

DATE: August 25, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-00412

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has had a history of financial difficulties. He has resolved the majority of his debts, but at this time he still has a remaining overdue debt to the Internal Revenue Service (IRS) of approximately \$200,000. While he has proposed an offer and compromise to settle this debt, it has yet to be accepted by the IRS. Applicant provided to the Government on a Security Clearance Application (SCA), materially incorrect information regarding liens against him, but he did not knowingly provide this misinformation. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On December 5, 2005 the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated January 4, 2006, Applicant responded in writing to the SOR allegations (RSOR), and he requested a clearance decision based on a hearing record.

The case was initially assigned to another Administrative Judge on February 8, 2006, but it was then reassigned to this Administrative Judge on June 29, 2006. A Notice of Hearing was issued to the parties on June 29, 2006, and the hearing was held on July 19, 2006.

At the hearing, Department Counsel offered 20 documentary exhibits (Exhibits 1-20) and no witnesses were called. Applicant appeared without counsel, offered 20 documentary exhibits (Exhibits A through T) and offered his own testimony. All documentary evidence was entered into evidence without objection. The transcript (Tr) was received on July 27, 2006.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. The SOR contains nine allegations, 1.a. through 1.h., under Guideline F, and one allegation, 2.a., under Guideline E. Applicant admitted SOR allegations 1.b. through 1.i., with some explanations, and he denied allegations 1.a. and 2.a. The admitted allegations are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the live testimony and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is 60 years old. He is currently unmarried, but he has been married and divorced three times in the past. He has three biological sons and one adopted son. Applicant is employed as an Test Pilot by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline F - Financial Considerations)

The SOR lists 10 examples of financial irresponsibility of Applicant, 1.a. through 1.i., under Adjudicative Guideline F. They will be discussed in the order that they were listed in the SOR:

1.a. This debt to Creditor 1 is listed in the SOR in the amount of \$87. At the hearing, Applicant contended that this debt was paid. Exhibit A is a letter from the collection agency for this debt, indicating this debt has been paid in full. I find that the current balance on this debt is \$0.

1.b. This debt to the IRS is in the amount of \$92,733 on a tax lien for unpaid federal taxes, interest and penalties. At the hearing, Applicant testified that he had engaged the services of a tax law firm to resolve his tax problems, in November 30, 2004, (Exhibit J), but they had mishandled this case. He then hired another attorney, and he proposed a settlement to the IRS (Exhibit L). They are awaiting a response. Currently the IRS is deducting \$330.37 a week to resolve his debts to the Government.

Applicant's offer of compromise to the IRS argues that after February 9, 2007, Applicant will only owe \$25,000 or less, because the remainder of his debt will no longer be collectible under the statute of limitations. He therefore, believes that he will be able to resolve all of his past due taxes to the IRS by February 9, 2007. He introduced a copy of a check in the amount of \$24,925 made out to him, that he plans to use to resolve his debt if the IRS accepts his offer in compromise (Exhibit F). At this time, until the IRS responds, I find that Applicant still owes the full amount alleged under 1.b.

1.c. This debt to the IRS is in the amount of \$22,445 on a tax lien for unpaid federal taxes, interest and penalties. This debt is also part of the proposed settlement offer to the IRS. Until the IRS responds, I find that Applicant still owes the full amount alleged under 1.c.

1.d. This debt to the IRS is in the amount of \$80,209 on a tax lien for unpaid federal taxes, interest and penalties. This debt is also part of the proposed settlement offer to the IRS. Until the IRS responds, I find that Applicant still owes the full amount alleged under 1.d.

1.e. This debt for a state tax lien to State of California is listed in the SOR in the amount of \$22,744. In his Response to the SOR, and at the hearing, Applicant contended that all of his debts to the state had been paid in full in 2003. He testified that he received a refund from the state tax board in 2004, which he would not have received it, if he still owed a debt to the state. Exhibit 4 shows that Applicant's state tax liens have been released. I find that the current balance on this debt is \$0.

1.f. This debt for a state tax lien to State of California is listed in the SOR in the amount of \$7,362. Applicant also contended that this debt had been paid. Exhibit 4 shows that Applicant's state tax liens have been released. I find that the current balance on this debt is \$0.

1.g. This debt for a state tax lien to State of California is listed in the SOR in the amount of \$2,054. Applicant contended that this debt had been paid. Exhibit 4 shows that Applicant's state tax liens have been released. I find that the current balance on this debt is \$0.

1.h. This debt for a state tax lien to State of California is listed in the SOR in the amount of \$12,778. Finally, Applicant contended that this debt had been paid. Exhibit 4 shows that Applicant's state tax liens have been released. I find that the current balance on this debt is \$0.

