

DATE: October 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-12624

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 68-year-old force protection officer working abroad for a defense contractor providing combat support . In the early 1990s, Applicant acquired debt. His wife withdrew a portion of her 401K retirement plan to pay their creditors, incurring a tax obligation. When completing a security clearance application in 2004, Applicant denied having any tax liens or delinquent debts, thinking property liens were different from past taxes owed and not knowing one delinquent account was listed on his credit report. Applicant's demonstrated history of repaying his tax obligations mitigated financial security concerns. Moreover, his lack of intent to falsify or misrepresent material facts on his security clearance application mitigated personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On September 23, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF-86).⁽¹⁾ On June 12, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons, under Guideline F (Financial Considerations) and Guideline E (Personal Conduct),⁽²⁾ 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 a clearance should be granted, continued, denied, or revoked.

In a notarized statement, dated July 20, 2006, Applicant admitted all the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on September 1, 2006. A complete FORM was provided to Applicant,⁽³⁾ which he received on September 20, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by October 20, 2006. Applicant's timely response to the FORM, dated September 28, 2006, was

admitted into the record without objection by Department Counsel. The case was assigned to me on October 25, 2006.

FINDINGS OF FACT

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

Applicant is a 68-year-old force protection officer working in the Middle East for a defense contractor providing combat support. He served in the U. S. Marines from 1958 through 1980, when he retired as a Master Gunnery Sergeant/Sergeant Major [E-9]. A year after being honorably discharged from the Marines, he attended college for one academic year. His 1963 marriage produced three children and ended in divorce in 1971. He married his current spouse in 1973, and the couple has one adult child.

In 1992 or 1993, Applicant was laid off from his job. He was then overpaid unemployment compensation. This obligation was formalized as a state tax lien for about \$1,000, which he satisfied.⁽⁴⁾ Then, sometime in 1994, Applicant's daughter was physically attacked, raped, and dropped off near her family's home. The family rallied around the young woman with their support to ensure she would recover physically and emotionally. They also received appropriate counseling from their church and medical personnel. The period of unemployment and the rape caused extreme emotional and financial hardships for the family. To address their resultant debt, Applicant's wife took a distribution from her 401K account in 1996 to satisfy their obligations. The withdrawal of these funds incurred a 1996 federal tax liability, later made into a tax lien, on which Applicant has been making regular payments.

Applicant's credit bureau reports and the SOR note two federal tax liens. One is for \$1,944 and was filed in June 1994. Neither party describes its origin, although the underlying obligation seems to have arisen around the time of Applicant's unemployment. In his answer to the corresponding allegation concerning this federal lien, SOR allegation 1.b, he admitted the allegation and stated: "In June 1994 - [City/State] Tax lien was filed against me for \$1,944.00 I admit this."⁽⁵⁾ Applicant then submitted proof of satisfaction of the 1993 state tax lien to show that he has satisfied the tax lien at issue. Applicant failed to notice that there was a difference between the 1993 state tax lien satisfied and the 1994 federal lien referenced in SOR allegation 1.b.

The other federal tax lien is for \$26,167 and was filed in February 1999. Applicant provided his most recent 16-month payment history, showing that he has been regularly making payments on that federal tax lien.⁽⁶⁾ There is no direct evidence as to whether this repayment plan with the IRS/EFTPS for the 1999 lien for his 1996 taxes ever incorporated payments addressing his earlier 1994 lien for \$1,944, but it clearly denotes that current payments have been made and are being made on both his current taxes and his 1996 tax obligation.

A third obligation apparently arose with a retail credit card with which Applicant admits he has an account, but denies knowledge of an outstanding debt. A February 11, 2004, credit bureau report⁽⁷⁾ notes an account in which the merchant's name is part of the account name. The account was opened in September 1997, has a date of last activity in November 2001, and was ultimately transferred or sold. It indicates a zero account balance and a high credit limit of \$3,700.

A credit bureau report, dated July 12, 2005,⁽⁸⁾ notes the account under a slightly different name, with an account number ending in -7064. It was opened and reported in June 2003 for sales financing with a balance of \$5,541 past due. A June 1, 2006, credit bureau report⁽⁹⁾ notes a variant on the account name with an account number ending -7064 and reported on April 2006. It indicates a balance of \$6,006 with a date of last activity in November 2001. A credit bureau report dated August 2006 reconfirms the existence of this obligation at a total of \$6,071.⁽¹⁰⁾

Although Applicant acknowledges he has an account with this merchant, he has no knowledge of any collection efforts on this account since its date of last activity in November 2001. His wife has been in correspondence with the company from their present home in the Middle East, but has yet to establish what this debt represents. She plans on personally visiting their hometown store when she returns to the United States in November 2006 to seek resolution of this issue.

