

DATE: December 11, 2002

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-05585

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Henry Lazzaro, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 42-year-old married man self-employed as a small-business owner of a trucking company. He and his spouse owe more than \$90,000 in unpaid federal income taxes for several recent tax years. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from a delinquent tax debt of such magnitude. Clearance is denied.

**STATEMENT OF THE CASE**

On May 9, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR advised Applicant that DOHA was unable to find--as required under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992--that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 21, 2002, Applicant answered the SOR and he requested a clearance decision based on a hearing record.

DOHA assigned the case to me on July 1, 2002. Thereafter, on July 15<sup>th</sup> a notice of hearing was issued to the parties scheduling the hearing for July 30, 2002.

At the hearing, Department Counsel presented 13 documentary exhibits that were admitted without objections; no witnesses were called. Applicant presented seven documentary exhibits that were admitted without objections; he testified on his own behalf as did his spouse. I received the hearing transcript on August 22, 2002.

**PROCEDURAL MATTERS**

This case involved a joint hearing with Applicant and his spouse, also an applicant for a security clearance. On July 9, 2002, I held a pre-hearing conference and raised the idea of conducting a joint hearing because the applicants are married to each other, the SORs are nearly identical, the applicants' answers to the SORs are nearly identical, and the

cases appear factually intertwined. Neither Department Counsel nor Applicant raised an objection or voiced a concern about a joint hearing. At the hearing, I discussed this matter with the parties, gave a more formal instruction on the nature of a joint hearing, and the parties again did not raise any objections. <sup>(1)</sup>

## FINDINGS OF FACT

In his Answer, Applicant admitted the SOR allegations in subparagraphs 1.a. through 1.k.; he denied the SOR allegations in subparagraphs 2.a., 2.b., 2.c., 2.d., and 3.a. Accordingly, I incorporate his admissions into the findings of fact.

Applicant is a 42-year-old married man self-employed as a farmer and a small-business owner of a trucking company. He is seeking access to classified information so the trucking company can haul loads involving the defense industry. His spouse, although not technically an employee or officer of the corporation, is involved in the day-to-day operations of the trucking company by handling the numerous administrative tasks and obligations involved in running a small business.

Applicant graduated high school in 1978 and started the trucking company in 1982. He married his spouse in 1989, and the marriage has produced two children, a daughter born in 1994 and a son in 1995.

SOR ¶ 1 alleges Applicant is delinquent on both local and federal taxes. Specifically, the SOR alleges four municipal fire protection liens were filed against Applicant for about \$410. The delinquent debt to the U.S. Internal Revenue Service (IRS) is based on personal income taxes for more than \$99,000 for tax years 1994, 1995, 1996, 1997, 1998, and 2000. Due to the unpaid taxes, the IRS filed three federal tax liens against all property and rights to property belonging to Applicant, plus additional penalties, interest, and costs. SOR ¶ 2 alleges Applicant deliberately falsified his security-clearance application (SF 86) <sup>(2)</sup> when responding to four different questions concerning his financial record and delinquencies. And SOR ¶ 3 alleges criminal conduct based on the alleged falsifications of his security-clearance application. Applicant admits to the tax delinquencies, but denies the falsification allegations and the related criminal conduct.

In May 2001, Applicant completed his SF 86. In response to Question 36 concerning tax liens within the last seven years, Applicant answered "yes" disclosing a federal tax lien for \$400 filed against him in 1995. In response to Question 37, he answered "no" thereby denying any unpaid judgments against him in the last seven years. In response to Question 38 concerning debts more than 180-days delinquent within the last seven years, Applicant answered "yes" disclosing a federal income tax delinquency for \$5000 incurred in 1995. And in response to Question 39 concerning debts currently more than 90-days delinquent, Applicant answered "no."

In December 2001, Applicant and his spouse were both interviewed by a special agent of the Defense Security Service (DSS). The interview produced a written statement, <sup>(3)</sup> dated December 17<sup>th</sup>, wherein Applicant detailed his knowledge of the tax liens and unpaid taxes. Applicant also denied any intent to deliberately provide false or misleading information on his SF 86. In his statement, Applicant mentioned an initial interview in August 2001 where he and his spouse speculated they owed the IRS about \$28,000. They suggested the DSS agent contact their attorney who was handling their tax problems and had all the relevant documents.

