

DATE: June 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-31512

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT J. TUIDER**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Financial considerations concerns arose over Applicant's falling behind on chapter 13 payments to his trustee, an arrearage in state taxes for 1993, and failing to file and pay state and federal income tax returns from 1998 through 2002. Applicant suffered a financial setback following a costly separation and divorce. In 2003, on his own volition he filed all required state and federal returns and has either paid or resolved past due debts and taxes. Failure to file and pay state and federal taxes also raised criminal conduct concerns. However, in light of his affirmative corrective action, Applicant has successfully mitigated financial and criminal conduct concerns. Clearance is granted.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 30, 2003, DOHA issued a Statement of Reasons (SOR) [\(1\)](#) detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on November 3, 2003, and elected to have a hearing before an administrative judge.

DOHA received the case on March 25, 2004, and it was assigned to me the same day. On June 1, 2004, DOHA issued a notice of hearing scheduling a hearing for June 17, 2004. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered seven documents, which were admitted without objection as Government Exhibits (GE) 1 through 7, and two documents for administrative notice, which were admitted without objection as Appellant Exhibits 1 and 2. The Applicant offered five documents, which were admitted without objection as Applicant Exhibits (AE) A through E. I left the record open after the hearing to afford Applicant the opportunity to resubmit a more legible copy of AE E, which he did. DOHA received the transcript on July 7, 2004.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 49-year-old married man. He was married to his first wife from July 1984 to September 1995. That marriage ended in divorce. Applicant remarried to his second and present wife in October 1995. Applicant has four children - two minor children born of his second marriage and two adult stepchildren from his second wife's previous marriage.

Applicant graduated from college in June 1978, and was awarded a bachelor of science degree, majoring in mechanical engineering. From September 1978 to September 1984, he was employed as a project engineer for the Department of the Navy. Since September 1984, he has been employed by a defense contractor and is currently a manager for the radar master planning and risk management. He supervises 22 employees. Applicant has held a secret clearance since 1978, without incident.

The SOR alleges Applicant is in arrears on five debts. The table below presents details about the debts alleged in the SOR, their current status, and cites to relevant parts of the record.

<b>Debt</b>	<b>Nature &amp; Amount in SOR</b>	<b>Current Status</b>	<b>Record</b>
Debt 1/SOR ¶1.a.	Medical bill overdue in the amount of \$329.00.	Submitted payment in full on Nov. 1, 2003. Creditor returned check stating they could not find Applicant's account.	Tr. 18, AE A.
Debt 2/SOR ¶1.b.	In arrears to Chapter 13 Trustee in the amount of \$3,541.64 as of March 2003.	Making payments and current in all respects.	Tr. 19-46, AE B.
Debt 3/SOR ¶1.c.	Had not filed or paid state or federal taxes for years 1998 to 2002.	All state and federal income tax returns for years 1998 to 2002 filed in 2003. Current in payments.	Tr. 20-21, 24-46, AE C, AE D.
Debt 4/SOR ¶1.d.	Had not filed or paid state income taxes for years 1998 to 2002. (Duplicate of Debt 3/SOR ¶1.c.)	All state income tax returns for years 1998 to 2002 filed in 2003. Current in payments.	Tr. 20-21, AE C.
Debt 5/SOR ¶1.e.	In arrears for state income taxes for tax year 1993 in amount of \$2,500.00.	Included in chapter 13 bankruptcy (see Debt 2). Debt to state for past due income taxes paid.	Tr. 21-24, AE B, AE E.

As the above chart reflects, Applicant has paid or otherwise resolved his past debts. In 1993, Applicant and his first wife separated and ultimately divorced in 1995. As a result of their ongoing differences, they were unable to come to terms on their 1993 state tax return. Consequently, their 1993 state return was not timely filed. As part of the divorce settlement, Applicant was awarded their marital home in return for buying her out. Additionally, Applicant paid alimony to his ex-wife from 1993 to 1996. After settling with his ex-wife, Applicant was unable to remain current on his mortgage payments and got behind on his debts.

