

DATE: October 31, 2006

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18549

**ECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie Hess, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Guideline J allegations against Applicant were mitigated, and 10 U.S.C § 986 was inapplicable to his case. However, Applicant failed to mitigate Guideline F security concerns arising from his federal income tax delinquencies. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 4, 2004, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), 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 9, 2004, and elected to have a hearing before an administrative judge. The case was assigned to me June 8, 2006. On October 4, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government offered nine exhibits for admission to the record. The Government's exhibits were identified as Exhibits (Ex.) 1 through 9 and were admitted into evidence without objection. Applicant testified on his own behalf and called no other witnesses. He offered three exhibits for admission to the record. Applicant's exhibits were identified as Ex. A through C and were admitted into evidence without objection. At his hearing Applicant stated he could obtain additional materials and records regarding his federal income tax indebtedness. I offered to keep the hearing record open for one week so Applicant could supply additional documents if he wished to do so. Applicant declined to submit additional information. On October 18, 2006, DOHA received the transcript (Tr.) of the proceeding.

**FINDINGS OF FACT**

The SOR contains five allegations of disqualifying conduct under Guideline F, Financial Considerations and two allegations of disqualifying conduct under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted

two allegations under Guideline F and denied three. He admitted the two Guideline J allegations and offered mitigating circumstances. His admissions are incorporated as findings of fact.

Applicant is 54 years old and employed as a manager by a government contractor. His annual salary is between \$80,000 and \$85,000. (Tr. 64.)

Applicant was married in 1973 and divorced in 1980. He has a son from the marriage. Applicant married again in 1991. (Ex. 1, Ex. 2.)

On about June 1, 1989, Applicant was arrested on a bench warrant and charged with three counts of forging and uttering a U.S. Treasury check. He pled guilty to Count III of the indictment, and Counts I and II were dismissed. Applicant was sentenced to two years in prison, with two years suspended. He was awarded two years of supervised probation, ordered to make restitution of approximately \$3,395, assessed \$50, and directed to serve 75 hours of community service. (Ex. 8, Ex. 9.)

In 1992, Applicant's wages were garnished to pay tax delinquencies. In 1999, Applicant retained counsel and filed an Offer in Compromise with the Internal Revenue Service (IRS). In 2002, the IRS advised Applicant he owed delinquent federal taxes of \$96,2561.50 for the tax years 1980, 1984, 1987, 1988, 1991, 1992, 1993, 2000, and 2001. (Ex. 3 at 4-5.)

Applicant, who prepared his own tax returns, blamed his tax problems on an IRS audit which he claimed was misdelivered and which he never received. Applicant did not recall when the audit occurred. He also claimed that in 1980 and 1984 his employer filed duplicate wage and earning statements for him, which resulted in tax deficiencies. He also reported the IRS lost his tax returns for five years in the 1980s and perhaps the early 1990s. He claimed he filed taxes for those years, but he did not make copies of his tax returns and had no records to substantiate his claims. Applicant claimed that between 1992 and 1999 he paid the IRS \$100 each pay period for his tax delinquencies, but, because the interest and penalties continued to accrue, the debt was not reduced. Applicant asserted the IRS released some of his tax liens when a finance officer seeking to help him refinance his home mortgage discussed the liens with an IRS employee. He did not specify which liens were released, but he acknowledged he had not paid them. (Tr. 34-49. 74-76.) Applicant's vagueness and failure to produce records to support his assertions had a negative impact on his credibility.

At his hearing, Applicant submitted an IRS monthly statement for September 2006 showing a debt of approximately \$16,000 in federal tax delinquencies, interest, and penalties. (Ex. B.) He submitted an investigation results report from a credit reporting company showing three federal tax liens paid and subsequently removed from his credit report. (Ex. A.) He could not specify the tax years which were referenced by debt amounts in the investigation results report. (Tr. 80-81.) He admitted owing delinquent taxes, penalties, and interest for 2000 and 2001, and he stated he was challenging the IRS claim that he owed delinquent taxes, interest, and penalties for 1993. (Ex. B.) He stated he had paid a 2002 tax delinquency totaling approximately \$2,000, but he failed to provide evidence of satisfaction or payment. At the time of his hearing, Applicant was paying \$275 per month on his 2001 tax delinquency. (Ex. B.) He had been making these payments for approximately seven or eight months. The 2000 and 1993 delinquencies continued to accrue interest and penalties. Applicant did not specify when he planned to pay the remaining tax liens. (Tr. 71.) He fired the attorney who had been representing him before the IRS when the attorney increased his fees. As of the date of his hearing, Applicant's Offer in Compromise had not been accepted. (Tr. 47-51.)