When answering his June 16, 2004, SF-86, ⁽¹¹⁾ Applicant admits he answered "No" 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?*) He answered in the negative because: "In good faith and effort with the knowledge I had, I thought property meant owning a house, car or property such as land; since I did not own any property, I responded to the question as "NO" I did not think it meant credit cards which we paid off using the money from the 401K which then caused the tax liability."⁽¹²⁾ In response to Question 38 (**Your Financial Delinquencies - 180 Days** *In the last 7 years, have you ever been over 180 days delinquent on any debt(s)?*) and Question 39 (**Your Financial Delinquencies - 90 Days** *Are you currently over 90 days delinquent on any debt(s)?*), he answered in the negative because he was not aware of the retail merchant's collection effort.

Both Applicant and his wife are currently employed with the same employer in the Middle East. They are current on all their other bills. For his annual review period ending March 10, 2006, he received an overall rating of "Commendable," which is defined as "Results employee achieves clearly exceed job requirements. Performance is of a high quality and is achieved on a consistent basis."⁽¹³⁾ Of the 11 factors considered in making the overall rating, none were less than "Commendable," and three were "Outstanding," defined as "Employee's performance is exceptional in all areas and is recognizable as being superior to others."⁽¹⁴⁾ He was rated "Outstanding" in the areas of Productivity, Creativity, and Reliability. His supervisor separately noted that Applicant is "a man that you can rely on."⁽¹⁵⁾

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.⁽¹⁶⁾ The government has the burden of proving controverted facts.⁽¹⁷⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁸⁾ 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.⁽¹⁹⁾ Finally, the applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁰⁾

No one has a right to a security clearance⁽²¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²³⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁴⁾ 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 security 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. [\(25\)](#)

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. [\(26\)](#)

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 set forth arguments for disqualification under both Guideline F (Financial Considerations) and Guideline E (Personal Conduct). For clarity, I will discuss each separately.

Financial Considerations

The government has provided evidence that Applicant incurred two federal tax liens and has a delinquent balance on a retail credit card. Applicant admits to at least one of the federal tax liens. He also admits to having an account with the retail merchant with which the SOR alleges he owes a delinquent amount. Consequently, under Guideline F, the government has raised sufficient evidence to raise Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*a history of not meeting financial obligations*) and FC DC E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*).

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant admits that his largest federal tax lien still has a balance to be addressed and has offered no tangible evidence that his retail merchant balance is in error. Therefore, neither Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.1 (*the behavior was not recent*) nor FC MC E2.A6.1.3.2 (*it was an isolated incident*) applies.

Between about 1992 or 1993, Applicant lost his job and, while unemployed, was overpaid in unemployment compensation funds. This overpayment created a state obligation. Then in 1994, his daughter was brutally attacked, raped, and left to her family, church, and medical practitioners to heal emotionally and physically. In order to address the debt which occurred during this time, Applicant's wife took a distribution from her 401K. In the process of using that money to honor their debts, they incurred a federal tax lien on the distribution. Given these facts, 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)*) applies. However, because there is no evidence that Applicant has received financial counseling, 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 be raised.

The overwhelming majority of the debt at issue is the approximately \$26,000 federal tax lien incurred from Applicant's wife's taking a distribution from her 401K plan to satisfy their debts. Applicant has provided proof that he is in timely repayment with the IRS over this 1996 obligation. Although he is unaware of the approximately \$6,000 retail merchant delinquency, his wife has tried, albeit unsuccessfully, to discern its origin from their present location in the Middle East, with plans to address it personally when she returns to the U.S. next month. Consequently, good faith efforts have been made to address these matters and FC MC E2.A6.1.3.6 (*[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) applies.

What remains is the second federal tax lien for approximately \$1,944, which appears to have arisen during Applicant's period of unemployment. In making his case, Applicant has confused this 1994 lien with the 1993 state lien incurred as part of an unemployment compensation overpayment. In the process, however, he provided proof that he successfully satisfied that state lien; combined with his current efforts to address the larger federal tax lien, he has thus demonstrated

a pattern of honorably resolving such obligations in good faith. (27)

Although the retail merchant account needs to be discerned as valid or in need of formal dispute with the major credit reporting bureaus as an inaccurate entry, his record for addressing his liens and debts is solid. Based on that record, there is every indication that if the IRS failed to combine his liens when it approved his EFTPS repayment plan and the older federal lien remains existent, then he will address it now that it has been shown to be distinct from his satisfied 1993 state lien. Moreover, the combined amount of the retail merchant account, if valid, and the smaller federal tax lien, if still unaddressed, represent a manageable sum which Applicant is capable of addressing. Further, it does not represent so significant a sum as to pose genuine security concerns. Therefore, Applicant has mitigated financial considerations security concerns.

Personal Conduct

The Regulation also sets out several potentially disqualifying and mitigating conditions under Guideline E. Here, the government argues that Applicant intentionally falsified material facts when he denied having any tax liens or delinquent debts. Applicant admits answering the applicable questions in the negative, but denies that he intentionally falsified material facts with his answers.

