

DATE: June 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-01812

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jonathan Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Statement of Reasons (SOR) alleges the Applicant failed to indicate his special compartmented information (SCI) access had been denied when he completed a Questionnaire for National Security Positions, Standard Form (SF) 86. The record fails to support the Applicant falsified his SF 86. However, the Applicant owes \$22,228.00 for child support and the record evidence is insufficient to mitigate or extenuate the negative security implications stemming from this child support debt. Clearance is denied.

STATEMENT OF THE CASE

On October 29, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) On January 28, 2003, the Applicant answered the SOR and requested a hearing. The case was assigned to me on March 17, 2003. A Notice of Hearing was issued on March 27, 2003, scheduling the hearing, which was held on April 29, 2003.

The Government's case consisted of seven exhibits (Gov Ex). The Applicant relied on his own testimony. The transcript (tr.) of the hearing was received on ay 8, 2003.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and financial conduct (Guideline F). The Applicant denies his SCI clearance was denied, but admits owing back child support. He has been trying for years to clear up this issue of support. 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.

The Applicant is 47-years-old, has worked for a defense contractor since May 1990, and is seeking to maintain a top-

secret security clearance.

In 1986 the Applicant and his wife separated. There were two children of the marriage. In May 1989, a legal separation was obtained. In November 1988, the county where his wife and children resided made a complaint against the Applicant to be reimbursed the public assistance and child support which had been provided. (Gov ex 6) The county requested to be awarded \$663.00 per month for child support for the three years previous to the date of filing. In February 1990, the Applicant received a final divorce decree. In April 1990, a judgment and order were issued granting the county a judgment of \$8,019.00 for the child support from June 1988 though July 1989. Payment on the judgment was to be \$200.00 monthly commencing May 1990.

The Applicant is 120 days past due on an obligation of \$22,228.00. (Gov Ex 4) This obligation, although in the same state as the previously listed judgment, is owed a different county. This debt originated in March 1990--as opposed to the above judgment entered in April 1990--and is also for delinquent family support. The Applicant's child support obligations have resulted in the interception of his 1991 (\$50.00) and 2001 (\$3,547.00) federal tax refunds. When his 1991 tax refund was intercepted, he attempted to telephonically resolve the matter, but he was unsuccessful. (Gov Ex7) His wages have been garnished to meet his child support obligations. Paycheck stubs (Gov Ex 5) indicate garnishments of: 1993 - \$3,000.00; 1994 - \$2,850.00, 1995 - \$3,600.00; 1996 - \$2,319.00; 1997 - \$4,300.00; 1998 - \$4,200; 1999 - \$1,325.00. In January 2000, the garnishment stopped. A garnishment started again and currently \$41.00 is currently garnished from his pay every other week. The Applicant does not know who is being paid by this garnishment. The Applicant pays the county as agreed on this obligation. (Gov Ex 4)

In September 1992, the Applicant completed a signed, sworn statement at which time he disputed the \$9,156.00 child support delinquency listed on his credit report. He stated he believed the funds had been fraudulently received. He did not consider this to be a legitimate debt, and did not intend to pay it. At that time, he stated he did not know how he would be able to resolve this disputed debt. He said he had no other credit problems or tax delinquencies. The Applicant's net remainder of monthly income after monthly expenses was \$1,150.00.

At the hearing, the Applicant acknowledged the child support issue has been a thorn in his side for a long while. He does not see it as an issue of right or wrong, but as an obligation or duty he owes his children to provide them support. He made a decision to allow the money for support to be taken from his pay check versus contacting an attorney in the appropriate state to fight the judgment. He determined the hiring of an attorney might cost more than simply allowing the garnishment to continue. He would like to get the matter cleared up. The Applicant is current on all other bills and can afford to pay his child support

In August 1994, the Army sent the Applicant a letter (Gov Ex 3) requesting information concerning the Applicant's child support obligation. He was specifically asked to provide documentary proof he had either paid the obligation in full or established a repayment plan concerning the February 1990 \$9,781.60 judgment. In September 1994, the Applicant was interviewed and disputed the judgment because he believed his former spouse had fraudulently received the money. Additionally, he stated he was withholding the child support money for May 1992 through September 1992 because he did not know his former spouse's address. In October 1994, the Applicant indicated a \$300.00 per month garnishment had been established in January 1993 and provided paycheck stubs to evidence the garnishment.