Applicant and his spouse were interviewed in October 2001 and learned from the agent that they owed about \$91,000 to the IRS. On December 12<sup>th</sup> the applicants were interviewed for the third time by the same DSS agent. During this interview the applicants learned they owed taxes for tax year 2000, and they also learned about the four municipal fire liens. The applicants were interviewed for the fourth and last time on December 17<sup>th</sup> where they were informed they owed the IRS about \$96,000 plus an additional \$3,900 or so the tax year 2000. Applicant acknowledged responsibility for all the tax delinquencies.

In his statement, Applicant also discussed the circumstances surrounding the judgment taken against the trucking company in 1997 for about \$34,000. The judgment was unpaid when the SF 86 was submitted, but satisfied a few months later in October 2001. The lawsuit and judgment were against the trucking company for fuel expenses; Applicant and his spouse were not sued in their personal capacity. <sup>(4)</sup>

Applicant's statement to the DSS included a personal financial statement current as of December 17<sup>th</sup>. While the financial statement suggests that Applicant's monthly expenses exceed his monthly income, the statement is not a true picture of the couple's financial situation because it is merely a snapshot that reflects the cyclical nature of the trucking business. Applicant and his spouse credibly explained the circumstances and, aside from the outstanding tax debt, they are otherwise living within their means.

At the hearing, Applicant's spouse testified about the circumstances surrounding the completion of their security-clearance applications. Applicant's spouse took charge of ensuring that the SF 86s were completed and submitted to the DSS. She was working to meet a self-imposed deadline to submit their SF 86s, along with SF 86s from five employees, within a few days so the DSS would conduct the background investigations. If submitted later, she understood their background investigations would be handled by another entity, resulting in delay. This deadline resulted in a rushed atmosphere.

Applicant's spouse also encountered some difficulties in the completing the forms further complicating the situation. The result was she completed SF 86 worksheets<sup>(5)</sup> for Applicant and herself. The five employees each completed a worksheet. Applicant's spouse points out the worksheet only contains one entry for Questions 36, 37, 38, and 39. In other words, the form does not have space for two or more entries in response to these questions. And as a result, Applicant's spouse responded with a single entry.

Due to the time crunch, Applicant's spouse delegated the task of entering the worksheet information into the SF 86 software program to an office clerk. Because the clerk entered the information, Applicant's spouse did not know the software program allowed for additional entries to the pertinent questions. Once the clerk completed the task, Applicant's spouse completed the process by having Applicant review it, a rather quick process, and sign it. She then had the SF 86s delivered to the DSS.

At present, the 1994 federal income tax debt is paid.<sup>(6)</sup> In addition, the municipal fire protection liens were paid in June 2002, and the liens were released.<sup>(7)</sup> Remaining is more than \$90,000 owed to the IRS for the other tax years.

The couple's federal income tax problems can be traced to tax year 1995 when they were hit with a large (more than \$30,000) and an unexpected tax bill. The \$30,000 tax debt mushroomed or snowballed resulting in unpaid taxes for several subsequent years. The initial problem resulted from operating the trucking company as a sole proprietorship as opposed to a corporation. A previous accountant had advised that incorporating was not the best method to operate the company. This proved to be unwise advice when the trucking company's annual gross income grew, which, in turn, resulted in higher federal income taxes. The trucking company has since incorporated as an S corporation.

Applicant and his spouse have made some efforts over the years to resolve the tax problem with the IRS, including making some irregular payments. The efforts to compromise with the IRS have been unsuccessful, however, no doubt because the IRS is well-secured on real property valued in excess of the tax debt. The couple's recent effort to resolve the matter is to obtain a bank loan.<sup>(8)</sup> The loan proceeds would be used to pay off the IRS debt, and the bank would take a mortgage against the property. Applicant believes the loan will be approved, although that has not yet occurred.

Considering the record evidence as a whole, I specifically make the following findings of fact:

1. Applicant owes the IRS for unpaid federal income taxes more than \$90,000 for tax years 1995, 1996, 1997, 1998, and 2000.
2. Applicant's answers to Questions 36, 38, and 39 of his SF 86 were not deliberately false, nor was it a deliberate attempt to provide incomplete or misleading information.
3. Applicant's "no" answer to Question 37 was correct as the unpaid \$34,000 judgment was taken against the trucking company, not Applicant or his spouse.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, the following adjudication policy factors are most relevant here:

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

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.

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

- (1) A history of not meeting financial obligations; and
- (3) Inability or unwillingness to satisfy debts.

Conditions that could mitigate security concerns include: none.

#### **Guideline E-Personal Conduct**

The Concern: 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 include: none.