In 2001, Applicant filed for chapter 13 bankruptcy protection seeking debt protection from \$39,600.00 in liabilities. Applicant is current in his payments to the trustee and has a projected payment date of June 2005. Tr. 76-77.

Applicant chose to file bankruptcy under chapter 13 versus chapter 7 because he "wasn't looking to get out of anything." Tr. 78. Applicant was unable to offer a plausible explanation why he did not file his federal and state income tax returns from 1998 to 2002. Tr. 55. Applicant added that he had difficulty locating the required information to timely file returns. Tr. 57. However, he did file all required returns in 2003, and is current on all tax arrears. Furthermore, Applicant accepted responsibility for his failure to file income tax returns.

Applicant has spent his working life spanning 25 years in the defense industry, first as a government employee, and then in the private sector. During those 25 years, Applicant has made and continues to make significant contributions to the national defense.

## POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

## BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

## CONCLUSIONS

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

In the SOR, DOHA alleged Applicant had five delinquent debts (¶¶ 1.a. through 1.e.). *The Concern*: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established its case under Guideline F by Applicant's admissions and evidence submitted. However, Debt 4 (§ 1.d.) is a duplicate of Debt 3 (§ 1.c.), thus reducing the number of debts owed by Applicant from five to four. His inability to satisfy his outstanding financial obligations gives rise to Financial Considerations Disqualifying Conditions (FC DC) E2.A6.1.2.1. (*A history of not meeting financial obligations*); and FC DC E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*).

As reflected above, Applicant submitted evidence that he has paid or resolved all debts alleged. Applicant's divorce and resulting financial fallout contributed to his financial problems. Since his divorce, he has remarried, become a father, and is on the road to financial recovery. While his failure to timely file his state and federal income tax returns over a four-year period from 1998 to 2002 cannot be condoned, he has since corrected his shortcomings by filing all required returns in 2003. Furthermore, he made substantial and documented efforts to pay taxes due and is very near to paying his tax liabilities in full. Most impressive, Applicant has not presented creative excuses to negate his past failures, but rather has accepted responsibility and taken corrective action.

Applicant has paid or otherwise resolved the debts identified in the SOR thus mitigating financial considerations concerns. These facts trigger application of Financial Considerations Mitigating Conditions (FC MC) E2.A6.1.3.3. (*The conditions that resulted in the behavior were largely beyond the person's control (e.g. . . . , divorce or separation)*); and FC MC E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). In short, Applicant has aggressively tackled his past financial problems and returned to financial stability.

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

In the SOR, DOHA alleged that Applicant's failure to file state and federal income tax returns from 1988 to 2002 violated state and federal statutes (§§ 2.a. and 2.b.).

The Government established its case under Guideline J by Applicant's admissions and evidence presented. These two allegations represent uncharged misconduct and constitute offenses under respective state and federal statutes. As indicated above under the discussion under Financial Considerations - Guideline F, Applicant has filed all required state and federal income tax returns and is diligently paying any arrearages. While his conduct cannot be condoned, his acceptance of responsibility in this regard and corrective action deserve merit and reflect mitigation.

Applicable Criminal Conduct Disqualifying Condition (CC DC) is E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*). In light of Applicant's corrective conduct, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) applies. Applicant successfully mitigated the government concerns over his filing lapses.

Based on the totality of the circumstances to include his documented actions coupled with his credible testimony, I find for Applicant on SOR §§ 1., 1.a. through 1.e., SOR §§ 2., 2.a. and 2.b.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1.: Guideline F: FOR APPLICANT

Subparagraph 1.a.-1.e.: For Applicant

Paragraph 2.: Guideline J: FOR APPLICANT

Subparagraph 2.a.-2.b.: For Applicant

### **DECISION**

In light of all of 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. Clearance is granted.

**Robert J. Tuider**

**Administrative Judge**

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.