

DATE: March 19, 2007

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-14352

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Both state and federal tax authorities have placed tax liens against Applicant. At present, Applicant owes the IRS approximately \$35,000, and he owes the state an unknown amount. Although he has now filed state and federal tax returns for tax years 2002-2005, he does not have a realistic plan in place to resolve his tax indebtedness. Clearance is denied.

**STATEMENT OF THE CASE**

Applicant contests the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on August 30, 2006. The SOR--which is in essence the administrative complaint--details the factual basis for the action and alleges security concerns under Guideline F for financial considerations and Guideline E for personal conduct. Applicant timely replied to the SOR and requested a hearing.

The case was assigned to an administrative judge on November 30, 2006. It was reassigned to me December 15, 2006, due to caseload considerations. The next month a notice of hearing was issued scheduling the case for February 13, 2007. The hearing took place as scheduled. DOHA received the hearing transcript February 23, 2007.

At Applicant's request, the record was kept open until February 28, 2007, to allow him to submit additional documentary evidence. He submitted matters in a timely manner and those matters were forwarded to me by department counsel who voiced no objections. His post-hearing submission is admitted as Exhibit E.

**FINDINGS OF FACT**

Under Guideline F, the SOR alleges Applicant has state and federal tax problems as evidenced by liens and delinquent

taxes. Under Guideline E, the SOR alleges Applicant failed to timely file his federal income tax returns for tax years 2002-2005 in violation of a federal criminal law (26 U.S.C. § 7203). Applicant, in general, admits the tax problems under Guideline F. Under Guideline E, he disagrees with the allegation and explained that he filed returns as soon as he was able to do so. Applicant's admissions and explanations are incorporated herein. I make the following findings of fact set forth below in numbered paragraphs.

1. Applicant is a 44-year-old truck driver who is seeking a security clearance for first time. Along with his 31-year-old wife, he owns and operates a truck hauling loads for a company that contracts with the Defense Department. He has a 16-year-old son from his first marriage. He pays about \$450 per month in child support for his son and he is current with this obligation.
2. Applicant has a history of financial problems, as evidenced by state and federal tax liens. Applicant's state of residence filed a state tax lien against him in about March 2003 (Exhibit 5). Neither Applicant nor his wife know how much they owe to the state. The IRS filed a federal tax lien against him in about January 2006 (Exhibit 6). The federal tax lien is for \$19,027. Both state and federal tax liens remain in effect.
3. The IRS indebtedness is a joint obligation of Applicant and his wife. They work together in the trucking business. His wife has primary responsibility for the financial and business aspects of the business. Applicant has primary responsibility for the operational and mechanical aspects of the business.
4. Applicant and his wife fell behind on filing state and federal income tax returns. Their tardiness was due to a combination of factors: (1) being on the road the vast majority of the year; (2) erroneous tax information provided by the company; and (3) an accountant who took far too much time to prepare their tax returns. Applicant has now filed all state and federal income returns for tax years 2002-2005 (Exhibits 3, A, B, C, and D).
5. The 2004-2005 tax returns show Applicant owes about \$1,045 in state income taxes, which are unpaid. Likewise, the 2004-2005 tax returns show Applicant owes about \$16,333 in federal income taxes, which are unpaid. Adding this amount to the \$19,027 owed per the federal tax lien, Applicant owes the IRS approximately \$35,000 in delinquent income taxes.
6. Sometime in the past few years, Applicant had a repayment agreement with the IRS where he and his wife were paying about \$350 per month. A copy of the agreement is not in the record. They do not know how many payments they made, but they made payments as recently as 2005 (Exhibit E). Although they believe they made all required payments, the IRS informed them that they missed a payment and were in default.
7. After the hearing, Applicant contacted the IRS to try to establish another repayment agreement (Exhibit E). He was told an agreement could be established if he paid his 2005 taxes in full, which he is unable to do. Also, he also tried to obtain a loan, but was unable to do so. His plan now is to save the money to pay off the 2005 taxes as quickly as possible and then try to establish a repayment agreement with the IRS for his remaining indebtedness. He did not address his state tax indebtedness in his post-hearing submission.
8. Concerning his overall financial situation, Applicant and his wife have about \$3,000 in a checking account and several hundred dollars in a business account set aside for truck maintenance. In addition, Applicant has about \$5,000 to \$6,000 in a 401(k) account with a previous employer. Applicant does not own any real estate.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. (2) 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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty. (3) Instead, it is a determination that

the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(4)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(5)</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>(6)</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(7)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance.<sup>(9)</sup> And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### ***1. The Personal Conduct Security Concern***

Personal conduct under Guideline E addresses issues of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In this regard, a pattern of dishonesty or rule violations may raise a security concern.

