

KEYWORD: Financial Considerations; Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 50-year-old employee of a defense contractor. In 1992, after being told by friends that he did not have to file federal income tax returns if his taxes were deducted by his employer, Applicant stopped filing federal income taxes. His failure to file continued through 1997. As a result, tax liens were levied for a number of tax years. Additionally, he accrued some non-tax related debt. On his 2003 security clearance application, he gave incomplete answers regarding whether he had tax liens against him and whether he was delinquent on any debts. Applicant failed to mitigate financial, criminal conduct, and personal conduct security concerns. Clearance is denied.

CASE NO: 03-19516.h1

DATE: 06/13/2006

DATE: June 13, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19516

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 50-year-old employee of a defense contractor. In 1992, after being told by friends that he did not have to file federal income tax returns if his taxes were deducted by his employer, Applicant stopped filing federal income taxes. His failure to file continued through 1997. As a result, tax liens were levied for a number of tax years. Additionally, he accrued some non-tax related debt. On his 2003 security clearance application, he gave incomplete answers regarding whether he had tax liens against him and whether he was delinquent on any debts. Applicant failed to mitigate financial, criminal conduct, and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On November 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statements of Reasons (SOR) concluding it was unable to find that it is clearly consistent with the national interest to grant him a security clearance.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). In a five-page answer with six attachments, dated November 30, 2004, Applicant responded to the SOR allegations. He admitted six of the seven allegations raised under Guideline F, denied all six allegations raised under Guideline J, and denied all three allegations raised under Guideline E. Additionally, he waived his right to an administrative hearing in favor of a decision based on the written record.

Department Counsel prepared a File of Relevant Material (FORM), dated December 27, 2004. Included in the FORM was a Motion to Amend the SOR, which is hereby granted.⁽²⁾ Applicant was provided a complete copy of the FORM, which he received on January 25, 2005. He chose not to respond or object to the FORM within 30 days of receipt, as provided, or thereafter.⁽³⁾ I was assigned the case on April 13, 2005.

FINDINGS OF FACT

Applicant's answers to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the record evidence, I make the following findings of fact:

Applicant is a 50-year-old employee of a defense contractor. He has been with his current employer since October 2002. Applicant served 20 years in the U.S. military and graduated from a noncommissioned officer academy. Married for nearly 25 years, Applicant and his wife have been legally separated since 1992. He has three children, the youngest of whom was emancipated in May 2003.

After Applicant and his wife separated, and her income was no longer supporting the household, he began to experience financial difficulties.⁽⁴⁾ The situation worsened when he returned from an overseas deployment and retired from the military in September 1993. As a consequence, certain debts accrued.

In the interim, Applicant paid child support for his youngest child until her emancipation. Additionally, after friends told him he did not have to file a federal tax return if he had his taxes automatically deducted at work, he stopped filing tax returns. As a result, he did not file federal tax returns from 1992 through 1997.⁽⁵⁾

When Applicant began his current employment, he was asked to complete a Security Clearance Application (SF-86). He did so on April 9, 2003. In response to Question 36 ("**Your Financial Record - Tax Lien - In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?**"), Applicant noted one lien had been placed by the Internal Revenue Service (IRS), in the amount of \$2,500 on June 1, 2002.⁽⁶⁾ Applicant states that he did not know the amount of the tax lien, only that he had been told in a 2003 meeting with the IRS that a compromise could reduce the amount to \$2,500. Therefore, he entered that amount on the SF-86 because he thought that was what he would eventually owe. As for the other two liens, Applicant denies having had knowledge of them at the time because he had not seen the actual IRS data.

In response to Question 38 ("**Your Financial Delinquencies - 180 Days - In the last 7 years have you been over 180 days delinquent on any debt(s)?**") on the SF-86, Applicant answered "No." Applicant denied having answered this question falsely because he "considered non-tax lien related debts to be dropped and over and done with."

The tax liens and debts at issue in the SOR, and Applicant's position with regard to them, are as follows:

FEDERAL TAX DEBT on a federal tax lien of approximately \$29,108 for tax years 1998 and 2001, and **FEDERAL**

TAX DEBTS on federal tax liens for approximately \$25,791 for tax years 1989 to 1992 and 1993 to 1997. As of March 26, 2004, these debts had not been paid. In 1992, Applicant stopped filing federal income tax returns, based on the advice of friends that workplace deductions satisfied payment of his fair share of taxes. In May 2001, he was contacted by the IRS for an audit of tax years 1992 through 2000. In the process, he learned that the advice he was given was incorrect. Subsequently, in May 2002, the IRS received his 2001 tax return. He has filed his taxes annually since that time.

Based on Applicant's assertion that an IRS representative told him that tax debts could be compromised down to as low as \$2,500, Applicant filed an IRS Form 656 (Offer in Compromise) in early 2003. It was returned in July 2003, in need of additional information. He missed the 30-day deadline for submitting the additional information and resubmitted a second IRS Form 656 requesting compromise.⁽⁷⁾ Still lacking all the necessary information to proceed, a compromise was never reached. He hopes that one might eventually be reached as he believes he now has all the pertinent information. In the interim, the tax liens are being satisfied by a levy against his pay

checks in \$2,000 monthly increments, thus hindering his ability to pay other bills.

