

DATE: January 31, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12821

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant sold a home in 1991 and incurred a significant state tax liability. When he failed to timely pay the taxes, a tax lien was filed in December 1993. His wife suffered a stroke in 1992 and was confined to a nursing home until her death in June 1995. After attempting to make payments on the tax lien, Applicant discovered it had expired and the debt was forgiven by operation of law. He did not disclose the tax lien on his security clearance application (SF 86), because he misunderstood the relevant questions. He has refuted the allegations that he falsified his SF 86, and the security concern based on financial considerations has been mitigated. Clearance is granted.

STATEMENT OF THE CASE

On June 16, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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 (Directive). The SOR alleged security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. It alleges an unpaid state tax lien under Guideline F and intentional failure to disclose the lien under Guideline E.

Applicant answered the SOR in an undated document and elected to have a hearing before an administrative judge. The case was assigned to me on November 9, 2006, and heard on December 13, 2006, as scheduled. I held the record open until January 16, 2007, to permit Applicant to submit additional evidence. DOHA received the hearing transcript (Tr.) on December 29, 2006. I received Applicant's additional evidence on January 12, 2007, and it has been admitted as Applicant's Exhibit (AX) H. Correspondence pertaining to AX H, including Department Counsel's lack of objection, is incorporated in the record as Hearing Exhibit I.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 65-year-old systems engineer employed by a university performing defense research. He has worked for his current employer since December 1990 and held a security clearance since January 1991. He has about three years of college but he did not receive a degree. He served in the U.S. Air Force from October 1960 to March 1968.

Applicant was married in February 1970. His wife became seriously ill around 1988 but recovered after receiving a liver transplant (Tr. 37). He moved across the country and started his current job in December 1990, but his wife remained behind. During this time, he was paying college tuition for his two daughters and maintaining two households (Tr. 37-38). He sold the family home in April 1991 and incurred a tax liability of \$8,370 resulting from the sale of the house (GX 3 at 1). In October 1992, his wife had a stroke and was confined to a nursing home. In December 1993, a state tax lien was filed for \$14,369.13, encompassing the unpaid taxes plus a penalty, interest, and collection costs (GX 2 at 8; Government Exhibit 6 at 1; GX 7 at 1; AX D).

Applicant's wife died in June 1995 (GX 1; GX 3 at 2). He became seriously depressed and began drinking heavily after his wife's death (GX 1 at 4; Tr. 38). He sought and received treatment for his depression. He was arrested for driving under the influence in July 1997, after consuming about 13 beers (GX 1; GX 3 at 2). He was convicted and sentenced to a \$1,000 fine and 40 hours of community service. His driver's license was suspended for one year. He moderated his drinking after his DUI arrest, and he now consumes about 2-3 beers a week.

At some time before 1996, Applicant was contacted by a collection agency regarding the tax lien, and he sent them a check for \$1,000. In 1996, his house was flooded and all his records were destroyed (Tr. 32-33). Applicant did not follow up on resolving the tax lien (Tr. 33).

Applicant remarried in October 2001. Although Applicant's own children were adults and financially independent, he "inherited" two minor stepsons. He and his new wife financially overextended themselves and fell behind on credit card payments (Tr. 49). At the time of the hearing, he had about \$41,000 in consumer debt (Tr. 60). He testified he and his second wife are now living apart and the future of their marriage is doubtful (Tr. 41).

In December 2002, Applicant submitted a SF 86 to continue his security clearance. He answered "no" to question 38, asking if he had been more than 180 days delinquent on any debt during the last seven years, and question 39, asking if he was currently more than 90 days delinquent on any debt. He did not disclose the unsatisfied tax lien. At the hearing, he testified he believed the two questions pertained to consumer debt and not to tax liens (Tr. 36). He had seen question 36, pertaining to tax liens filed in the past seven years, and he assumed questions 38 and 39 pertained to debts other than the tax liens covered by question 36. He answered "no" to question 36, because the lien had been filed more than seven years before he executed his SF 86 (Tr. 51).

Applicant answered "yes" and disclosed derogatory information in response to questions 19 and 24 of his SF 86. In response to question 19, concerning his medical record, he disclosed his treatment for depression after his first wife's death. In response to question 24, concerning his police record, he disclosed his DUI arrest and conviction in July 1997.

At some point, Applicant learned of a tax amnesty program that provided for forgiving a tax debt after ten years. He applied for tax amnesty in March 2005 and filed a state tax return for the unpaid 1991 taxes. He received the SOR in June 2006. In July and August 2006, he sent two \$600 checks as payments on the tax lien, but the state refunded the full amount of both checks (Tr. 38-39, 48; AX H at 2). In November 2006, Applicant hired an attorney to resolve the state tax lien (AX B). On January 3, 2007, Applicant was notified that the tax lien had expired, and his tax debt was zero (AX H at 5).

