

DATE: July 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-04091

## **DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

#### **FOR APPLICANT**

Richard B. Rosenblatt, Esq.

### **SYNOPSIS**

Applicant's business failed after a major client defaulted on a contract and infringed on his copyrighted software. The client declared bankruptcy after a judgment was entered against him. Applicant incurred significant tax liability by early withdrawals from his retirement funds in an effort to save his business. He found new employment, but he was medically disabled from February 2000 until ay 2001 and periodically during 2002 and 2003. All these circumstances made him unable to pay his federal income taxes. He returned to full-time employment in April 2004, and he negotiated an installment payment plan for his delinquent taxes in June 2005. He made timely payments for several months until a loan from a friend enabled him to pay off his tax liability in full. The security concern based on financial considerations is mitigated. Clearance is granted.

### **STATEMENT OF THE CASE**

On October 28, 2005, 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. The SOR alleges security concerns under Guideline F (Financial Considerations). It alleges delinquent federal taxes for tax years 1992-1993 and 1999-2003 totaling almost \$40,000.

Applicant answered the SOR in writing on November 17, 2005. He denied owing taxes for 1992 (SOR ¶ 1.a), stating they have been paid in full. He denied owing taxes for 1993 (SOR ¶ 1.b), stating the statutory deadline for collecting these taxes has expired. He denied the allegation in SOR ¶ 1.c, stating the balance due for 1999 has been paid down to \$150. He admitted owing taxes for 2000-2003 (SOR ¶¶ 1.d-1.g), explaining the debt is being satisfied through an installment agreement to pay \$500 per month.

Applicant requested a hearing, and the case was assigned to me on April 5, 2006. On April 21, 2006, DOHA issued a notice of hearing setting the case for May 10, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on June 1, 2006.

On June 5, 2006, Applicant submitted additional evidence, even though he had not requested that the record be kept open for post-hearing submissions. Department Counsel did not object to the post-hearing evidence, but argued it had no mitigating value. I admitted the evidence, identified in the record as Applicant's Exhibit (AX) F. Department Counsel's response to AX F is incorporated in the record as Hearing Exhibit (HX) 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 55-year-old employee of a federal government contractor. He is employed as an "independent verification and validation analyst." His duties are software testing and assisting project managers in managing and monitoring their projects.<sup>(1)</sup> He served in the U.S. Air Force from February 1969 to March 1981. He received a clearance in December 1969, while in the Air Force, and he received a clearance as an employee of a contractor in June 1983, but he does not currently hold a clearance.<sup>(2)</sup>

After being discharged from the Air Force, Applicant worked in computer-related positions with several government contractors. After he was laid off in 1992, he started his own business, developing database solutions using specialized software. In December 1992, a major client defaulted on his payments to Applicant's company. He withdrew money from his personal retirement funds to keep his five employees on the payroll through the holidays.<sup>(3)</sup> In January 1993, he laid off all his employees and began running the business by himself. He withdrew an additional \$30,000 from personal retirement funds to cover his payroll taxes, payrolls, and business operating expenses. By withdrawing his retirement funds, he incurred tax penalties for early withdrawals plus taxes on the withdrawn funds.<sup>(4)</sup>

The same delinquent client who defaulted on his payments also transferred Applicant's proprietary software to another company. After extensive litigation, Applicant prevailed in his copyright infringement case in October 1998. However, the client filed for bankruptcy, precluding Applicant from recovering damages after incurring about \$30,000 in legal fees. Applicant shut down his company in December 1998. He made no effort to pay state or federal taxes because all his available funds were being used to pay legal fees.<sup>(5)</sup>

Applicant was employed by a government contractor in December 1998 in a position that did not require a clearance. He became medically disabled in February 2000 because of a bipolar condition. His medical condition was stabilized with medication in May 2001, but he continued to draw disability pay in 2002 and 2003. No income taxes were withheld from his disability payments even though they were taxable.<sup>(6)</sup> His adjusted gross income was \$70,945 in 1999, \$43,577 in 2000, \$49,928 in 2001, \$26,513 in 2002, and \$7,411 in 2003.<sup>(7)</sup>