In January 1995, the Army sent the Applicant a Letter of Intent (LOI) to Deny SCI Access Eligibility. The LOI stated the Applicant had provided copies of his paycheck stubs, but had failed to provide documentation concerning the outstanding judgment. Additionally, he failed to show he was current on his child support obligation. According to the LOI, the SCI determination did not affect his Top Secret collateral security clearance. The LOI was intended to offer the Applicant "every reasonable opportunity to explain and/or refute the adverse information which is the base of the action." (Gov Ex 3) The Applicant was directed to acknowledge receipt of the LOI.

Although the LOD is addressed to the Applicant, the endorsement to this LOI relates to a different individual.

On March 17, 1995, the Army sent the Applicant a letter of "Determination of SCI Access Ineligibility" (LOD), which stated:

2. Inasmuch as this command has not received a response to reference 1.a., your case has been unfavorably adjudicated

on this basis of the existing investigation results. Therefore, in accordance with reference 1b, your eligibility for access to Sensitive Compartmented Information (SCI) is denied.

The LOD notified the Applicant he had sixty days in which to appeal this action.

The Applicant denies receiving the January 1995 LOI or the March 1995 LOD. There is nothing in the record indicating the Applicant received either the LOI or the LOD. In a March 1, 1995 letter (Letter Accompanying the Answer to the SOR) the Facility Security Officer (FSO) states the point of contact (POC) listed in the Army correspondence had been contacted. The POC stated the investigation for the Applicant's SCI access was being stopped because the contract had not been extended and the continued processing of access request could not be justified. The SFO then notified the Applicant the SCI investigation would be terminated and the Applicant instructed to keep all paperwork concerning the investigation.

In June 1998, the Applicant completed a Questionnaire for National Security Positions, SF-86. In response to question 31-[\(2\)](#)

the Applicant listed three clearance and an SCI investigation. He stated the 1993 SCI investigation was started, but clearance was not granted prior to the contract ending and stated the investigation stopped in March 1995.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Financial Considerations (Guideline F) The Concern: 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. E2.A6.1.1.

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

1. A history of not meeting financial obligations. (E2.A6.1.2.1.)
3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)

Conditions that could mitigate security concerns include:

None Apply.

Personal Conduct (Guideline E) The Concern: 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.

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

None Apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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.* 484 U.S. 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." Executive Order 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.

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*, at 531. All that is required is proof of facts and circumstances which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The allegations under Guideline E, (Personal Conduct) are not supported by the record. The Government has shown the Applicant stated his SCI access investigation was stopped when the contract was not extended. The government alleges the Applicant knew his SCI access had been denied. The Applicant denies he gave false information about his SCI access. He states he never received the January 1995 LOI nor the March 1995 LOD. The Applicant's response to the SOR, supported by the FSO's letter, put the government on notice he was disputing he knew his SCI access had been denied. There is nothing in the file substantiating the Applicant received either the LOI or LOD. In fact, the endorsement to the LOI (Gov Ex 3) relates not to the Applicant, but to a different individual.

Although an intent to deceive or mislead the government does not require direct evidence and can be inferred from circumstantial evidence, this is not the case here. Clearly the Applicant knew in the Fall of 1994 the Army was requesting information about his past due child support obligations. However, the Applicant was notified by the FSO the SCI access investigation was terminated, because the contract had not been extended. When his statements are weighed in light of the evidence as a whole, I find his answer to question 31 was not a deliberate omission, concealment, or falsification and, therefore, none of the disqualifying conditions under personal conduct (Guideline E) apply. Because none of the disqualifying conditions apply, I find for the Applicant as to SOR subparagraph 1.a.