In November 2006, Applicant also contacted a credit counseling agency for assistance in bringing his credit card account payments up to date, and he enrolled in a debt management plan on December 8, 2006, providing for monthly payments of about \$1,057 (AX E; F, and G). He recognized that his credit card debt was not alleged in the SOR, but he decided to get better control of his credit card debt while he was "on a roll" with his financial situation (Tr. 36).

Applicant is an admitted procrastinator (Tr. 39), but he is not financially overextended. His annual salary is about

\$140,000 (Tr. 53). His monthly home mortgage payment is \$975. His automobiles are fully paid for (Tr. 54). His most recent personal financial statement, dated August 31, 2005, reflected monthly net income of about \$8,000, expenses of \$2,635, debt payments of \$3,085, and a monthly remainder of \$2,279 (GX 5). The debt payments and net monthly remainder were calculated before he initiated his debt management plan. He has "four to five thousand" in savings, and a retirement account of about \$235,000 (Tr. 58). He will begin receiving monthly social security payments of \$661 per month in February 2007, and he intends to continue working while drawing his social security payments (Tr. 61).

POLICIES

"[N]o 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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; *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case.

DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. Applicant's long-standing tax lien raises DC 1.

DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Procrastination or negligence do not necessarily equate to unwillingness to pay a debt. However, in this case, Applicant was aware of the debt, made one payment on it, but then ignored it until it became apparent that it raised security concerns. He was able to pay the debt but avoided dealing with it. I conclude DC 3 applies.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1). Directive ¶ E2.A6.1.3.1. Applicant's tax lien was only recently resolved. Thus, I conclude MC 1 is not established.

A security concern also can be mitigated by showing that a delinquent debt was an isolated incident (MC 2). Directive ¶ E2.A6.1.3.2. Applicant's tax delinquency occurred in 1991. He had no other significant financial difficulties until after his remarriage in October 2001. Although he accumulated significant credit card debt after October 2001 and missed payments on several occasions, his credit card debt was significantly different from his tax debt and separated by more than ten years. I conclude his tax delinquency was an isolated event within the meaning of MC 2. Thus, I conclude MC 2 is established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially arose due to circumstances beyond his control, it is appropriate to consider whether he acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003). Applicant's unexpected tax liability on the sale of his house in 1991, his wife's extended illness, and her untimely death were all beyond his control. However, he did not act reasonably, because he procrastinated until the SOR was issued before taking significant action to resolve the tax liability. I conclude MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is not relevant to the tax lien because the lien was resolved by operation of law before Applicant undertook financial counseling. However, it is relevant to the extent that Applicant is now in control of his financial situation.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant's distraction by his first wife's prolonged illness and untimely death, followed by his period of grief and depression, is certainly understandable. His inaction after he overcame his grief and depression and remarried, however, was neither reasonable nor prudent. He is an admitted procrastinator. He was aware in June 2004, after being interviewed by a security investigator, that the tax lien raised a concern about continuing his security clearance. Nevertheless, he procrastinated until March 2005 before taking any action to resolve it. I am satisfied he did not intentionally allow the ten-year period to run, because he attempted to make payments on the lien in July and August 2006, and he was surprised when he found that the lien had expired and he owed nothing. He is honest and sincere, but

his procrastination and negligence preclude a finding of good faith. I conclude MC 6 is not satisfied.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information.

Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "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."

Directive ¶ E2.A5.1.2.2.

When a falsification allegation is controverted, as in this case, the government has the burden of establishing proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

I am satisfied Applicant did not intentionally falsify his SF 86. He was candid, direct, and sincere at the hearing. His explanation for not disclosing the lien was plausible and credible. He voluntarily disclosed other derogatory information on his SF 86, such as his treatment for depression and his DUI arrest and conviction. These disclosures tend to negate an intent to conceal derogatory information. I conclude he has refuted the allegations of falsification in SOR ¶2.a and 2.b, and I resolve those allegations in his favor.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9. Some of these factors have been discussed in the above discussion of Guidelines F and E, but some merit additional comment.

Applicant is a mature adult. Although he is of retirement age, he enjoys his work and intends to continue working. His life has been an emotional roller coaster since around 1988, but he has persevered. He has held a clearance for more than 15 years without incident. When he received the SOR and realized his security clearance was on the line, he stopped his habitual procrastination and righted his financial ship.

The tax lien was the only debt alleged in the SOR. Until recently, the unpaid tax lien made him vulnerable to pressure, coercion, exploitation, or duress. However, the lien has expired and the debt has been forgiven, making him no longer vulnerable. His remaining financial problems are under control. He appears to have learned from his mistakes and has become more attentive to his finances. I am satisfied the likelihood of recurring financial problems is low.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegations of falsifying his SF 86, and he has mitigated the security concern based on based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge