

SYNOPSIS

Applicant is a 55-year-old computer scientist employed by a federal contractor. Because of improvements to his home and a divorce, his expenses exceeded his income, leading to numerous judgments and garnishments. With the assistance of credit counseling, use of a Chapter 13 bankruptcy petition, and the prospects of refinancing his home, he could become debt-free later this year. He successfully mitigated the security concerns about financial considerations. He also falsely answered seven questions on various security clearance questionnaires/applications. Because four questions dealt with minor events occurring over 35 years ago, they were mitigated. He failed to mitigate the security concerns about his personal conduct in his answers to security clearance applications in 1999 and 2004, involving his finances. Clearance is denied.

STATEMENT OF THE CASE

On March 25, 2004, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program (Directive)*, dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on January 19, 2006, detailing the basis for its decision – security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them effective September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG are to be used in all cases when the SOR is issued on or after September 1, 2006. Because the SOR was issued prior to September 1, 2006, this case proceeds under the former guidelines.

Applicant answered the SOR in writing on March 20, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on January 16, 2007, and a Notice of Hearing was dated on February 16, 2007. I convened a hearing on March 8, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered thirteen exhibits, marked as Exhibits 1-13. Applicant offered 1 exhibit, marked as Exhibit A. All exhibits were admitted without objection. I kept the record open until March 30, 2007, to allow Applicant the time to file additional documents. He filed four documents that were marked as Applicant's Exhibits B, C, D, and E, and admitted without objection. The government filed one exhibit marked as Exhibit 14, and was admitted without objection. DOHA received the transcript (Tr.) on March 19, 2007.

FINDINGS OF FACT

Applicant admitted the all of the allegations contained in the SOR except subparagraphs 1.dd., and 2.a. through 2.g. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 55-year-old computer scientist employed by a federal contractor.² He was divorced in 1998, and has two children.³ He has a bachelor's degree, and has completed about 75% of the work toward's a master's degree.⁴ He served in the United States Air Force from 1969 to 1971. He was a jet engine specialist, E-3, when he left the service because of family problems. He

¹Government Exhibit 1, Standard Form (SF) 86, Security Clearance Application, dated November 13, 2003.

²Tr. at 23, 28.

³*Id.* at 23-24.

⁴*Id.* at 25-26.

was given an honorable discharge.⁵ He held a security clearance while in the service, attended college, and received another security clearance in 1978, when he was employed by a government contractor. He has held a clearance since that time.⁶

Financial Considerations

Applicant's financial problems started around 1996-1997, hitting bottom as a result of his second divorce in 1998. He was required to pay \$1550 per month for child support and alimony. At the time of the divorce, he and his wife were in the process of an extensive home remodeling, adding a substantial addition to the house, and incurring a considerable amount of debt. The family income at that time was based on the salaries of both Applicant and his then wife. The divorce created a substantial hardship for him because of the alimony and support, attorney's fees, and the debt incurred in the extensive home renovations. He was required to pay all credit card debt. The alimony and child support payments were taken from his wages by court-ordered withholding, and amounted to 40% of his monthly take-home pay. A large portion of the home construction debts was financed through the use of credit cards. Although he eliminated contributions to his 401(k) retirement plan, he was unable to pay many of his creditors.⁷ Nine judgments and six garnishments ensued.⁸

Attorney fees continued, because he repeatedly had to go back into court in order to enforce the exercise of his child visitation privileges. Finally, in the fall of 2004, he sought professional help from a credit counseling service and ultimately decided to file a Chapter 13 bankruptcy petition.⁹

Applicant had 21 delinquent debts totaling \$98,727, and an income tax lien in the amount of \$10,849. He claimed that he had paid the debts listed in SOR subparagraphs 1.s., 1.t., and 1.z., which totaled \$16,775. Those debts listed in subparagraphs 1.w., 1.y., and 1.aa., are to be paid when he refinances his home. The debts listed in subparagraphs 1.bb. and 1.cc., appear to be duplicates of the debts listed in subparagraphs 1.u. and 1.y., respectively. Subtracting these figure from the total yields an amount of \$73,518, representing the debts listed in subparagraphs 1.a. through 1.r., 1.u., 1.v., 1.bb., and 1.cc., which were listed in a Chapter 13 bankruptcy petition filed October 14, 2004. There are nine judgments totaling \$35,400, eight of which are listed in the bankruptcy petition. Applicant paid the ninth judgment which was for \$5,000. The tax lien was paid January 22, 2003.¹⁰

As of March 15, 2007, Applicant paid the bankruptcy trustee a total of \$23,747. His monthly payments were \$994. The balance needed to pay creditors in full was \$84,361. The plan obligated

⁵*Id.* at 26-27.

⁶*Id.* at 27-28.

⁷Applicant's Exhibit A (Applicant's Written Statement, dated March 8, 2007) at 2.

