

DATE: November 25, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-08932

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant reached an agreement with the IRS to satisfy his tax debt with monthly \$1,5000.00 payments. He entered the agreement in good faith, has honored it so far, and intends to honor it until the debt is satisfied. The \$1,500.00 monthly payments do not leave applicant financially overextended. Clearance is granted.

**STATEMENT OF THE CASE**

On April 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as administratively reissued on April 20, 1999), issued a Statement of Reasons (SOR) to 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 applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on May 5, 2003. The case was assigned to the undersigned on June 18, 2003. A Notice of Hearing was issued on July 2, 2003, and the hearing was held on July 23, 2003. Following the hearing, applicant submitted a six page document. This document was marked as Exhibit H and admitted into evidence.<sup>(1)</sup> The transcript was received on August 11, 2003.

**FINDINGS OF FACT**

Applicant is 71 years of age. He has been employed as a security officer by a defense contractor since January 2001.

Applicant served as a police officer in State A for over 30 years. In 1986 he retired from the police force, and in 1987, moved to State B. In 1989, he sold a property in State A and netted approximately \$72,000.00. The property applicant sold was a three story building, part of which he lived in and part of which he rented out. It is clear that the sale of this

property was the event that triggered applicant's tax problems. However, because applicant has provided different versions of how he handled the sale of the property on his tax return, exactly what occurred cannot be determined from the record.

### **Applicant's testimony:**

Because of the unique nature of the property (i.e., part residence, part income-producing), he believed he could exclude some of the gain from taxation, but was not sure. (2) He dealt with the uncertainty by having his "tax man" in State A prepare a 1989 Federal tax return. The prepared tax return did not claim the personal residence exclusion. (3) Because he did not claim it, the tax return indicated that applicant owed the IRS approximately \$24,000.00. The "tax man" assured applicant that he would mail the tax return, along with a letter requesting the IRS to determine if applicant was entitled to the exclusion, to the IRS. Applicant did not send any money to the IRS with his tax return. He decided that he would wait for the IRS to answer his letter. If the IRS agreed that he could claim the personal residence exclusion, then he would owe no tax for 1989. Applicant did not take any action, and did not file any additional Federal tax returns, until the IRS contacted him in 1992 informing him that it never received his 1989 tax return, and that with penalties and interest, he owed the IRS approximately \$100,000.00. Applicant eventually refiled his 1989 tax return.

### **Applicant's signed, sworn statement to the Defense Security Service (DSS) in February 2002 (Exhibit 3):**

When he filed his 1989 tax return in 1990, he claimed the personal residence exemption. The IRS subsequently advised him that the deduction had been disallowed, and that he "owed an additional \$24,000.00 or \$25,000.00 for tax year 1989."

Adding to the confusion is a January 2003 letter from IRS to applicant (Exhibit C). This letter indicates that applicant filed his 1989 tax return in 1994, and that when he filed the tax return, he treated the sale of the property in question "as the sale of business property." By doing so, he did not identify the property as his personal residence, and did not claim the personal residence exemption. The letter further indicates that the time period for applicant to amend his tax return in order to claim the personal residence exemption has long since expired.

Regardless of how he treated the sale of the property on his 1989 tax return, the evidence establishes that as of June 2003, applicant owed the IRS \$86,552.39 in back taxes and interest for tax year 1989 (Exhibit F).

Because of the confusion surrounding his 1989 tax return, for several years after 1989, applicant did not file his Federal income tax returns on time (TR at 31-33). As a result, he is still indebted to the IRS for tax years 1992 and 1994. As of June 2003, he owed the IRS \$6,871.27 in back taxes and interest for tax year 1992, and \$3,258.12 in back taxes and interest for tax year 1994 (Exhibit F).

Applicant entered into an installment agreement with the IRS in October 2002 (Exhibit A). The agreement calls for applicant to pay off his tax debts at the rate of \$1,500.00 per month. He started making the payments in November 2002, and has made all required payments so far. By doing so he has reduced his total tax debt by about \$7,000.00. He testified that he intends to continue making the required payments until the debt is satisfied (TR at 57).

