

DATE: May 2, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0638

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Bruce P. Anderson, Esquire

SYNOPSIS

Forty-three year old Applicant's financial problems stemming from a business failure, which resulted in both business and personal bankruptcies in August 2000, as well as a federal tax liability to the IRS in the amount of \$32,308.44, were mitigated by the conditions which caused the bankruptcies (they were business related); the isolated nature of the problem; and the fact that he initiated good faith efforts to resolve the indebtedness, and actually paid it off approximately 30 days prior to the hearing. Clearance granted.

STATEMENT OF THE CASE

On November 7, 2000, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*, dated 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, 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated November 27, 2000, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge John G. Metz, Jr., on January 30, 2001, but, due to caseload considerations, was reassigned to, and received by, this Administrative Judge that same day. A notice of hearing was issued on March 14, 2001, amended on March 21, 2001, and the hearing was held before me on March 29, 2001. During the course of the hearing, two Joint exhibits, six Government exhibits, and eight Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on April 30, 2001.

FINDINGS OF FACT

Applicant has denied the sole factual allegation pertaining to financial matters under Guideline F (subparagraph 1.a.).

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 43 year old male employed by a defense contractor, and he is seeking to obtain a security clearance. He previously held a TOP SECRET security clearance from about 1982 until 1996.

Applicant spent sixteen years on active duty with the U.S. Air Force⁽¹⁾ before resigning his commission in April 1996⁽²⁾ to create a business--a subchapter "S" Corporation--with a partner. They opened a restaurant seating 260 persons in early 1997. Despite an initial investment by Applicant of about \$200,000.00 in savings and investments, the restaurant business failed in August 1998, and Applicant was forced to take both personal and business bankruptcy.⁽³⁾ His debts were discharged under Chapter 7 in March 1999. Unfortunately for Applicant, the discharge did not resolve his business tax obligations.

As the direct result of the failed business venture, Applicant became indebted to the Internal Revenue Service (IRS), in the amount of approximately \$32,308.44,⁽⁴⁾ including penalty, for unpaid employment taxes for certain tax periods ending in 1997 and 1998.

Applicant filed amended tax returns because of the losses he experienced from his failed business investment in the anticipation his refunds would offset his tax liability.⁽⁵⁾ That tax liability was reduced by \$4,363.00 on May 15, 2000 when the IRS applied that amount of his overpaid tax on his 1999 tax return to the unpaid balance.⁽⁶⁾ It was further reduced by \$14,415.41 on July 10, 2000 when the IRS applied that combined amount of his overpaid taxes on his 1994,⁽⁷⁾ 1995,⁽⁸⁾ and 1996⁽⁹⁾ tax returns to the unpaid balance. It was again reduced by \$7,846.02 on August 7, 2000, when the U.S. Bankruptcy Court ordered a disbursement of remaining assets in that amount to the IRS.⁽¹⁰⁾

Three other factors entered into the overall situation. In January 2000, Applicant and his wife were divorced, and pursuant to their marital settlement, each party agreed to assume responsibility for 50% of the outstanding IRS tax liability.⁽¹¹⁾ In June 2000, Applicant submitted an Offer in Compromise to the IRS in which he sought to resolve the entire remaining balance through the payment of \$500.00.⁽¹²⁾ The Offer was never acted upon by the IRS. The third factor impacting the situation was the refusal of Applicant's partner to accept any financial responsibility for the bankruptcy or the IRS liability.⁽¹³⁾ As a result, the IRS assigned responsibility and liability solely to Applicant.

When Applicant was interviewed by a special agent of the Defense Security Service (DSS) on June 27, 2000, he described the various anticipated methods by which the outstanding balance of the entire tax liability would be reduced to approximately \$7,594.00, should his Offer in Compromise not be accepted.⁽¹⁴⁾ On November 7, 2000, the date of the SOR, the remaining tax liability owed to the IRS was only \$7,105.19. On November 27, 2000, in his Response to SOR, Applicant clarified the amount due by describing the various payments already made as well as the split responsibility arising from his agreement with his former wife. He contended his remaining obligation was in the amount of \$2,842.00,⁽¹⁵⁾ not the \$27,945.44 alleged in the SOR.⁽¹⁶⁾

On February 27, 2001, approximately one month prior to the hearing in this matter, Applicant paid off the entire remaining balance on the tax liability--\$7,105.19--including the portion for which his former wife was responsible.⁽¹⁷⁾ By the date of the hearing, Applicant had satisfied the entire tax liability.⁽¹⁸⁾

When Applicant completed his financial statement for DSS in June 2000, he reflected a monthly net remainder of approximately \$58.00. As a direct result of his dedicated and aggressive money management activities, and the absence of the albatross of the failed business venture, he has reduced the IRS tax liability to zero and increased his monthly net remainder to \$515.64.⁽¹⁹⁾

Prior to his venture into the business world, Applicant had extensive savings and investments, and excellent credit.⁽²⁰⁾

His foray into the restaurant business changed everything.

