

DATE: November 27, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04672

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate the security concerns raised by his financial and personal conduct. While he has now initiated payments for his past federal tax obligations and his past child support arrears, he did not take action either on his federal taxes until after the security investigation began or on his child support obligation until after the state issued a garnishment. He has not demonstrated that he now has control of his finances as he submitted no updated financial statement or references. Nor has he sought any financial counseling. His personal conduct also raises security concerns as he failed to respond fully with required information in response to four material questions on the Security Clearance Application and misrepresented his efforts to resolve his tax debts in his initial security interview. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on March 22, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ (Item 1) The SOR initially alleged only concern in paragraph 1 over financial issues (Guideline F). Applicant responded to these SOR allegations in an Answer notarized on June 2, 2001, where he admitted paragraphs 1.a. through 1.f. with explanation and requested a decision be made on the record as he did not wish a hearing.

The case was assigned to Department Counsel. On July 13, 2001, he prepared the File of Relevant Material (FORM) for the Applicant's review and included in the FORM an Amendment to the SOR which was authorized ⁽²⁾ by DOHA Operating Instruction (OI) No. 31, issued on 18 May 2000. Department Counsel's Motion to Amend the Statement of Reasons added a series of allegations under Guideline E, that Applicant falsified material facts on the April 1999 Questionnaire for National Security Positions, Standard Form (SF) 86, by his answers to questions 9, 34, 40, 38, and by a false statement in an interview with DSS in August 1999 (SOR 2.a. through 2.e.).

Department Counsel advised Applicant that he had 30 days to submit objections and/or information before the FORM

was submitted to an administrative judge and that he had the right to be represented by counsel. The FORM explicitly noted the need to answer each new allegation in the Amended SOR. A Personnel Security Specialist (PSS) sent the FORM to Applicant on July 13, 2001, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. (The cover letter did not explicitly note the Amendment to the SOR nor the need to answer each new allegation.)

Applicant received the FORM on July 27, 2001. On August 30, 2001, the Government accepted his response of August 26, 2001, with attachments (Exhibit A) and forwarded those documents to Department Counsel who indicated that he had no objection to those exhibits being admitted into evidence. No comment was made on Applicant's failure to answer SOR 2.a. through 2.e. On August 31, 2001, the case was assigned to me.

PROCEDURAL ISSUES

After noting Applicant's failure to respond to the Department Counsel Motion to Amend the SOR and noting Applicant's failure to answer the allegations in SOR 2.a. through 2.e., I sent Applicant a letter on October 1, 2001, advising him of his need to respond to the Amended SOR and "either admit or deny each allegation in paragraph 2.a. through 2. e." I also noted the need for further clarification of the documents he had attached (Exhibit A). He was advised to respond by October 16, 2001.

On October 8, 2001, Applicant responded and submitted additional explanation and documents regarding the allegations in Paragraph 1 (Exhibit B), but he again failed to respond to any of the falsification allegations in SOR 2.a. through 2.e. in the FORM Amendment to the SOR. After I received Exhibit B on October 17, 2001, I forwarded the documents to Department Counsel, so that he could review the information presented by the Applicant and indicate whether or not he objected to the admissibility into evidence of Exhibit B by Close of Business October 19, 2001. On October 23, 2001, Department Counsel responded that it had no objection to Exhibit B being admitted into evidence.

Subsequently, Applicant submitted another exhibit in a letter mailed October 25, 2001, an Order from the child support court issued on October 19, 2001 (Exhibit C). On November 1, 2001, I issued a Procedural Issues Order forwarding Exhibit C to the government for comment and again advising Applicant of his failure to comment on the Government's Amendment to the SOR and failure to answer the falsification allegations in SOR 2.a. through 2.e. Both parties had until November 8, 2001 to respond. The Applicant failed to respond.

The Government's Response of November 8, 2001, contends that the DOHA Appeal Board has allowed the government to make a Motion to Amend the SOR in a FORM without providing a "good cause reason" as "The overall purposes of the industrial security program are not well-served by interpreting the Directive in a manner that emphasizes pleading formalities over a full and fair adjudication of cases on the merits." Appeal Board Decision, ISCR Case No. 99-0447 (July 25, 2000) The Government argued that the Applicant has had ample notice of the amended SOR and ample opportunity to respond. Department Counsel also objected to the admissibility of Applicant's Exhibit C as not timely. While I concur it is not timely and Applicant made no request that the opportunity to respond be enlarged, I have admitted Exhibit C into evidence as the applicant is *pro se*, and the document is helpful in clarifying the record on his child support status.