STATE TAX LIEN of approximately \$1,365, filed in or about April 1997. This debt was a state tax lien filed against Applicant, based on an arrearage of child support.⁽⁸⁾ The matter was previously satisfied and Department Counsel acknowledged in the FORM that there is "insufficient evidence to support" this allegation.⁽⁹⁾

BANK CARD DEBT of approximately \$3,294, listed as a Profit & Loss Writeoff. As of March 26, 2004, this debt had not been paid. Applicant states this sum is based on what was initially a \$600 disputed charge that has grown due to interest. He had closed the account and written the bank concerning the disputed charge and thought it had been removed. After receiving the SOR, he says he learned of the debt and made inquiries. Because it has been written off, he does not believe he has to "pay anything on it."⁽¹⁰⁾

LOAN COMPANY DEBT of approximately \$680, charged off. As of March 26, 2004, this debt had not been paid. Applicant admits he had a loan with this institution. He states that the company told in, in 2003, that the debt had been written off and he could make payments on it.

MILITARY EXCHANGE DEBT of approximately \$1,658, listed as Profit & Loss Writeoff. As of March 26, 2004, this debt had not been paid. Before Applicant returned to the United States following military service, his estranged wife, then living in a separate state, continued to use his exchange card. Consequently, this debt arose. Applicant decided to "simply let this ride."⁽¹¹⁾ He is unable to satisfy the debt because of his reduced net income from the tax liens. He has, however, contacted the exchange to set up a payment plan. He provided a copy of an executed, but unprocessed, check in the amount of \$200 to the exchange which he states was sent on the date of his response to the SOR.⁽¹²⁾

FEDERAL TAX LIEN NOTICE THAT A LIEN WOULD BE ISSUED FOR NONPAYMENT OF TAX LIABILITY for tax year 2002 in the amount of \$1,658. Applicant admits that he received the tax lien notice. He states, without documentation, that he gave it to his employer and that it was deducted from his pay in monthly \$500 installments.

SOR subparagraph 1.c concerned a state tax lien filed against Applicant, based on an arrearage of child support. That matter was previously satisfied and Department Counsel acknowledges that now there is "insufficient evidence to support subparagraph 1.c. The evidence shows Applicant no longer owes any child support." FORM at 4. Therefore, subparagraph 1.c. is found in Applicant's favor.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹³⁾ The government has the burden of proving controverted facts.⁽¹⁴⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁵⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽¹⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁷⁾

No one has a right to a security clearance⁽¹⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁰⁾

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²¹⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

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.⁽²²⁾

Guideline J - Criminal Conduct. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.⁽²³⁾

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.⁽²⁴⁾

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). For clarity, I will discuss each separately.

Financial Considerations

The Regulation sets out several potentially disqualifying and mitigating conditions under Guideline F. Between the time Appellant and his wife legally separated in 1992 and his return from deployment abroad in 1993, Appellant started to accrue debt. The majority of this debt arose from his failure to file federal taxes for the majority of the decade. To date, much of his total debt is still outstanding. Moreover, with regards to debt which was subsequently written off, he feels he has no duty to pay on such obligations. Consequently, both Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.2 (*a history of not meeting financial obligations*) and FC DC E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*) apply.

I considered all the Financial Considerations Mitigating Conditions (FC MC). Of the seven outstanding debts noted in the SOR, one has been satisfied. ⁽²⁵⁾ The remaining have either been put into repayment or knowingly neglected. Under these facts, neither FC MC E2.A6.1.3.1 (*the behavior was not recent*) nor FC C E2.A6.1.3.2 (*it was an isolated incident*) applies.

In 1992, Applicant and his wife separated. He has plausibly linked the acquisition of his debt to the military exchange to his wife's use of that card from the beginning of their separation through the first years after his return to the U.S. the following year. He claims no similar nexus, however, between his separation and his other debts. Therefore, FC MC E2.A6.1.3.3 (*the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*) marginally applies.

No evidence was provided by Applicant to show he has received financial counseling. In the absence of appropriate and much needed professional guidance and education, FC MC E2.A6.1.3.4 (*the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*) cannot apply.

Other than the debts owed on child support and to the military exchange, there is no indication that Applicant has earnestly endeavored to resolve his debts. His tax liens are being repaid through the imposed efforts of the IRS. He was unwilling or unable, in the absence of the assistance of a credit counselor or some other professional help, to timely submit compromise petitions for his tax debts. With regard to debts which have been written off, he feels no duty to honor his obligations and repay the amounts accrued. Given these facts, FC MC E2.A6.1.3.6 (*[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) does not apply.

Criminal Conduct

The Regulation sets out several potentially disqualifying and mitigating conditions under Guideline J. Applicant admits that he failed to file federal income tax returns for tax years 1992 through 1997. Consequently, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*[a]llegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies.

