

DATE: September 8, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24909

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Robert J. Tuider, Department Counsel

FOR APPLICANT

Russell W. Woodlief, Esq.

SYNOPSIS

Applicant has mitigated her liability for delinquent Federal income taxes for tax years 1994 and 1996 through a discharge in bankruptcy in 1998. However, she has not mitigated liability, jointly incurred with her husband, for filing frivolous amended federal income tax returns for tax years 1993, 1994, and 1995. She has also not mitigated her liability for delinquent federal income taxes for tax years 1998, 2000, and 2001. The Internal Revenue Service (IRS) rejected the offer in compromise that Applicant and her husband submitted for this joint and several tax liability, which totals nearly \$40,000.00, including penalties and interest. Although they appealed, IRS has not rendered a decision on the appeal and there is no basis for concluding that it will favor Applicant. Clearance is denied.

STATEMENT OF THE CASE

On October 17, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant her access to classified information and recommends that her case be submitted to an Administrative Judge. On October 31, 2002, Applicant responded to the SOR and requested a hearing. The case was assigned to me on January 21, 2003. A notice of hearing was issued on February 4, 2003, and the hearing was held on February 26, 2003. During the hearing, 14 Government exhibits, seven Applicant exhibits, and the testimony of seven Applicant witnesses, including Applicant, were received. The transcript (Tr) was received on March 5, 2003.

PROCEDURAL ISSUE

Evidence presented at the hearing raised the issue of whether Applicant's liability for tax years 1994 and 1996 was covered by her discharge in bankruptcy under Chapter 7. At the conclusion of the hearing, I allowed the parties three

weeks to address the issue. I received Applicant's submission on the issue by telefax on March 19, 2003, which I have admitted into evidence as Applicant (Ap) Exhibit (Ex) H. Department Counsel advised me orally that he had no objection to Ap Ex H and later confirmed that in writing, which I have marked as Government (Govt) Exhibit (Ex) 15.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admission to all the allegations in the SOR, I make the following findings of fact:

Applicant is a 32-year-old computer programmer employed by a defense contractor and is seeking a security clearance. Her husband of 10 years has owned and operated an insurance agency for the past 17 years. ⁽¹⁾

By 1995, Applicant's husband was not making quarterly estimated Federal income tax payments due to their financial conditions. These conditions included a reduction of income from his business, continued mortgage payments on the house from which they moved after it had been on the market for 14 months, and a bad business venture. ⁽²⁾ Later that year or by 1996, Applicant's husband met a man who informed him about theories for claiming refunds for taxes previously paid. The man recommended materials supporting such theories, which Applicant's husband purchased. ⁽³⁾

In 1997, relying on those theories, Applicant and her husband filed amended federal income tax returns for tax years, 1993, 1994, and 1995. IRS disallowed the amended returns and assessed a \$1,000.00 penalty for each tax year for filing a frivolous return. ⁽⁴⁾ IRS also filed tax liens against their property. ⁽⁵⁾

After IRS placed liens against their property and bank accounts, Applicant and her husband sought legal advice and were advised to file bankruptcy. ⁽⁶⁾ On November 3, 1997, they filed for bankruptcy under Chapter 13 of the bankruptcy code. ⁽⁷⁾ Their outstanding tax liability was covered by the filing. It included their liability for tax years 1994 and 1996.

On June 16, 1998, Applicant converted her bankruptcy filing to Chapter 7, so that she could begin re-establishing her credit. ⁽⁸⁾ Applicant received a discharge in bankruptcy on September 29, 1998. ⁽⁹⁾ Applicant's husband made the payments required by his filing under Chapter 13, including those that satisfied their tax liability for 1994 and 1996, and received a discharge in bankruptcy on August 9, 2001. ⁽¹⁰⁾

After Applicant and her husband filed their joint Federal income tax return for tax year 1998, they still owed \$1,431.88 in taxes for that tax year. ⁽¹¹⁾ When they filed their joint federal income tax return for tax year 2000, they still owed \$15,656.06 in taxes for that tax year. ⁽¹²⁾ After Applicant and her husband filed their joint federal income tax return for tax year 2001, they still owed taxes \$10,562.51 in taxes for that tax year. ⁽¹³⁾ By the date of the hearing, they had not satisfied these obligations and owed a total of \$39,145.00 for tax years 1998, 2000, and 2001, including penalties and interest. ⁽¹⁴⁾

On April 25, 2002, Applicant and her husband submitted an offer in compromise to IRS for tax years 1998, 2000, and 2001, offering to pay a total of \$16,343.00. ⁽¹⁵⁾ On July 5, 2002, IRS rejected their offer in compromise. ⁽¹⁶⁾ Based on the financial information Applicant and her husband submitted, ⁽¹⁷⁾ IRS concluded that they could pay the full amount owed. Applicant and her husband appealed the IRS decision on July 31, 2002. ⁽¹⁸⁾ As of the hearing, IRS had not rendered a decision on their appeal.