Upon Applicant's divorce in January 2000, his wife was awarded custody of their daughter and he was awarded custody of their two sons.

Applicant has been employed by his current employer, a federal contractor, since November 1998. The quality of his performance has not been described.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Guideline F - Financial Considerations]: 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.

Conditions that could raise a security concern and may be disqualifying include:

- (1) a history of not meeting financial obligations;
- (3) inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

- (2) it was an isolated incident;
- (3) the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business turndown, unexpected medical emergency, or a death, divorce or separation);
- (6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(21\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in

each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

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.

One additional comment is worthy of note. 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 I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline F, the Government has established its case. When Applicant was on active military duty, prior to resigning his commission to enter the business world, he had extensive savings, investments, and excellent credit. Unfortunately, his unsuccessful foray into the business world, cost him his savings, investments, good credit, and plunged him into a situation for which he was apparently unprepared. The business failed, he became indebted to the IRS in the amount of \$32,308.44, and he declared bankruptcy. The commencement of his financial problems came sometime prior to the actual business failure in August 1998, and continued until he actually paid off the entire tax liability in February 2001. Thus, during that period, Applicant's conduct pertaining to his financial obligations fell within Financial Considerations Disqualifying Condition (DC) E2.A6.1.2.1., and DC E2.A6.1.2.3.

Applicant's business-related financial misfortune was relatively brief in duration and significantly aberrant in nature, bringing it within Financial Considerations Mitigating Conditions (MC) E2.A6.1.3. 2. and MC E2.A6.1.3.3. It is true that for a brief period he was unable to satisfy his debts, and as a result, he took advantage of legal means to resolve all but one of his debts--the tax liability to the IRS. He then turned his attention and efforts to resolving that liability. It was successively reduced by the application of a variety of payments so that by the time the SOR was issued in November 2000, Applicant no longer was indebted to the IRS in the amount of nearly \$28,000.00, as alleged in the SOR. By the date of the hearing, Applicant had paid off both his obligation and that of his former wife. Applicant's good faith efforts to repay overdue creditors and otherwise resolve his debts clearly fall within MC E2.A6.1.3.6.

Applicant's finances are presently in good shape--a marked improvement over the way they had been briefly as a result of the business failure and the bankruptcies. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case with respect to his financial considerations. Accordingly, allegation 1.a. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

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: FOR THE APPLICANT

Subparagraph 1.a.: For the 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 or continue a security clearance for Applicant.

Robert Robinson Gales

Chief Administrative Judge

1. *See* Government Exhibit 1 (Security Clearance Application (SF 86), dated January 11, 1999), at 7.
2. *See* Response to SOR, dated November 27, 2000, at 2.
3. *See* Government Exhibit 4 (Statement of Subject, dated January 14, 2000), at 1.
4. *See* Government Exhibit 2 (Notice from IRS, dated November 22, 1999), at 1.
5. Tr., at 38-39.
6. *See* Government Exhibit 3 (Notice from IRS, dated May 15, 2000).
7. *See* Joint Exhibit II.A (Notice from IRS, dated July 10, 2000). The amount of the overpaid 1994 tax return was \$7,595.01.
8. *See* Joint Exhibit II.B (Notice from IRS, dated July 10, 2000). The amount of the overpaid 1995 tax return was \$6,483.47.
9. *See* Joint Exhibit II.C (Notice from IRS, dated July 10, 2000). The amount of the overpaid 1996 tax return was \$336.93.
10. *See* Joint Exhibit II.D. (Order Directing Disbursement of Funds, dated August 7, 2000), at 2.
11. *See* Joint Exhibit II.F (Marital Settlement Stipulation and Agreement, dated December 2, 1999), at 2.
12. *See* Government Exhibit 5 (Offer in Compromise, dated June 19, 2000). *See also* Tr., at 41.
13. *See* Government Exhibit 6 (Statement, dated June 27, 2000), at 1-2.
14. *Id.*, at 3.
15. *See* Response to SOR, *supra* note 2, at 1.
16. In support of his contentions, Applicant attached six documents (later identified and resubmitted as Joint Exhibit II.

A through F), but those documents were inexplicably detached from the Response in the case file submitted to this Administrative Judge.

17. See Joint Exhibit II.G (Check and IRS Acknowledgment, dated February 27, 2001).

18. Tr., at 48.

19. See Joint Exhibit II.H (Financial Statement, dated March 28, 2001).

20. Tr., at 51.

21. See Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (see Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (see Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (see Enclosure 2, Sec. E2.2.2.)