DoD Directive 5220.6 Enclosure 3 has no specific guidance on the proper way to amend an SOR in a FORM, but does allow an SOR to be amended at a hearing "so as to render it in conformity with the evidence admitted or for other good cause." (See E3.1.17.) However, DOHA has internal guidance, OI 31, which is a guideline unavailable to applicants. Paragraph 8 of OI 31 allows Department Counsel to include an Amendment to the SOR in the text of the FORM to provide notice to the Applicant and to allow opportunity to respond to the motion. Paragraph 8 does not take note of the Directive's requirement that an Amendment to the SOR at hearing be limited to those circumstances "so as to render it in conformity with the evidence admitted or for other good cause."⁽³⁾

(See E3.1.17.) Paragraph 8 of DOHA Operating Instruction No. 31 notes that the Administrative Judge has authority under Paragraph 10 (or E3.1.10) to rule on a Motion to Amend an SOR because "The Administrative Judge may rule on questions on procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner."

In determining what is fair, I rely on the Directive's specific guidance on amending SOR's at hearing which limits amendment to two circumstances: "so as to render it in conformity with the evidence admitted or for other good cause." (See E3.1.17.) In this case while the Government has provided no "good cause" basis for the Amendment, I accept the Government's argument that under Appeal Board determinations a Motion to Amend in a FORM need fulfill only the Directive's first prong: "to render it in conformity with the evidence admitted. . . ." While the evidence cited in support of the allegations (Applicant's alleged deliberate omissions in the SF 86 of April 1999 and his Statements of August 1999 and October 1999) were documents in the hands of the Government at the time the original SOR was issued in March 2001 and thus the better practice would have been to include the falsification allegations in the initial SOR, I will allow the government to Amend through the FORM document to conform to this evidence. I grant the Amendment to the SOR mindful of the fact that the Applicant had three opportunities to respond and failed to do so either in his August 2001 response to the FORM; in response to my October 1, 2001, letter order; or in response to my November 1, 2001, Procedural Issues Order. I interpret his failure to respond to Paragraph 2 as a general denial.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is a 44 year old employee of a defense contractor (Employer #1 in State #1), where he has worked since March 1999. From 1998 to 1999 he was employed with another company; from February to September 1998 he was unemployed; from 1994 to January 1995 and from June 1995-1998 he was a federal employee in State #2; and from February to May 1995 he was unemployed. From March to October 1994 he worked for another company. (Item 4)

Applicant was re-married in September 1995 after he and his first wife divorced in 1993; he has a son born in March 1978. (Items 4,5; Exhibit C)

Financial Considerations and Personal Conduct

In completing his April 1999 Questionnaire for National Security Positions (Standard Form 86) (SF 86) Applicant made several omissions: he failed to list his son born on March 1978 (Question 9), his wage garnishments for child support in October 1998 (Questions 34 and 40), and his debt to the Internal Revenue Service (IRS) in State #2 for tax years 1994, 1995, 1996, and 1997 (Question 38). He further misrepresented information in an August 1999 statement to a Defense Security Service (DSS) investigator when he claimed that his wife had paid \$125 toward a 1998 tax debt, when in fact they had not made this June 1999 payment. I do not find credible his defense that he merely omitted this adverse information from the SF 86 because he answered the questions "quickly and without much concern if such were true and accurate." In completing a government security form, Applicant had an obligation to provide "true, complete and correct" answers and signed a certification that he had done so in April 1999 when he had not shown the required due diligence; therefore I find his omissions deliberate. (Items 4, 5, 6)

In 1984-85 Applicant was ordered by State #2 court to pay child support of \$50 every two weeks with increases in ensuing years. He paid child support until 1992 when he was unemployed and before he received unemployment compensation. He thus began to accrue an arrears in child support. His child support payments were subsequently automatically deducted from his unemployment checks. He was subsequently unemployed from 1994-96 and again accrued an arrearage in child support payments until his child support payments were again subsequently automatically deducted from his unemployment checks. Again in 1998 he was unemployed, once more accrued an arrearage, and again his child support payments were subsequently automatically deducted from his unemployment checks. In 1998 he was ordered to pay \$156 every two weeks for child support for this arrears balance and his current support obligation. Since October 1998 his child support payments were garnished from his salary. (Item 5)

While Applicant owed \$1,000 in taxes in both 1993 and 1994, he neglected to pay these tax debts, and he himself took no action to pay as he had not heard from the IRS concerning this tax debt. In August 1999 Applicant stated that he planned to contact the IRS to arrange a repayment plan and pay the past due debt. In 1998 he and his wife owed the IRS \$601 which they neglected to pay. His wife contacted the IRS in June 1999 but failed to sent a \$125 monthly payment. Again in October 1999 his wife contacted the IRS, and they then remitted \$200 to IRS; he stated they intended to pay

the full amount owed for 1998 by December 1999.