1.i. The Government alleges that Applicant's wages were garnished in 1985 for unpaid taxes for tax year 1980. Applicant testified that this debt had been paid. A letter from the California Franchise tax board, dated July 10, 1985, indicated that the lien ended on June 11, 1985, after this debt of \$122.60 was paid (Exhibit 15).

Applicant initially became delinquent to the IRS and California Franchise tax board, because he failed to file federal and state tax returns for tax years 1989, 1990, 1991, and 1992. While he said those were difficult times in his life, he could give no specific explanation as to why he failed to file tax returns for those tax years. He attempted to make an offer in compromise with the IRS but was told because of the large size of the debt, he was "uncollectible." Therefore his debt to the IRS was never resolved. As discussed above, his state tax was finally paid off by liens. Applicant also did not file timely tax returns for tax years 2001, 2002, and 2003. He testified that he fell behind in 2001, because he was deployed overseas, and then he did not catch up until 2004 because of procrastination.

With the exception of the debt to the IRS of approximately \$200,000, Applicant is now current on all of his other debts. He currently has \$81,533 in his vested company account. He introduced his company performance evaluations for years 2002, 2004, and 2005. All of them rate Applicant as exceeding expectations (Exhibit H).

Finally, Applicant introduced letters from three Lieutenant Colonels of the United States Air Force. All of them have known him for many years, and they all strongly recommend him for a position of trust, because of his strong character and integrity and his excellent work ethic (Exhibits N, O and P).

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges that when Applicant completed a signed, sworn Security Clearance Application (SCA) on June 10, 2002, (Exhibit 1), he did not furnish truthful, complete answers.

2.a. Question #36 asks, "In the last 7 years, have you have you had a lien place against your property for failing to pay taxes or other debts?" Applicant responded "Yes" and he listed the date of January 1, 1998, for a lien to the IRS in the amount of \$74,000.

At the time Applicant completed the SCA, liens had been placed against his him for all of the debts listed as 1.b. through 1.h., above.

Applicant denied that he was aware that he was submitting incorrect information to the Government. He testified that he had only received notice five days before he was to be deployed overseas to help the United States Air Force, which caused some confusion in completing his SCA. Applicant also gave several potential explanations as to why he did not furnish a complete answer to the Government on his SCA, (he did not fully understand the question, he did not realize he had to list all of his liens, he might not have had all of the information available to him regarding the liens, and the information he did have only showed that there was a lien of \$74,000 placed against him), but he is insistent that he never knowingly gave incorrect information to the Government. While Applicant did not give a complete answer regarding his liens, he did list a substantial lien of \$74,000 by the IRS, and I find his testimony credible that he did knowingly mislead or misinform the Government.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge

must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to Applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of Applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with regarding Guidelines F and E:

(Guideline F - Financial Considerations)

With respect to Guideline F, the Government has established that Applicant has had a history of financial difficulties. The evidence shows that Applicant has resolved his overdue state taxes, and he has made a good faith effort to resolve his debt with the IRS. Unfortunately at this time he still owes to the IRS approximately \$200,000. It is Applicant's hope that this debt may be satisfied in February 2007. But at this time there is no way to know if the IRS will accept Applicant's offer in compromise. An additional point of concern is that Applicant again exhibited the conduct that got him into trouble previously. It was his failure to file his tax returns in 1989 through 1993 that was the cause of the initial debt to the IRS. The fact that he again filed his returns late for tax years 2001 through 2003 shows that he may still be subject to some irresponsible financial behavior.

Regarding the Disqualifying Conditions (DC) under Guideline F, I conclude both DC E2.A6.1.2.1., and DC E2.A6.1.2.3 apply, because of Applicant's history of not meeting financial obligations and his inability to satisfy his debt to the IRS. I find that Mitigating Condition (MC) E2.A6.1.3.6. applies because Applicant has initiated a good-faith effort to repay his overdue debt to the IRS. I, therefore, resolve Guideline F against Applicant.

Applicant will be eligible to reapply for a security clearance in one year. If he can resolve his federal tax debt by that

time, and show continued financial stability, including filing his tax returns in a timely manner, then he could be eligible for a security clearance at that time.

(Guideline E - Personal Conduct)

With respect to Guideline E, the evidence does establish that Applicant provided inaccurate information to the Government in response to question, #36 on the SCA. However, Applicant did list a significant lien by the IRS on his SCA, and I conclude that he did not knowingly provide misinformation to the Government.

I conclude that no DC applies under Guideline E. I resolve Guideline E for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1, Financial Considerations, Guideline F: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2, Personal Conduct, Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

DECISION

In light of all the circumstances and facts 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.

Martin H. Mogul

Administrative Judge