

DATE: November 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00097

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-three year old Applicant's financial problems stemming from: (1) participation in illegal bookmaking/gambling during 1983-86, resulting in a state income tax liability for the period 1985-86; (2) unwise money management, eventually resulting in a 1995 bankruptcy discharge; and (3) lack of adequate attention to his federal income tax issues resulting in substantial non-gambling related tax arrearage for 1995-97, were mitigated by his enrollment and participation in the Gambler's Anonymous step program; his vow not to gamble in the future; his abstinence from gambling for 15 years; the fact that he initiated good faith efforts to resolve the tax delinquencies; and his history of making timely payments--all prior to the issuance of the SOR. Clearance granted.

STATEMENT OF THE CASE

On April 13, 2001, 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 May 7, 2001, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge Elizabeth Matchinski on June 1, 2001, but due to Applicant's job-related relocation, was reassigned to, and received by, this Administrative Judge on August 23, 2001. A notice of hearing was issued on July 30, 2001, and the hearing was held before me on March 29, 2001. During the course of the hearing, eight Government exhibits, and eight Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on August 31, 2001.

FINDINGS OF FACT

Applicant has denied the two factual allegations pertaining to financial matters under Guideline F (subparagraphs 2.a. and 2.b.).⁽¹⁾ He has, however, admitted certain aspects of those allegations, and those 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 43 year old male employed by a defense contractor, and is seeking to obtain a SECRET security clearance.

During the period 1983-86, without his wife's knowledge, Applicant engaged in illegal gambling by placing bets on various athletic contests with bookmakers. At some point in 1986, Applicant's bookmaker was arrested and the ensuing investigation revealed Applicant's participation in the gambling activity. Because he had previously taken advantage of a 20% commission relationship with the bookmaker by claiming to be placing bets for others--a fact which was not true but only stated to reduce his wagering risk--he was eventually arrested and charged with using the telephone for gambling. Upon his plea, Applicant was found guilty and given probation.

When Applicant's gambling came to light, he acknowledged his actions to his wife and, on his own initiative, in June 1987, enrolled in Gambler's Anonymous (GA). For the next year he attended twice-weekly step meetings. Since his bookmaker's arrest approximately 15 years ago, with the exception of participation in the state-sponsored lottery, Applicant has abstained from any form of wagering or gambling, and now armed with the knowledge of the dangers of gambling, has vowed not to gamble in the future.

In addition to the criminal charge arising from his gambling, Applicant also faced the scrutiny of the state Department of Revenue. The review of the bookmaker's records enabled the state to estimate Applicant's winnings for the period 1985-86 and calculate a tax liability on those winnings. As a result, he was assessed an additional liability for unpaid taxes, interest, and penalties of approximately \$10,000.00. Applicant attempted to fight the state's assessment by noting that his losses had been greater than his winnings, but because the gambling was illegal, losses were not recognized. Applicant eventually stopped resisting the state and agreed to a combined tax liability of approximately \$15,000.00. With the liability increasing until satisfied, in February 1997 Applicant entered a payment agreement with the state for him to make payments of \$500.00 each month. Applicant made the payments when he received periodic statements, but he eventually became delinquent because he did not always receive such statements. A newer verbal agreement was attempted for awhile, and in September 1998, the state gave notice of levy on wages to Applicant's employer, and bi-weekly payments of \$161.54 were taken directly from his salary. As of May 7, 2001, the then current income tax liability to the state, according to the state, was \$6,024.84. As of August 21, 2001, the unpaid balance was \$4,894.06. There is no evidence to rebut Applicant's contention he is current in making payments under this agreement.

Applicant and his wife lived an unremarkable lifestyle until approximately 1990 when they engaged in some "unwise money management" and started living somewhat beyond their family means. His income tax situation with the state only added to his overall financial difficulties. At some point, the financial burden overwhelmed him and he fell behind in his monthly payments. Eventually a number of accounts were charged off or sent to collection, and in September 1995, in an effort to lessen his financial burden, Applicant filed for bankruptcy. In December of that year, most of his debts were discharged, leaving only his state income tax liability and his home mortgage. In 1996, the residence was lost to foreclosure.

A negative result of his bankruptcy discharge was the loss of homeowner deductions. The unanticipated higher taxes and insufficient withholding caused his federal income tax liability to soar, resulting in an unmanageable shortfall for the tax year 1995, as well as the ensuing tax years of 1996-97. Adding to his burden was his failure to address the withholding issue. His gambling income was not an issue. Applicant's tax liability for those years was as follows: for 1995, approximately \$3,192.53; for 1996, approximately \$12,130.32; and for 1997, approximately \$4,340.24.