On March 1, 2004, in response to interrogatories from DOHA, Applicant asserted he had paid a creditor \$550 on a delinquent account; that he had disputed a delinquent account of \$122 to a fuel oil company; and that he was in the process of returning a cable box to a cable company, which had caused a delinquent debt dating to 2002/2003. (Ex. 7.) Applicant's credit report of March 25, 2004, showed the debts as continuing in delinquent status. (Ex. 6.) The delinquencies were alleged in the SOR. Applicant provided no evidence to show the debts had been settled, paid, or resolved in his favor after a dispute. Two small medical debts totaling approximately \$100 were also alleged in the SOR and were admitted by Applicant. (Answer to SOR at .)

Applicant introduced a recent credit report dated September 30, 2006, to show the debts alleged on the SOR were no longer listed. The credit report showed serious account delinquencies for \$50, \$52, \$433, \$649, \$225. Applicant acknowledged the \$50 and \$52 debts as resulting from medical treatments. He claimed to be unaware of the three larger debts, which he speculated could also have been debts owed to medical providers. (Tr. 57-63.)

Applicant and his wife file separate federal tax returns. When Applicant married his wife, he told her about his income tax delinquencies. She was concerned that Applicant's tax problems might cause difficulties for her in her federal job, so she changed jobs. (Tr. 73-74.) Applicant has a 401(k) retirement account which has an estimated value of \$70,000 to \$80,000. Because his tax problems affected his ability to obtain credit, he borrowed \$18,000 from his 401(k) account to pay for a new vehicle. (Tr. 67, 72.)

Applicant suggested he could obtain additional records to support his assertions. I offered to keep the record open for a reasonable time, so that Applicant could produce records to support his testimony that he had paid certain debts and delinquencies. Applicant declined and stated he had supplied sufficient documentation. (Tr. 89-92.)

Applicant asserted he had learned valuable life lessons as the result of his earlier criminal conduct, and he was devoted to his family, his community, and his church. (Answer to SOR at 1-2; Tr.102-103.)

I take administrative notice that an amendment to 10 U.S.C. § 986 was signed by the President on October 28, 2004, as a part of the Defense Authorization Act. The amendment changed the language at section 986(c)(1) of the act to disqualify an individual from being granted a security clearance if that person "has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year and was incarcerated as a result of that sentence for not less than one year." Prior to October 28, 2004, section 986(c)(1) denied security clearances to persons convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

### POLICIES

"[No one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

### CONCLUSIONS

## Guideline F-Financial Considerations

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Directive ¶ E2.A6.1.1. Applicant has a history of not meeting his financial obligations, and his financial history suggests an inability or unwillingness to satisfy his debts, conditions which raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. DOHA's Appeal Board has concluded that "[a] person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810 at 4 (App. Bd. June 8, 2000).

In the SOR, DOHA alleged that Applicant owed the IRS delinquent taxes, penalties, and interest for tax years 1980, 1984, 1987, 1988, 1991-1993, 2000, and 2001, and his Offer in Compromise was still pending (¶1.a.); that he owed a creditor approximately \$505 on a delinquent account that had been placed for collection in about September 2002, and, as of March 25, 2004, the debt had not been paid (¶1.b.); that he owed a creditor approximately \$122 on a delinquent account that had been placed for collection in about March 1999, and, as of March 25, 2004, the debt had not been paid (¶ 1.c.); that he owed a creditor approximately \$649 on an account that was placed for collection in about May 2003, and, as of March 25, 2004, the debt had not been paid (¶ 1.d.); and that he owed a creditor approximately \$100 on two accounts placed for collection in about October 2003, and, as of March 25, 2004, the debts had not been paid (¶ 1.e).