⁸Government Exhibits 7 and 8, Adverse Information Reports, dated September 4, 2003 at 1-13, and October 14, 1999 at 1-9.

⁹Applicant's Exhibit A, *supra*, note 7, at 2.

¹⁰Applicant's Answer to the SOR, Attachments at 1, Certificate of Release of Federal Tax Lien, dated January 23, 2003.

him to pay a minimum amount called a “base,” which was established at \$53,515. The balance on his base was \$29,768. The bankruptcy plan obligated him to pay the lesser of the base balance or the 100% of the total debts owed.¹¹

On November 30, 2005, Applicant repaid his son’s student loans in the amount of \$29,138.¹² He still owes his first wife \$12,000 for the remainder of this son’s college loans, and he confessed judgment to her to secure repayment.¹³ Because of his successful adherence to his bankruptcy plan, he is eligible petition the bankruptcy judge for permission to refinance his house, and he anticipates that there is sufficient equity to pay off all outstanding debts.¹⁴

Personal Conduct

When Applicant executed his questionnaires for national security positions (Standard Form 86), on December 14, 1999, and March 25, 2004, he answered “No” to the following question:

Question 24. Your Police Record - Alcohol/Drug Offenses Have you ever been charged with or convicted of any offenses related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the federal controlled substances act for which the court issued an expungement order under the authority of 21 U.S.C. §844 or 18 U.S.C. §3607.

He failed to disclose that in November 1971, he was arrested for sale and possession of marijuana. The charges were *nolle prosequi*.¹⁵ However, he did disclose the arrest on both a Personnel Security Questionnaire (DD Form 4B) & DISCO Form 50, executed in August 1977.¹⁶

Applicant executed a personnel security questionnaire, DD Form 4B, on August 8, 1989. He responded “No” to the following question:

Question 14.a. Arrests Have you ever been arrested, charged, cited, or held by Federal, State, or local law enforcement or juvenile authorities regardless of whether the citation was dropped or dismissed, or you were found not guilty? (Include all courts-Marshall or non-judicial punishment while in military service. You may

¹¹Applicant’s Exhibit C (Trustee’s Periodic report to Debtor, dated March 15, 2007) at 1-2.

¹²Applicant’s Exhibits D and E (Receipts for Payment Of Student Loans, dated November 30, 2005).

¹³Tr. at 61.

¹⁴Applicant’s Exhibit A, *supra*, note 7, at 2.

¹⁵Government Exhibit 2 (Security Clearance Application, SF 86, dated December 14, 1999) at 6; Government Exhibit 1 (Security Clearance Application, SF 86, dated March 25, 2004) at 4.

¹⁶Government Exhibit 4, Personnel Security Questionnaire (DD Form 4B), dated August 1, 1977 at 4, and DISCO Form 50, dated August 15, 1977, at 1.

exclude minor traffic violations for which a fine or forfeiture of \$100 or less was imposed, unless alcohol related.)¹⁷

He failed to disclose the 1971 arrest, and an Article 15, UCMJ, dated September 25, 1970, Failure to Go to Appointed Place of Duty in violation of Article 86, UCMJ.¹⁸

On the December 14, 1999, Standard Form 86, Applicant responded “No” to the following question: “**Question 37. Your Financial Record - Unpaid Judgments** In the last 7 years, have you had any judgments against you that have not been paid?” He failed to disclose those judgments as set forth in SOR subparagraphs 1.a., 1.n., and 1.o.¹⁹

When Applicant executed a Standard Form 86 on March 25, 2004, he answered “no” to the following questions: “**Question 34. Your Financial Record - Wage Garnishments** In the last 7 years, have you had your wages garnished for any reason?” He failed to list the garnishments enumerated in SOR subparagraphs 1.e., 1.g., 1.i., 1.j., and 1.l.²⁰ He also 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 did not list the federal tax lien filed on October 27, 2000.²¹

Applicant was asked why he answered “No” to these questions. He stated:

From what I remember, you know, because during that period, I think if you look at that application, I think I answered some garnishments, because it was several questions about garnishments. I think I answered some of those and some of them I did not answer. I tried to answer the questions. I know that I remember answering some. Some I did not. Some I didn't have information on, and you know, that was still part of that difficult period that I was having, because I did attempt to answer some of those questions. Maybe I didn't answer all of them, and I mean, you know, just to spend a whole lot of time on my finances. But it was nothing due to trying to hide them, because I did answer some of those questions. I think at the time I was just--wanted to complete the process, and to keep it less painful as possible. I'm just trying to remember my actions during that period of time. It wasn't anything that I was trying to not disclose about my finances, because I did attempt to answer some of those questions. I think I didn't have enough information about that, and so I

¹⁷Government Exhibit 3 (Personnel Security Questionnaire (DD Form 4B), dated August 8, 1989) at 2.