With regard to his answer about whether he has any tax liens placed against his property for failure to pay taxes or other debts, Applicant, a former Marine with one year of post-secondary education, answered in the negative. To him, the IRS obligation was not placed against his property, because he did not own a home or real estate against which a lien could be placed. Rather, he viewed it simply as an unpaid balance owed to the IRS on their 1996 taxes. This interpretation and the resultant answer is not illogical and, given Applicant's background and the wording of the question, makes practical sense.

As for his denial of any delinquencies, Applicant did not know of the retail merchant's entry on his credit bureau report; consequently, he did not know it was an issue. His denial of any delinquent debts was based on the fact he was uninformed, not on an attempt to mislead or falsify. Indeed, there is no evidence or indication of an intent to intentionally deceive or conceal information. Consequently, neither 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*), 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*), nor any of the other available disqualifying conditions apply to the three SF-86 denials at issue.

I have considered all the facts and evidence in this matter. I also have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests with regard to the security concerns raised. He is a mature man with considerable life experience. He has had a solid military and civilian career, and is currently a high rated employee noted for his reliability. He has raised four children and arrived in his mid-60s without incurring any significant debts other than those listed. At one point, however, after a period of unemployment and a horrific family tragedy, his family did incur some debts. Rather than let their debts go unaddressed, his wife borrowed against her retirement plan in 1996, incurring a tax obligation on the proceeds. He has been repaying that tax obligation with the same good faith he demonstrated in paying back a state tax lien incurred because of an overpayment on his unemployment compensation. Meanwhile, his wife has been seeking information regarding the retail merchant account that is allegedly delinquent, and will continue to pursue it when she returns from the Middle East next month.

Remaining at issue is the smaller federal tax lien for under \$2,000. Although it is unclear whether that obligation was absorbed into his current repayment plan with the IRS, it is clear that Applicant has demonstrated a history of honoring his debts and satisfying his tax obligations. Even if he is ultimately found to be liable for the full amount of both the smaller federal tax lien and the retail merchant balance, the amount at issue remains a manageable sum, under \$8,000, and he has shown that he is one who honors his debts. More importantly, the sum at issue, if fully substantiated, does not pose a security risk.

As for his personal conduct, Applicant has given a common sense interpretation as to why he answered the SF-86 question regarding tax liens in the negative. He has also explained that he was unaware of the one delinquent debt cited. Consequently, his negative answers regarding delinquent debt were based on an honest mistake and a lack of information, not fraud. Moreover, there is no evidence that Applicant in any way meant to falsify facts in executing his SF-86 or that he was anything less than the reliable man commended by his supervisor. Applicant has mitigated security concerns arising under financial considerations and personal conduct. Clearance is granted.

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): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 1. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

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

Arthur E. Marshall, Jr.

Administrative Judge

1. The SF-86 contained in the government's file of relevant material (FORM) as Item 4 is dated September 22, 2003, but Applicant signed the SF-86 on September 22, 2003, and then on September 23, 2003.
2. The allegations under Guideline E are not predicated upon the SF-86 presented as Item 4. They are based on a subsequent SF-86 Applicant apparently executed "under date June 16, 2004," and which was not included as evidence in the FORM.
3. The FORM consists of a 5 page brief and 11 items.
4. Item 6 (State Department of Labor statement, dated September 20, 2000).
5. Applicant Response to the SOR, dated July 20, 2006.
6. Item 5 (16-Month Payment History to Internal Revenue Service [IRS] through the Electronic Federal Tax Payment System [EFTPS], dated April 5, 2006).
7. Item 10 (Credit bureau report, dated February 11, 2004).
8. Item 11 (Credit bureau report, dated July 12, 2005).

9. Item 9 (Credit bureau report, dated June 1, 2006).
10. Item 8 (Credit bureau report, dated August 18, 2006)
11. Because no copy of this SF-86 is contained in the official file, Applicant's admissions serve as a basis for confirming that this SF-86 is existent and that he gave negative responses to the questions at issue.
12. Applicant's Response, *supra*, note 5.
13. Item 7 (March 10, 2006, Appraisal).
14. *Id.*
15. *Id.*
16. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
17. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
18. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
19. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
20. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
21. *Egan*, 484 U.S. 518, at 531.
22. *Id.*
23. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
24. Executive Order 10865 § 7.
25. Directive, Enclosure 2, ¶ E2.A6.1.1
26. Directive, Enclosure 2, ¶ E2.A5.1.1.
27. Moreover, inasmuch as Applicant has shown that he is repaying his larger, more recent, federal tax lien through EFTPS, it is highly likely that the smaller, older federal tax lien was previously satisfied or incorporated into that EFTPS repayment plan by the IRS in order to assure its satisfaction.