Applicant filed his federal income tax returns for 2000, 2001, and 2002 at the same time. For all other years, he filed his returns on time.<sup>(8)</sup> He did not realize he had owed taxes on his disability pay until he took his tax records to his accountant.<sup>(9)</sup>

Applicant was hired by his current employer in April 2004, with an annual pay of \$82,400. He had attempted to negotiate an installment agreement with the Internal Revenue Service (IRS) in 2002, but he was unsuccessful.<sup>(10)</sup> In 2005, he again contacted the IRS and inquired about an installment agreement on his delinquent taxes. Initially, the IRS insisted on around \$730 per month, which Applicant could not afford. After the statutory period for collection of the 1993 taxes (about \$18,000)<sup>(11)</sup> expired, the IRS offered monthly payments of \$440, but Applicant agreed to pay \$500 per month.<sup>(12)</sup> The installment agreement was executed in June 2005, with payments to begin in August 2005. At the time of the hearing, he owed about \$16,000 in delinquent taxes. His installment payments were current through May 2006.<sup>(13)</sup>

Applicant adopted a budget that provided for continuing his installment payments to the IRS and reflected a net monthly remainder of about \$525.<sup>(14)</sup> He sold one of his two cars and used the proceeds to pay off the balances of two of his  
<sup>(15)</sup>

three credit cards.

After the hearing, Applicant obtained a loan from a friend and paid the balance of his delinquent federal taxes in full. (16) The terms of the loan are not reflected in the record. The record reflects that Applicant had a romantic relationship with this friend and they lived together from February 1998 until September 2003. They parted amicably and remained in contact. (17) She is a Canadian citizen residing permanently in the U.S. (18) She previously lent Applicant the money to purchase a car (the same car Applicant sold to pay off two credit cards), and she held the title as security for the loan. (19)

## 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. "[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

Under Guideline F (Financial Considerations), "[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 Guideline F 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. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's history of tax delinquencies establishes DC 1 and DC 3.

. A disqualifying condition (DC 2) applies where there is evidence of "[d]eceptive or illegal financial practices such as . . . income tax evasion." Directive ¶ E2.A6.1.2.2. Except for the 2000-2003 tax returns, Applicant filed all his returns on time, even though he could not afford to pay his taxes. He unsuccessfully contacted the IRS in 2002 in an effort to resolve his tax liability. I conclude DC 2 is not established.

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) or an isolated incident (MC 2). Directive ¶¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant had multiple delinquent debts. Although he recently satisfied his debt to the IRS, he now has a substantial debt to the personal friend who lent him the money to pay off his tax debt. I conclude MC 1 and MC 2 are not 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). There were several conditions beyond his control: a major client's default on a contract, a business failure, a copyright infringement, bankruptcy of the person who infringed his copyright, and unexpected illness and disability. Applicant took reasonable steps to save his business and protect his copyright. He took reasonable measures to resolve his tax liability when he returned to full-time employment. I conclude MC 3 is established.

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 attempted to resolve his tax liability in 2002, long before applying for a security clearance. He was not successful until 2005. He complied with his installment agreement for several months until he was able to pay off the back taxes in full with a loan from a friend. While Department Counsel correctly noted that he has not resolved the debt but merely transferred it to a different creditor, it is reasonable to expect that his long-time friend will not be as demanding as the IRS in terms of interest and penalties. He used the proceeds from selling his car to reduce his credit card debt. He has a steady income. He has adopted a frugal lifestyle and a budget that will permit him to divert funds from the IRS to his friend in satisfaction of the loan. I conclude MC 6 is established.

After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on financial considerations.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline F (Financial): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Tr. 18.

2. Tr. 6.

3. Tr. 22-23.

4. Tr. 23-24.

5. Tr. 26.

6. Tr. 26-28.

7. Tr. 30-31.

8. Tr. 56.

9. Tr. 57.

10. Tr. 62.

11. Tr. 68.

12. Apparently, Applicant's 1992 return was lost and refiled after the 1993 return. Consequently, the collection of the 1993 taxes was barred by the statute but the 1992 taxes were still collectable. Tr. 69.

13. Tr. 32-34; AX A; AX B; AX C..

14. AX E.

15. Tr. 42, 71-72.

16. AX F.

17. GX 2 at 1.

18. GX 1 at 10 (page marked as "page 9").

19. GX 3 at 18.