts. When she met with the DSS agent in April 2000 and was shown her credit report, she asked her husband whether it was true. He confirmed the credit report. She later signed a sworn statement (exh. 2) for the DSS agent. ⁽¹⁾ She then went to her supervisor, told her supervisor what had happened, and some months later offered to resign. The offer was refused. Tr pages 85-87, 93-98.

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:

[2nd] Deceptive or illegal financial practices such as . . . income tax evasion, . . . and other intentional financial breaches of trust;

[3rd] Inability . . . to satisfy debts;

Conditions that could mitigate security concerns include:

None applicable.

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. ⁽²⁾

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. ⁽³⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Applicant successfully refuted and overcame the Government's case with regard to Guidelines F and E.

The Applicant admitted in her response to SOR ¶ 1 that tax liens have been filed against her of approximately \$105,000 by the IRS for failure to pay Federal income taxes for tax years 1995-98. She is presently unable to satisfy these liens wholly. This falls within the scope of DC #3, which is identified on page 4 *supra*. The record shows that the Applicant signed her income tax returns for those years but that her husband did not timely file them. A failure to file income tax returns when required raises the issue of an intentional breach of trust in financial matters, such as income tax evasion (DC #2). On the other hand, the record is clear that the Applicant did not know--and did not have reason to know--that the Federal taxes for those years were neither filed nor paid. Absent knowing accumulation of debt, Guideline F (financial considerations) presents no bar to the grant or continuation of a security clearance, particularly where an applicant has taken available steps to pay down debt once discovered. *See* footnote 1 on page 3 *supra*. With regard to Guideline E (personal conduct), the Applicant signed an erroneous SF-86 a few days **after** the first of the tax liens were filed by the IRS. Note the amendment of the SOR at the hearing. However, DC #2 under Guideline E, also identified on page 4 *supra*, is not applicable where the omission, concealment, or falsification of a personal security questionnaire is not deliberate. The record clearly supports the finding that the Applicant did not deliberately falsify her SF-86. Therefore SOR ¶ 1 (financial considerations) and SOR ¶ 2 (personal conduct) are 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 page 5 *supra*. The nature and extent of the current liability for back Federal income taxes imposed on the Applicant and her husband are serious. The age of the Applicant at the time the taxes were not filed weighs against her. Her innocent motivation and her lack of intent, lack of negligence, and lack of knowledge weigh heavily in her favor. Her demonstrated willingness to try to pay down, as best she is able, her current tax liabilities also weighs in her favor. Although the IRS Code imposes joint and several liability on taxpayers who file jointly, decisions on eligibility for a security clearance ought to be made on an individual basis alone.

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

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. ⁰ In September 2000 the Applicant and her husband filed their joint Federal income tax return for tax year 1999 prepared by a new accountant. That return (exh. B) reported their combined adjusted gross income as \$52,000, listed \$19,400 in 1999 estimated income tax payments, and claimed a \$10,500 refund, to be applied to their prior tax obligations. Some \$7,500 was applied to the outstanding 1995 tax obligation. Exh. A. *But see* tr pages 131-138.

2. ⁰ 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).

3. ⁰ 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).