In October 1999 Applicant reported that he had failed to contact the IRS about paying his 1993 and 1994 tax debts. IRS records in October 1999 showed he owed \$281 for 1997, \$1,664 for 1996, \$273 for 1995, \$343 for 1994 and \$3 for 1992. He failed to file a 1993 IRS return. His intent was to resolve the debts to the IRS, but in October 1999 he asserted he did not have the financial means to do so as he was looking for a new job and could not resolve the matters until he found a better job. (Items 5, 6)

Subsequently, he claims to have paid his IRS debts and has made arrangements to pay his child support debts through wage garnishment. (Item 3, Exhibits A & B) On October 19, 2001, State #1 court ordered that child support for his child, now 23, be terminated, effective in March 1996; but that Applicant remit payments in arrears to the child's mother of \$60 per week until paid in full. (Exhibit C)

Applicant's Personal Financial Statement in August 1999 reflected his monthly net income of \$975 with monthly expenses of \$1,072 and a car debt of \$225 per month. While this statement showed a negative remainder of \$322, he claimed that this amount was covered by his wife's salary which he did not know and did not reveal. (Item 5) He offered no updated 2001 Financial Statement.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

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:

None

Guideline E - Personal Conduct

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:

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;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator,

security official, competent medical authority, or other official representative in connection with a personnel security or trust-worthiness determination;

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Financial Considerations

Applicant has (1) a history of financial problems and has shown at times (3) an inability or unwillingness to satisfy debts (SOR 1.a-c.) Admittedly, Applicant had some unemployment periods, but he neglected for several years his responsibility to address and resolve the federal tax obligations and his child support obligations.

While Applicant does assert that conditions largely beyond his control partially caused his financial problems, Applicant has not shown sufficient evidence to meet mitigating conditions (MC⁽⁴⁾). While security concerns may be mitigated if conditions were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), he has had short periods of unemployment and failed to address the tax and child support debts after he was employed in 1999. In short, he has not demonstrated that he initiated a good-faith effort to repay these overdue creditors or otherwise resolve these debts until after the DSS interview. While he states the IRS debts are now resolved, he provided no IRS documentation or canceled checks to substantiate these payments. He still owes child support arrears.

Further he failed to provide any updated budget or financial information beyond the 1999 statement which showed insufficient financial resources as he provided no information on his wife's income or her responsibility in meeting monthly expenses. While he now has a stable job and income, he has failed to sufficiently demonstrate he is now financially responsible. Neither has he demonstrated that he has met 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. With no current budget provided, there is no way to assess his current financial position in meeting all of his obligations. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 1.a. through 1.f. under SOR Paragraph 1.

Personal Conduct

In an Amendment to the SOR filed with the FORM the Government advanced security concerns over personal conduct issues as Applicant's behavior reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information because of multiple falsifications on his SF 86 and misrepresentation in his initial DSS interview about his IRS payment history. Despite Applicant's failure to answer these allegations, the evidence submitted supports these significant concerns. Thus conditions that could raise a security concern and may be disqualifying include his deliberate omission, concealment, or falsification of relevant and material facts from his personnel security questionnaire and in his DSS interview. He failed to give the required information completely on the sf 86 even though he had a duty to fully disclose all relevant and material information.

(5)

Applicant has failed to demonstrate he meets the mitigating conditions.

In completing a government security form, Applicant had an obligation to provide "true, complete and correct" answers and signed a certification that he had done so in April 1999 when he had not. I do not find credible Applicant's defense that he merely omitted this adverse information from the SF 86 because he answered the questions "quickly and without much concern if such were true and accurate." While he was cooperative in explaining some of the financial details to the DSS agent, his conduct is not sufficient to fall within MC 3 as he did not volunteer all the facts and misrepresented others in the initial interview.

Also, undermining his credibility is the fact that the applicant misled at his initial DSS interview on the efforts he and his wife had made to meet his past IRS obligations: he claimed that his wife had paid \$125 toward a 1998 tax debt, when in fact they had not made this June 1999 payment. Indeed there was a second DSS interview to address and resolve additional adverse information. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a. through 2.e. under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

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: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against 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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Although DoD Directive 5220.6 Enclosure 3 has no specific guidance on the proper way to amend an SOR in a FORM, Paragraph 8 of OI 31 authorizes Department Counsel to include the Amendment to the SOR in the text of the FORM to provide notice to the Applicant and to allow opportunity to respond to the motion.
3. The FORM Motion to Amend does not provide any "good cause" reason for the Motion to Amend by adding five new falsification allegations under Guideline E. The FORM contains no statement that the Amendments to the SOR were occasioned by newly discovered evidence; nor do the amendments to the SOR concern merely minor matters. The Government argues that the Motion need fulfill only the Directive's first prong to make an Amendment "to render it in conformity with the evidence admitted. . . ."
4. **Conditions that could mitigate security concerns include:** 1. The behavior was not recent; 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 downturn, unexpected medical emergency, or a death, divorce or separation); 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; 5. The affluence resulted from a legal source; and 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
5. **Conditions that could mitigate security concerns include:**
 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.