POLICIES

The burden of producing evidence initially falls on the Government to present evidence, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Directive E3.1.14. Once the Government meets its burden, the burden then shifts to the applicant to present evidence to refute or mitigate the Government's evidence and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive E2.2.2.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline F - Financial Considerations: the concern is that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

A history of not meeting financial obligations (Disqualifying Condition 1);

Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust (Disqualifying Condition 2);

Inability or unwillingness to satisfy debts (Disqualifying Condition 3).

Conditions that could mitigate security concerns include:

It was an isolated incident (Mitigating Condition 2);

The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts (Mitigating Condition 6).

CONCLUSIONS

Applicant continues to have delinquent tax liability for tax years 1998, 2000, and 2001, as alleged by the Government in SOR ¶ 1.e, SOR ¶ 1.f, and SOR ¶ 1.g. This history of not satisfying taxes, as well as the inability to do so, establish both Disqualifying Condition 1 and Disqualifying Condition 3.

Applicant's amended joint returns for tax years 1993, 1994, and 1995, which IRS found to be frivolous, are evidence of Disqualifying Condition 2, since she and her husband appear to have tried to evade tax liability rather than to have claimed legitimate deductions. Although the amended returns were submitted at the same time, they involved the preparation and submission of three separate returns. For this reason, they cannot be mitigated under Mitigating Condition 2, as an isolated incident. Even though Applicant and her husband have resolved the tax liability for these years, that does not mitigate the disqualifying condition, given the nature of their acts from which it resulted. Although Applicant's husband appears to have been primarily responsible for the submission of the amended returns, the record does not totally exculpate Applicant. Under these conditions and due to the nature of the disqualifying condition, I find against Applicant as to SOR ¶ 1.a.

Although filing bankruptcy is indicative of a history of not meeting financial obligations and an inability or unwillingness to satisfy debts, it is also a lawful way to resolve debts, as long as all requirements are met and a discharge is obtained from the court. This is the only time that Applicant and her husband have filed bankruptcy. As

Applicant testified, they did so after IRS tied up their assets to the point "there wasn't even money to put food on the table."⁽¹⁹⁾ They satisfied all requirements and obtained discharges from the court. Their creditors were paid in accordance with the court's direction. Under the circumstances, the actions of Applicant and her husband lawfully resolved their delinquent indebtedness at that time. Accordingly, I find in favor of Applicant with regard to SOR ¶ 1.b.

SOR ¶ 1.c and SOR ¶ 1.d are not correct in alleging that her liability for tax years 1994 and 1996 extended into 2002. In 1998, the bankruptcy court discharged her of all debts covered by the Chapter 13 filing. Those debts included her tax liability for tax years 1994 and 1996. This resolved those debts in accordance with Mitigating Condition 6. Consequently, I find in favor of Applicant.

Subsequent to Applicant's discharge in bankruptcy, she and her husband began to incur new liability for delinquent federal income taxes. They continue to owe nearly \$40,000.00 for tax years 1998, 2000, and 2001. In nearly four years, they have not been able to pay or resolve the smallest of these debts. Moreover, there is no basis in the record for concluding that they are likely to pay or otherwise satisfy these debts in the near future. Merely appealing the IRS rejection of their offer and compromise for those tax years is not sufficient to establish Mitigating Condition 6.

Applicant and her husband do not dispute the amount of their tax liability for the tax years in question.⁽²⁰⁾ They simply seek to be excused from full payment of the taxes due to the circumstances they cited. Based on the financial information they were required to submit, however, IRS does not agree that they lack the ability to pay. Even though they have included some additional extenuating circumstances in their appeal, there is no basis for concluding that the IRS position will change or that their appeal will be successful. There is at best doubt about whether Applicant's appeal will be successful, which must be resolved against her in accordance with Section E2.2.2. of the Directive.

Applicant is a highly regarded and respected employee of the defense contractor for whom she works. Clearly, her dilemma with federal taxes is essentially due to her husband's actions and decisions. I found Applicant most sincere in her regret for what occurred and in her determination not to have it repeated. Unfortunately, these factors alone do not mitigate the \$40,000.00 in taxes, penalties, and interest that she is jointly and severally liable for with her husband. Since these debts have not been mitigated, I find against Applicant with regard to SOR ¶ 1.e, SOR ¶ 1.f, and SOR ¶ 1.g.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

DECISION

In light of all the evidence in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth
Administrative Judge

1. Tr 87-88.
2. Tr 92.
3. Tr 93.
4. Govt Ex 6A.
5. Govt Ex 6A and 6B.
6. Tr 110.
7. Govt Ex 11 at 8.
8. Govt Ex 11 at 8; Tr 111.
9. Govt Ex 11 at 9.
10. Ap Ex H at 4; Tr 90-91.
11. Govt Ex 12 at 10.
12. Govt Ex 12 at 13.
13. Govt Ex 12 at 16.
14. Tr 78.
15. Govt Ex 9.
16. Govt Ex 14.
17. Govt Ex 10.
18. Ap Ex B; Tr 60, 66.
19. Tr 110.
20. Tr 113-114.