The Government has satisfied its initial burden of proof under Guideline F, Financial Consideration. A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an Applicant with a history of serious or recurring financial difficulties is in a situation of risk that is inconsistent with the

holding of a security clearance. Under Guideline F, an Appellant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations. The Applicant's overall history of financial difficulties concerning his child support obligations, that started in the late 1980s, and continues to the present, provides concern. The Appellant owes approximately \$22,228.00 for delinquent family support. Disqualifying conditions (DC) 1 (3) and 3 (4) apply.

As of September 1992, the Applicant knew the government was concerned about his child support obligations. At that time, he considered the county's judgement for child support to be an unjust (5) debt, but did not know how to resolve this disputed debt. In 1994, he was asked to prove he had paid the judgment or established a payment plan. Additionally, he was asked to prove he was current on his child support obligations. Because of the Applicant's problems with his past child support obligations, his SCI access was denied.

Since 1992, the Applicant has considered hiring an attorney, but thought it might cost more to do so than simply allowing the garnishment to continue. He sees the garnishment as part of his obligation to provide for his children. Since 1993, the Applicant has paid more than \$25,000.00 in child support through garnishments and tax refund interceptions. However, an additional \$22,228.00 debt is yet owed for delinquent family support.

None of the mitigating factors (MC) apply in the Appellant's favor to this \$22,228.00 debt. For MC 6 (6) to apply there must be an "ability" to repay the debts, the "desire" to repay, and evidence of a good faith effort to repay. Although the Applicant has a desire to look into this matter and get it straightened out, there is no evidence he has done anything about the debt. Nor is there evidence he has reached an agreement with this creditor. The mere desire to investigate the debt is insufficient. A systematic, concrete method of handling past due liabilities is needed, and this is not present. The Applicant has provided no cancelled checks, money order receipts, other receipts, letters from the creditor, or other evidence showing payment has been made.

None of the other mitigating factors apply in the Applicant's favor. The conduct is recent (MC 1) (7) in that the debt is still owed. It is not an isolated incident (MC 2) (8) because garnishments have been ongoing since 1993. There is no indication the Applicant's child support problems are under control. (MC 4) (9) Affluence was not alleged. (MC5) (10) There is no showing the Applicant has any financial problems other than the problems relating to child support. The Applicant's 1990 divorce was a factor beyond his control, however, sufficient time has passed since the divorce to allow some type of repayment plan to be established and therefore MC 3 (11) does not apply. Because the Applicant has failed to present sufficient mitigation to overcome his financial irresponsibility concerning his debts, I find against the Applicant as to SOR subparagraph 2.a.

The awarding of a security clearance is not a one time occurrence, but is based on current disqualifying and mitigating conditions. Under the Applicant's current circumstances a clearance is not recommended, but this decision should not be construed as a determination that the Applicant's conduct could never justify the award of a DoD security clearance. Should the Applicant be afforded an opportunity to reapply for a security clearance, in the future, he may well demonstrate persuasive evidence of his security worthiness. A clearance at this time is not warranted.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2 Guideline F (Financial): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

DECISION

In light of all 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. It was not alleged the Applicant falsified material facts when he answered "no" to question 32, which asked the Applicant if his clearance or access had ever been denied, suspended, or revoked.
 3. DC 1. A history of not meeting financial obligations. (E2.A6.1.2.1.)
 4. DC 3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)
5. The Applicant's opportunity to argue the debt was "unjust" was prior to the judgment being entered.
6. MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
 7. MC 1. The behavior was not recent.
 8. MC 2. It was an isolated incident.
9. MC 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.
 10. MC 5. The affluence resulted from a legal source. (E2.A6.1.3.5.)
11. MC 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). (E2.A6.1.3.3.)