¹⁸Government Exhibit 12 (Applicant's USAF Article 15, UCMJ, report, dated September 28, 1970, at 1-2.

¹⁹Government Exhibit 2, *supra*, note 15, at 8.

²⁰Government Exhibit 1, *supra*, note 15, at 4.

²¹*Id.*

really, you know, it was a very stressful time that period also. So all lead is playing a part of that. But I did attempt to answer some of those questions, you know.²²

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed below. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 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.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence." The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition.²³ Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and

²²Tr. at 39-41.

²³"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the government.²⁴

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Applicant’s allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

CONCLUSIONS

Financial Considerations

The government established its case under Guideline F. Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1. arises where there is (*A history of not meeting financial obligations.*) Similarly, FC DC E2.A6.1.2.3. applies where the information shows an (*Inability or unwillingness to satisfy debts.*) The available information demonstrates Applicant has a history of not meeting his financial obligations. He has been delinquent in paying his debts since at least 1999.

Various conditions can mitigate the security concerns arising from financial difficulties. The Directive sets out Financial Considerations Mitigating Condition (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).*) Applicant and his ex-wife began having marital problems in 1996 and 1997, leading to divorce in 1998. Applicant was required to pay the credit card debts, much of which had been used on their home expansion. With a sizable alimony and child support payment, the loss of his wife’s income contribution, and the costs associated with his home expansion project, Applicant was

²⁴See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

in financial exigency. He could not pay his creditors, resulting in nine judgments against him and six corresponding garnishments to enforce those judgments. He also had a federal income tax lien. After failing on his own to resolve his indebtedness, he turned to financial counseling for help. Slowly, but steadily, he is extracting himself from financial insolvency. The tax lien was paid in 2003. He filed a chapter 13 bankruptcy, wage earner petition, and has paid about 50% of his required payments. He is now able to petition the bankruptcy court to allow him to refinance his home. Because of its size and improvements, Applicant is confident that there is sufficient equity to pay off all outstanding debts. Divorce is usually an unseen event. For that reason, I find the mitigating condition applies.

FC MCE2.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*) applies. Applicant sought financial counseling, and there is substantial evidence that it has been of benefit to him. Although he has not totally resolved his debts, he has made significant efforts to get his finances under control.

FC MCE2.A6.1.3.6. (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve bad debts*) is applicable. Since filing for bankruptcy in October 2004, Applicant has made consistent progress in reducing his indebtedness. He is not required to pay 100%, to show a good-faith effort to repay creditors. He has established a credible effort at reducing his indebtedness, and it was made in good-faith. I conclude Guideline F for Applicant.

Personal Conduct

Conduct involving questionable judgment, unreliability, lack of candor, or dishonesty could indicate that the person may not properly safeguard classified information.

The government established its case under Guideline E. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*The 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*) is the standard. The operative word is “deliberate.” The 1971, arrest, and his 1970 Article 15 in the Air Force are over 35 years old. He did not remember the Article 15. Due to the age of the incidents, I find his omission to be due to a faulty memory, and not done with any deliberate intention to mislead the government. The 1989 questionnaire also deals with the 1970 and 1971 incidents and I again do not believe his omissions were deliberate. I conclude SOR subparagraphs 2.a. through 2.d. for Applicant.

Applicant’s answers on the 1999 and 2004 SF 86 applications are more problematic. Applicant knew he had delinquent debts, judgments, and garnishments beginning in 1999, but failed to report them. His explanations were rambling. He provided no rational reasons why he did not answer the questions on these applications completely. No mitigating conditions apply. I conclude Guideline E, SOR subparagraphs 2.e., 2.f., and 2.g. against Applicant.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”²⁵ “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”²⁶ In evaluating Applicant’s case, in addition to the disqualifying and mitigating conditions, I also considered the “whole person concept” in evaluating Applicant’s risk and vulnerability in protecting our national interests.²⁷ Applicant has made good-faith efforts at resolving his indebtedness.

Applicant falsified numerous security clearance questionnaires/applications. This is problematic because candor with the government about a person’s embarrassing information is the crux of a trustworthiness and security determination. If a person discloses their personal adverse information, then he or she is more likely to be trustworthy with confidential or classified information. Applicant has held a security clearance for nearly 30 years His attempt to explain his false answers on the 1999 and 2004 security clearance applications was evasive, and he never provided a clear explanation. For this reason, the totality of the record raises reasonable and persistent doubts about Applicant’s ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests and secrets. I conclude it is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

| Paragraph 1. Guideline F: | 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 |
| Subparagraph 1.h: | For Applicant |
| Subparagraph 1.i: | For Applicant |
| Subparagraph 1.j: | For Applicant |
| Subparagraph 1.k: | For Applicant |
| Subparagraph 1.l: | For Applicant |
| Subparagraph 1.m: | For Applicant |

²⁵Directive ¶ E.2.2.1.

²⁶*Id.*

²⁷*Id.*