In February 1997, Applicant approached the Internal Revenue Service (IRS) and requested the establishment of a

payment agreement. Commencing in March 1997, he was to make monthly payments of approximately \$138.00. Applicant complied with the agreement for an unspecified period and eventually it too became delinquent. In October 1998, the IRS filed a notice of levy regarding the estimated amount due of \$22,032.32, including unpaid taxes and statutory additions. Applicant, through his accountant, made an offer and compromise to resolve the entire issue. The offer was eventually rejected, and the levy was never actually acted upon. Applicant made several payments in an effort to reduce his tax liability. As of January 2001, his entire liability for those tax years, as well as 1998-99, was approximately \$36,128.76. A new installment agreement was implemented, effective February 2001, under which Applicant was to make monthly payments of \$100.00 until February 2002, when the payments are to increase to \$1,600.00. There is no evidence to rebut Applicant's contention he is current in making payments under this agreement.

When Applicant completed his financial statement for the Defense Security Service (DSS) in September 1999, he reflected a monthly net remainder of approximately \$1,297.00. As a direct result of his aggressive money management activities, accompanied by his increased salary, he has reduced his state and federal tax liabilities and increased his monthly net remainder to approximately \$3,145.00.

Applicant has been employed by his current employer, a federal contractor, since August 1976, in two separate locations. While the quality of his performance has not been described, in June 2001, he was selected for promotion to a managerial position and relocation.

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;
- (5) financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.

Conditions that could mitigate security concerns include:

(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;

(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," ⁽²⁾ 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. Applicant's financial difficulties appear to fall within three separate, but interrelated, areas: (1) participation in illegal gambling, resulting in a state income tax liability; (2) unwise money management, eventually resulting in a discharge in bankruptcy; and (3) lack of adequate attention to his federal income tax issues resulting in substantial tax arrearage. To his credit, the gambling ceased in 1986 and has not resumed.

However, the consequence of Applicant's three year bookmaking endeavor continues to have a negative impact on his overall life and lifestyle. Applicant was unable to direct all of his financial resources towards diminishing the state income tax liability, and he failed to comply with an earlier payment arrangement. As a result, in September 1998, a levy was placed on his wages. To this date, salary is taken directly from his employer in bi-weekly payments of \$161.54. Applicant still owes the state an outstanding balance of approximately \$4,000.00. Thus, with respect to his state income tax situation, Applicant's conduct pertaining to his financial obligations falls within Financial

Considerations Disqualifying Condition (DC) E2.A6.1.2.1. (a history of not meeting financial obligations), DC E2.A6.1.2.3. (inability or unwillingness to satisfy debts), and DC E2.A6.1.2.5. (financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern).

Likewise, Applicant's lack of adequate attention to his federal income tax issues resulting in substantial tax arrearage, while having no direct connection with his gambling, occurred because of his inability to direct all of his financial resources towards diminishing the federal income tax liability. Without the diversion of funds necessary to satisfy the state liability, Applicant could have more timely and effectively addressed the federal liability before it mushroomed into the situation that eventually occurred. After one failed effort to comply with a payment arrangement, he finally agreed to another agreement, effective in February 2001--two months before the issuance of the SOR--and still owes the IRS a substantial outstanding balance. Thus, with respect to his state income tax situation, Applicant's conduct pertaining to his financial obligations falls within DC E2.A6.1.2.1. and DC E2.A6.1.2.3.

While not alleged in the SOR, Applicant's unwise money management exacerbated his problem with the IRS.

Applicant's financial difficulties with the state arose because of his bookmaking activities during the period 1983-86, and that conduct has not recurred during the past 15 years. Likewise, recognizing an earlier, failed attempt at resolving his delinquent state income tax obligations, Applicant has, since September 1998--albeit by tax levy--managed to remain current in his payment of those obligations, and the remaining balance has been reduced to approximately \$4,000.00. And he has successfully completed step meetings of the GA program and abstained from gambling since that time. As they relate to the state income tax liability, Applicant's actions fall within Financial Consideration Mitigating Condition (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). In addition, although Applicant's current payment arrangement is by virtue of the tax levy, in light of his other positive efforts, I have chosen to credit him with the initiation of good faith efforts in trying to resolve his debts in the initial failed attempt to do so. Thus, his actions also fall within MC E2.A6.1.3.6. (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts).

Applicant's financial difficulties with the IRS were of a completely different nature. It is true that for a brief period he was unable to satisfy this debt, but with additional resolve and resources, he has been able to make payments under a repayment agreement established in February 2001. Applicant's good faith efforts to repay the IRS clearly falls within MC E2.A6.1.3.6.

Applicant's finances are presently in good shape--a marked improvement over the way they had been as a result of his illegal gambling, unwise money management, lack of adequate attention to his federal income tax issues, and the bankruptcy. While he has addressed his other debts through bankruptcy in 1995, his debts with the state and federal authorities have been handled through payment arrangements. Applicant has also taken a more pro-active posture regarding these debts and his aggressive money management activities, accompanied by his increased salary, have reduced his state and federal tax liabilities and increased his monthly net remainder to approximately \$3,145.00. There is clear evidence of rehabilitation and other pertinent behavioral changes to lead me to believe the changes will endure. 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, allegations 2.a. and 2.b. of the SOR are 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 2. Guideline F: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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. It should be noted that the SOR has only one paragraph and it is erroneously numbered as paragraph 2.
2. 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.)