Applicant states, however, that he was advised by friends that he did not have to file annual taxes with the IRS if he had taxes directly deducted through the workplace. As noted by Department Counsel, under Title 26, United States Code, Section 7203, if he truly believed that, he has a defense to the statute cited. Applicant may have been so advised, but it seems implausible that a mature man and a graduate of a noncommissioned officer academy, no matter how uninformed with regard to finances, could truly believe such "advice." This is especially true given the fact his tax problems date back to at least 1989. Much like his unique theory that one is no longer obligated on debts which have been written off, it is patently incorrect and little more than an economic pipe dream.

Since being enlightened by the IRS as to his civic responsibilities and the law, Applicant has filed his annual federal income tax returns regularly. Although he apparently still has problems with those taxes and has resisted financial counseling, he is now in compliance with the applicable laws. Given that he has filed federal incomes taxes since the failing was brought to his attention in May 2001, barely five years ago, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*[t]he criminal behavior was not recent*) applies. None of the other mitigating conditions, however, apply.

Personal Conduct

The Regulation also sets out several potentially disqualifying and mitigating conditions under Guideline E. Here, Applicant falsified material facts on his security clearance application when he failed to list material matters related to his finances. Specifically, he failed to list two tax liens on his application and stated the amount of the one he did list to be less than 10-percent of the actual obligation.⁽²⁶⁾ Therefore, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*[t]he 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*) and PC DC E2.A5.1.2.4 (*[p]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) apply.

Applicant completed his security clearance application in 2003, three years ago. He listed a tax lien, but stated its amount as being only \$2,500 because he thought he could eventually get a compromise on the real balance, which was over 10-fold larger. His explanation might be plausible if the question asked for conjecture on possible eventualities, but it does not. Even if he did not know the precise amount, a double digit estimate would have made more sense. As for the other liens, he states that he did not list them because he had not seen that actual IRS data. Inasmuch as actual data on the first lien did not help him answer that question correctly, it seem disingenuous to now argue that a lack of actual data

precluded him from at least acknowledging the existence of the other liens. After review of the available Personal Conduct Mitigating Conditions, I find that none apply.

I have considered all the facts and evidence in this matter. I also have considered the "whole person" concept in evaluating Appellant's risk and vulnerability in protecting our national interests with regard to the security concerns raised. Applicant has a high school diploma and has graduated from a noncommissioned officer academy. He may have been well qualified for a leadership position, but his knowledge of finance and his reliance on friends, rather than professional financial counselors, for basic legal and fiscal advice is highly troubling and raises serious doubts with regard to his judgment. This is especially true for a mature man with a disciplined military background seeking access to classified information. Applicant has failed to mitigate serious security concerns regarding his financial situation, criminal conduct, and personal conduct. Clearance is denied.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline F (Financial Considerations) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Paragraph 2. Guideline F (Criminal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: Against Applicant

Paragraph 3. Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

DECISION

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

Arthur E. Marshall, Jr.

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The motion was unopposed. Therefore, pursuant to Department Counsel's motion, the SOR is hereby amended to replace the word "felony" with "misdemeanor" in sub-allegations 2.a. through 2.f.
3. The case file contains a handwritten note, dated March 7, 2005, stating that Applicant requested an extension of time to respond to the FORM, and he was given until the end of March 2005.
4. Government Item 5 (Applicant's interview with the Defense Security Service, dated May 7, 2003) at 1.
5. Additionally, Applicant owed on his taxes for 1989-1991. *See* SOR subparagraph 1.b.
6. As noted in the SOR at subparagraph 1.b., the June 2002 tax lien was for the amount of \$25,791. Applicant made no mention of the other two liens.
7. Government Item 3 (Applicant's Response to the SOR, dated November 30, 2004)(hereinafter "Applicant's Response to the SOR") at Attachment 1 (undated IRS Form 656).
8. *See* SOR subparagraph allegation 1.c.
9. FORM at 4. The evidence supports Department Counsel's acknowledgment. Therefore, SOR subparagraph 1.c. is found in Applicant's favor.
10. Government Item 3 (Applicant's Response to the SOR) at 2.
11. *Id.*
12. *Id.*, at Attachment 6 (Uncashed Check to Exchange for \$200, dated November 29, 2004).
13. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
14. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
15. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
16. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
17. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
18. *Egan*, 484 U.S. 518, at 531.
19. *Id.*
20. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
21. Executive Order 10865 § 7.
22. Directive, Enclosure 2, ¶ E2.A6.1.1
23. Directive, Enclosure 2, ¶ E2.A10.1.1
24. Directive, Enclosure 2, ¶ E2.A5.1.1.
25. The state tax lien for child support, noted above, has been satisfied.

26. Inasmuch as Applicant's argument that he did not list his past delinquencies because he thought they were "dropped and over and done with" is consistent with many of his other misunderstandings of finance, such as the dismissal of one's obligation on debts written off, and given the ultimate disposition of this decision, I find SOR sub-paragraph 3.b. in Applicant's favor.