

DATE: April 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00359

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Robert L. Depper Jr., Esq.

SYNOPSIS

Applicant, a 35-year-old truck driver for a defense contractor, had a history of financial difficulties which caused him to declare bankruptcy in 1993 and again in 2002. He was administratively discharged from military service for a 31-day absence without leave (AWOL) terminated by apprehension in 1985, and failed to note that he had debts that were over 90 and 180 days past due on his security clearance application. Applicant mitigated the personal conduct security concerns, but has not demonstrated that his financial situation is sufficiently stable to grant him a clearance. Clearance is denied.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 26 August 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the financial consideration (Guideline F) and personal conduct (Guideline E) personnel security guidelines.

Applicant answered the SOR in writing on 23 September 2002. The case was assigned to me on 27 November 2002. With the concurrence of Applicant, a hearing was scheduled for 14 January 2003. Shortly before the scheduled hearing, Applicant notified DOHA that he had retained an attorney to represent him. On 10 January 2003, I granted Applicant's attorney a delay because of his schedule. The earliest date Applicant's attorney, Department Counsel, and I were available on the same date was 1 April 2003. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of seven exhibits. Applicant testified on his own behalf and called three witnesses. A transcript (Tr.) of the proceeding was received on 8 April 2003.

FINDINGS OF FACT

Applicant, a 35-year-old truck driver, hauls munitions for a defense contractor. Ex. 1 at 1; Tr. 15. At the age of 16, he married. Ex 1 at 4. He enlisted in the Army when he was 17 years old. Ex. 1 at 6; Tr 18. In 1985, after a year in the service, Applicant went absent without leave (AWOL) and was apprehended 31 days later. Tr. 18-20. The Army administratively separated Applicant from the service with an under other than honorable conditions discharge. Ex. 5; Tr. 54.

In 1989, Applicant divorced his first wife and married a woman with two children and large debts. Answer; Tr. 21. He accepted responsibility for those debts. While his wife was pregnant in 1990, both were laid off their jobs. Applicant started to attend truck driving school. Their son was born prematurely and had health difficulties that imposed an additional financial burden on the family. Tr. 21. Unemployment benefits ran out and they were eventually forced into Chapter 7 bankruptcy in 1993. Tr. 22.

Despite the bankruptcy, Applicant and his family continued to have problems meeting their financial obligations. Applicant purchased a riding lawnmower and a weed eater on credit. He was unable to keep up with the payments to Conesco Finance. Tr. 30. He purchased a used car which cost a lot to keep it operating. Applicant borrowed money from Cross Country Bank to pay for the repairs. He owed \$1,805 on this debt. After the radiator failed, Applicant called the credit company to repossess the vehicle. The vehicle was sold with a resulting deficiency of \$3,916.

Applicant was also indebted to UNIPAC in the approximate amount of \$1,126 of which \$150 was more than 60 days past due. This was the loan that financed the cost of his truck driver training. Tr. 36-37. Applicant believes he is current on this debt. However, he admits he is not sure of that because his wife handles the bills and financial matters in his family. Tr. 36.

In June 1999, Applicant lost his job when his employer contracted out the services he was performing. Tr. 22. Thirty days elapsed before he got his first check from his current employer. At the same time, Applicant's wife was unable to work because she was receiving cancer treatments. Ex. 3 at 2. The cancer treatments were expensive and fueled their financial problems.

In May 2000, Applicant and his wife signed a voluntary bankruptcy petition. Ex. 6. Apparently, they had difficulty with their attorney, and the petition was not filed until February 2002. *Id.*; Tr. 23. Applicant and his wife had all of the listed debts, with the exception of the educational loan for truck driving school, discharged in bankruptcy on 24 July 2002. Ex. 7.

Applicant answered "no" to questions 38 and 39 on his security clearance application. Question 38 asked whether Applicant had been over 180 days delinquent on any debt in the past seven years. Question 39 asked whether he was currently over 90 days delinquent on any debt. Ex. 1 at 8. In fact, Applicant had been delinquent more than 90 days, and more than 180 days in the past seven years, in paying some of his debts.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1)

the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. May 9, 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged under Guideline F that Applicant had several debts outstanding and had filed for bankruptcy twice.

Under Guideline F, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1. The following are the applicable conditions that have raised security concerns in this case:

- (1) A history of not meeting financial obligations. Directive ¶ E2.A6.1. 2.1.
- (2) Inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3.

The following applicable conditions could mitigate these security concerns:

- (1) The conditions that resulted in the behavior were largely beyond the applicant's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation). Directive ¶ E2.A6.1.3.3.
- (2) The applicant initiated a good-faith effort to resolve debts. Directive ¶ E2.A6.1.3.6.

Since his 2002 bankruptcy, Applicant's financial problems have been resolved, at least for the immediate future. However, the fact that Applicant resolved his debts in a manner authorized by law "does not preclude the Government from considering the negative security implications of his history of recurring financial difficulties." ISCR Case No. 00-0345 2001 DOHA LEXIS 338 at **5-6 (App. Bd Dec. 12, 2001). Indeed, filing for bankruptcy twice in nine years demonstrates the depth of Applicant's financial difficulties and his inability to stay solvent.

Applicant's history of financial difficulties seems to have coincided with conditions that were largely beyond his control. Applicant, his wife, and family have been living on the margin for years. Applicant and his wife lost their jobs on a couple of occasions, apparently through no fault of their own, and the family medical expenses have been substantial and beyond Applicant's control. At the same time, Applicant expresses a somewhat cavalier attitude towards his

financial problems. His wife takes care of the bills, and even when confronted with an SOR that could prevent him from gaining a security clearance, Applicant did not become familiar with his financial status. Furthermore, sufficient time has not elapsed since the second bankruptcy to demonstrate that Applicant's financial condition is stable. Finding is against Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant falsified material facts on his security clearance application, and went AWOL from his military unit in 1985 and received a bad conduct discharge.

Under Guideline E, 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. Directive ¶ E2.A5.1.1. The following applicable conditions raise security concerns and may be disqualifying:

- (1) Reliable unfavorable information provided by employers. Directive ¶ E2.A5.1.2.1.
- (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 determine security clearance eligibility. Directive ¶ E2.A5.1.2.2.
- (3) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. Directive ¶ E2.A5.1.2.5.

None of the mitigating conditions listed under Guideline E strictly seem to apply to Applicant's case. However, Department Counsel conceded that Applicant had sufficiently mitigated any security concern regarding the falsification of the security clearance application. Tr. 74. Indeed, it would not make sense for an applicant to deliberately omit mention of debts greater than 90 or 180 days on his security clearance application after admitting a bankruptcy and a repossession of property. Finding is for Applicant.

Applicant's AWOL terminated by apprehension occurred when he was 18 years old, some 17 years ago. Contrary to the allegation in the SOR, Applicant did not receive a bad conduct discharge for the AWOL. A bad conduct discharge can only be imposed as a sentence of a court-martial. Applicant was administratively separated from the Army, not court-martialed. Ex. 5. Applicant has not been in trouble with the law since, and he is well respected by his employer and other members of his community. Under the circumstances, I find Applicant has sufficiently mitigated this security concern. Finding is for Applicant.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Executive Order No. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.