The Government has established, through Applicant's admissions and the record evidence, a *prima facie* case that Applicant is financially overextended. Applicant provided no persuasive evidence to rebut the financial concerns specified in the SOR and identified as disqualifying conditions under ¶¶ E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. Applicant's federal income tax delinquencies date back to the early 1980s and continue to this day. While he has a plan in place to pay his 2001 delinquent taxes, interest, and penalties, his tax delinquencies for 1993 and 2000 remain unpaid and continue to accrue interest and penalties. Applicant's annual salary is between \$80,000 and \$85,000, suggesting he has the ability to pay his federal tax liens but is disinclined to do so.

While Applicant asserted he had paid, challenged, or settled the debts alleged at ¶¶ 1.b., 1.c., and 1.d. of the SOR, he failed to produce credible evidence that he had done so. The fact that a debt no longer appears on a credit report is not conclusive evidence of payment.

We turn to a review of the several conditions that could mitigate the security concerns raised by Applicant's financial delinquencies. Applicant's acknowledged financial delinquencies involve long-standing debts, and his inability or unwillingness to pay them is recent. Thus, neither mitigating condition E2.A.6.1.3.1. nor mitigating condition E2.A6.1.3.2. applies.

If a person's financial delinquencies were largely caused by conditions beyond his or her control, then mitigating condition E2.A6.1.3.3 might apply. The record shows that Applicant's financial problems were not caused by conditions beyond his control but, rather, appear to be the result of inattentiveness and the failure to develop a payment strategy and to keep necessary records. Thus, mitigating condition E2.A6.1.3.3. does not apply.

Applicant asserted he had plans to pay his remaining federal tax liens at some unspecified time in the future. DOHA's Appeal Board has stated that promises to pay one's debts in the future are not a substitute for a clear record of debts actually paid. ISCR Case No. 98-0188 at 3 (App. Bd. Apr. 29, 1999) In determining an individual's security worthiness, the Government cannot rely on the possibility that an applicant might resolve his or her outstanding debts at some future date. ISCR Case No. 98-0614 at 5 (App. Bd. Jul. 12, 1999)

Applicant has not sought financial counseling and has not presented clear indications that his financial problems are being resolved or are currently under control. Moreover, while he was paying on one of his three tax liens, he had no over-all plan to timely pay his remaining tax liens and to assure he will not incur additional tax debts in the future. Accordingly, mitigating conditions E2.A6.1.3.4. and E2.A6.1.3.6. are inapplicable. The Guideline F allegations in the SOR are concluded against the Applicant.

## Guideline J - Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested in June 1989 on a bench warrant and charged with three counts of Forging and Uttering U.S. Treasury Check; that he pled guilty to Count III of the indictment and Counts I and II were dismissed; that he was sentenced to two years in jail, with two years suspended, and placed on two years supervised probation, ordered to carry out 75 hours of community service, and fined \$50. (¶ 2.a.) DOHA alleged the facts in ¶ 2.a. disqualified Applicant, pursuant to 10 U.S.C. § 986, from being granted a security clearance or having a security clearance renewed. (¶ 2.b.)

Applicant's admitted criminal conduct raises security concerns under Disqualifying Conditions (DC) E2.A10.1.2.1. and E2.A10.1.2.2. of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. ¶ E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

We turn to a review of the mitigating conditions that might be applicable to Applicant's conduct. Applicant's criminal conduct occurred in 1989, seventeen years ago, and appears to have been a lapse in judgment and an isolated incident. Applicant holds a responsible job and gives clear evidence of successful rehabilitation. Thus, mitigating condition (MC) E2.A10.1.3.1., MC E2.A10.1.3.2., and MC E2.A10.1.3.6. of Guideline J apply to the conduct alleged in the SOR. Accordingly, the allegation at ¶ 2.a. of the SOR is concluded for the Applicant.

Additionally, I note the SOR was dated November 4, 2004, several days after October 28, 2004, when the President signed the amendments changing the language of 10 U.S. C. § 986(c)(1) to require that a grant or renewal of a security clearance could only be denied if an individual had been sentenced to imprisonment for a term exceeding one year and was incarcerated for not less than one year. Applicant was sentenced to incarceration for two years, with two years suspended, and received two years supervised probation. He was not incarcerated. Accordingly, the provisions of the statute do not apply to the facts of his case, and the allegation at ¶ 2.b. of the SOR is concluded for the Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1.: Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2.: Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

**DECISION**

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

Joan Caton Anthony

Administrative Judge

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