Conditions that could mitigate security concerns include: none.

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

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include: none.

Conditions that could mitigate security concerns include: none.

### **BURDEN OF PROOF**

The only purpose of a clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(9)</sup> The Government has the burden of proving controverted facts.<sup>(10)</sup> The U.S. Supreme Court has said the burden of proof in security clearance cases is less than the preponderance of the evidence.<sup>(11)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue<sup>(12)</sup> establishing a substantial-evidence standard. Once the Government meets its burden, Applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.<sup>(13)</sup> In addition, Applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(14)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(15)</sup> Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

### **CONCLUSIONS**

Under Guideline F, a security concern typically may exist for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, careless, or negligent in their obligation to properly safeguard and handle classified information.

Here, based on the record as a whole, I conclude the Government has established its case under Guideline F. Applicant has a history of not meeting his financial obligations as well as inability or unwillingness to satisfy his just debts. Unpaid federal income taxes, more than \$90,000 over several recent tax years, support these conclusions. Applicant is not an illegal tax protestor and he acknowledges responsibility for the unpaid taxes. But that does not mean a tax debt of this magnitude is not a security concern. It is, notwithstanding Applicant's best intentions. In other words, a person who is unable or unwilling to fulfill their financial obligation to pay federal income taxes--as required by law--creates a reasonable doubt about that person's fitness or suitability for access to classified information. The record evidence shows that is the situation here. Indeed, I cannot reconcile the situation where an applicant with a history of not paying their share of federal income taxes is nonetheless asking that the federal government grant them the privilege of access to classified information.

I have reviewed the mitigating conditions (MC) under Guideline F and conclude none apply. In particular, MC 6<sup>(16)</sup> does not apply because Applicant's irregular efforts over the years to resolve the federal income tax debt cannot be viewed as good-faith efforts. In addition, although Applicant is trying to obtain a loan to pay off the IRS, I cannot give this information much weight because it is a future event that may or may not happen. Until the delinquent federal income taxes are paid, Applicant and his spouse agree with the IRS on a realistic payment schedule, or another solution is found, the likelihood of continuation or recurrence of the problem remains most probable. The record evidence is insufficient, at this time, to mitigate or extenuate the security concern raised by Applicant's unpaid federal income taxes totaling more than \$90,000. Accordingly, Guideline F is resolved against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the key question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

Here, the totality of facts and circumstances do not convince me that Applicant deliberately omitted or concealed information about his financial history on his SF 86. Instead, I conclude Applicant had very little to do with completing his security-clearance application. Other than reviewing the SF 86 for a few minutes and signing it, Applicant's spouse took responsibility for the task. And he reasonably relied on her to accurately complete the SF 86. Unfortunately, her efforts--while working under time pressures with incomplete information--were in error and less than perfect. Although Applicant certainly adopted the answers when he signed the SF 86, he was not deliberately attempting to mislead, nor was he trying to omit or conceal his financial history. Considering the record evidence as a whole, including that some derogatory financial information was disclosed in the SF 86, my commonsense conclusion is Applicant's answers to Questions 36, 38, and 39 were mistaken, but not deliberately false. Accordingly, Guideline E is resolved in Applicant's favor.

Using the same reasoning, the Government has not established Applicant violated Title 18 U.S.C. § 1001, the federal crime of making a false statement to a governmental agency. Accordingly, Guideline J is resolved in Applicant's favor.

## FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a : Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: Against the Applicant

Subparagraph j: Against the Applicant

Subparagraph k: For the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

SOR ¶ 3-Guideline J: For the Applicant

Subparagraph a: For the Applicant

## DECISION

In light of all the circumstances presented by the record evidence, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Michael H. Leonard

Administrative Judge

1. Transcript at pp. 16-19.
2. Exhibit 1.
3. Exhibit 9.
4. Exhibits 10, E, and F.
5. Exhibit A.
6. Exhibit B; transcript at p. 101.
7. Exhibit D.
8. Exhibit G.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
11. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. *See, e.g.*, DOHA Case No. 94-0966 (July 21, 1995) at p. 4 n.4. *See also* ISCR Case No. 95-0818 (January 31, 1997) at p. 6 (Department Counsel not required to prove its case by "conclusive evidence"); DISCR Case No. 93-0386 (April 21, 1994) at p. 4 ("All that is required . . . is proof based on substantial evidence.").
13. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4.
14. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
15. *Egan*, 484 U.S. at 528, 531.
16. Item E2.A6.1.3.6. ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.").