Under Guideline E, the SOR alleges Applicant engaged in criminal conduct by failing to timely file his federal income tax returns for tax years 2002-2005. I have some concern about the legality or correctness of this pleading because it alleges criminal conduct--a violation of 26 U.S.C. § 7203--under the personal conduct guideline instead of the Guideline J, the criminal conduct guideline. Nevertheless, I will address it as alleged in the SOR, which alleges that Applicant violated a rule by failing to timely file federal income tax returns for four years. The rule in question is 26 U.S.C. § 7203, a federal criminal law.

Under 26 U.S.C. § 7203, "[a]ny person required under this title . . . or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor."<sup>(11)</sup> *Willfully* is the key term. In *United States v. Cheek*, the United States Supreme Court reviewed a series of tax cases and concluded that "the standard for the statutory willfulness requirement [for all federal criminal-tax offenses] is the 'voluntary, intentional violation of a known legal duty.'"<sup>(12)</sup> Also, the Court explained the government's requirement to prove willfulness in criminal-tax cases:

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.<sup>(13)</sup>

Based on this legal standard, I conclude that the evidence is not sufficient to prove Applicant willfully failed to file federal income tax returns in violation of federal law. The evidence supports a case of negligence, but not willfulness. Applicant is neither a tax protestor nor a tax evader. In any event, he has resolved any concern by filing the tax returns in question. Accordingly, for these reasons, Guideline E is decided for Applicant.

### ***2. The Financial Considerations Security Concern***

Under Guideline F, a concern typically exists for two different types of situations--significant unpaid debts or unexplained affluence. An individual who is financially overextended is at risk of having to engage in illegal or

unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, a concern is raised by significant unpaid debts. Applicant has a history of financial problems, as evidenced by state and federal tax liens. Also, he owes the state an unknown amount and he owes the IRS approximately \$35,000 in taxes. He does not, at this time, have the ability to pay these debts. It appears that the likely cause of Applicant's tax problems is that he has been inattentive to this aspect of his trucking business. Inattention to important matters such as federal income taxes has obvious security significance.

I reviewed the mitigating conditions (MC) under the guideline and conclude he receives some credit in mitigation. Each MC is discussed below.

The first MC--the behavior was not recent--does not apply. His financial problems are current and ongoing, as opposed to matters from the distant past.

The second MC--it was an isolated incident--does not apply. Applicant's financial problems involve both state and federal tax authorities for more than one tax year.

The third MC--the conditions that resulted in the behavior were largely beyond the person's control--does not apply. There is no evidence showing that the tax problems resulted from a loss of employment, a business downturn, an unexpected medical emergency, or a death, divorce, or separation.

The fourth MC--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--does not apply. Other than working with the accountant to get the tax returns filed, there is no evidence that Applicant has sought professional assistance to resolve his situation. Moreover, at this time, it is far too soon to say that his situation is being resolved or are under control, especially in light of the large unresolved IRS debt.

The fifth MC--the affluence resulted from a legal source--is not applicable here.

The sixth MC--the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts--applies somewhat. Applicant had a repayment agreement with the IRS and made payments as recently as 2005. These circumstances show that he made some effort to address the IRS debt.

Viewing the record evidence as a whole, Applicant is 44 years old and sufficiently mature to make thoughtful, prudent decisions about his taxes, and yet he has a sizeable federal tax liability and an unknown state tax liability. Both federal and state tax authorities have placed tax liens against him. I am persuaded that he genuinely wants to resolve his tax problems, but he is simply in no position to do so. Indeed, what's missing here is: (1) a realistic approach for resolving his tax indebtedness; (2) documented actions taken in furtherance of that approach; and (3) a measurable improvement to his situation. It is likely that his tax problems will continue as evidenced by the IRS debt, which is increasing in amount.

In conclusion, after weighing the favorable and unfavorable information, I conclude that Applicant has failed to rebut, explain, extenuate, or mitigate the financial considerations security concerns. Likewise, he did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I also considered Applicant's case under the whole-person concept, and my whole-person analysis does not support approval of a clearance for Applicant.

### **FORMAL FINDINGS**

Here are my conclusions for each allegation in the SOR:

SOR ¶ 1-Guideline F: Against Applicant

Subparagraphs a-c: Against Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

## DECISION

In light of all the facts and circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Directive, Enclosure 2, ¶ E2.2.1 (setting forth nine factors to consider under the whole-person concept).
3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).
5. ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).
6. Directive, Enclosure 3, ¶ E3.1.14.
7. Directive, Enclosure 3, ¶ E3.1.15.
8. Directive, Enclosure 3, ¶ E3.1.15.
9. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").
10. *Egan*, 484 U.S. at 531.
11. If found guilty of this misdemeanor offense, a person is subject to a fine of \$25,000 or imprisonment for not more than one year or both.
12. *United States v. Cheek*, 498 U.S. 192, at 201 (1991). See *Bryan v. United States*, 524 U.S. 184, 212-213 (1998) (quoting *Cheek*, 498 U.S. at 201).
13. *Cheek*, 498 U.S. at 201.