The IRS filed two tax liens with the recorder's office in the county where applicant resides. The first lien, in the amount of \$5,004.00, was filed in December 2001, and the second lien, in the amount of \$25,200.00, was filed in May 1995. The Government alleges that applicant lied when, in response to Question 36 of a Security Clearance Application (SCA) he completed in January 2003, he denied that during the previous seven years he had a lien placed against his property for failing to pay taxes. Applicant denies that he intentionally provided a false response. He testified that, although he had received notices from the IRS that indicated it could place a lien on his property, he was unaware liens had actually been filed until he received the SOR (TR at 38-39, 41-42). This testimony was credible and worthy of belief. Accordingly, SOR Allegation 2a is found for applicant.

The evidence does not establish that applicant is indebted to Chase. Other than his long-standing debts to the IRS, applicant has "not been late on any kind of a payment for about the last 4 or 5 years" (TR at 43; Exhibit H). Applicant's current monthly net income, consisting of his police pension and his current salary, is about \$5,000.00 per month, which

is more than sufficient to cover his expenses, including the \$1,500.00 monthly payment to the IRS.

## **POLICIES**

Enclosure 2 of the Directive sets forth Guidelines (divided into Disqualifying Conditions and Mitigating Conditions) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Disqualifying Factors and Mitigating Conditions are applicable:

### **Financial Considerations**

#### Disqualifying Conditions

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

E2.A6.1.2.3: Inability or unwillingness to satisfy debts.

#### Mitigating Conditions

E2.A6.1.3.6: The individual initiated a good-faith effort to repay

overdue creditors or otherwise resolve debts.

## **CONCLUSIONS**

The evidence establishes that applicant did not pay the IRS all of the income tax he owed for tax year 1989, and that as a result, as of June 2003, he owed the IRS \$86,552.39 in back taxes and interest for tax year 1989. The evidence further establishes that as of the same date, he owed the IRS a total of \$10,129.39 in back taxes and interest for tax years 1992 and 1994.

Applicant has provided different, conflicting versions of how he handled the sale of his property on his 1989 tax return. I do not believe applicant was attempting to mislead anyone with his different versions of what transpired. Rather, I believe that after dealing with this matter for over ten years, applicant is not exactly sure how he got himself into such a mess. Regardless of which version is correct, applicant exercised poor judgment when handling this matter. If his testimony is true, then he exercised poor judgment by not paying the approximately \$24,000.00 in income tax that his personally prepared tax return indicated he owed, and then again by not following up with the IRS after he did not hear back from them within a reasonable period of time. If his written statement is true, then he exercised poor judgment by not immediately addressing his tax liability after the IRS notified him that it was disallowing his deduction and that he owed \$24,000.00 or \$25,000.00 for tax year 1989. Applicant also exercised poor judgment by failing to timely file his Federal tax returns for several years after 1989.

In 2002, applicant reached an agreement with the IRS to repay his almost \$100,000.00 tax debt. Applicant agreed to pay the IRS \$1,500.00 a month until it is paid, with his first payment due in November 2002. To date, applicant has made the required payments, and by doing so has reduced his debt by approximately \$7,000.00. Although applicant waited far too long to deal with his tax liability, he appears to have entered into this agreement in good faith, he has honored it so far, and he testified credibly that he will continue to honor it until the debt is completely satisfied. Given these facts, he qualifies for Mitigating Condition E2.A6.1.3.6.

The concern expressed under Guideline F is that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds."<sup>(4)</sup> In this case, although applicant's tax debt is extremely large, his agreement with the IRS, requiring him to make monthly payments of \$1,500.00, is not that onerous. Although not trivial, his \$1,500.00 payments are manageable given applicant's current net monthly income of approximately \$5,000.00. When viewing the evidence as a whole, I conclude that applicant is not financially overextended. Accordingly, Guideline F is found for applicant.

## **FORMAL FINDINGS**

PARAGRAPH 1: FOR THE APPLICANT

PARAGRAPH 2: 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.

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Joseph Testan

Administrative Judge

1. Department Counsel indicated that she had no objection to this document.
2. At the time, IRS regulations allowed the gain from the sale of a personal residence to be excluded from taxation under certain conditions.
3. The terms "exclusion" "exemption" and "deduction" are used interchangeably.
4. DoD Directive 5220.6, Attachment 6 to Enclosure 2, page 29.