

DATE: November 9, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08803

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Past due indebtedness incurred during a prolonged period of unemployment and temporary employment was mitigated by small occasional and/or periodic payments over the past three years and a demonstrated willingness to forego extensive reliance on credit. Clearance is granted.

STATEMENT OF THE CASE

On June 27, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the 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 July 31, 2001, the Applicant responded to the allegations set forth in the SOR and elected to have his case decided on a written record, in lieu of a hearing. [\(1\)](#)

The Applicant received a complete copy of the file of relevant material (FORM) on September 18, 2001, and received an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant responded to the FORM on October 16, 2001. The record in this case closed on October 24, 2001, the date the Applicant's FORM response was admitted into evidence without objection. The undersigned Administrative Judge received the case assignment on October 24, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following sole guideline: paragraph 1, Guideline F (financial considerations). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 37-year-old support engineer employed by a U.S. Government contractor and its predecessor company since January 1996. The Applicant seeks to obtain a personnel security clearance.

The Applicant attended the U.S. Naval Academy from July 1982 through May 1986 and graduated with a bachelor's degree. He served on active duty as a commissioned officer (O-3) in the Navy until July 1994 and has since remained in the Naval Reserve (O-4). He was unemployed during two periods: August 1994 to January 1995 and April 1995 to September 1995; he worked as a temporary office worker from September 1995 to January 1996. He attended graduate schools in 1994-95 and 1996-97; he was awarded an MBA degree in December 1997. The Applicant was married in February 1987. He listed six children on his January 1998 security clearance application (SF-86) and had two more children as of his SOR answer in July 2001. FORM item 4.

The Applicant admits that he owes over \$18,000 in delinquent debts to some 12 creditors.⁽²⁾ These debts fell into arrears and were charged off/referred for collection in 1995 during the Applicant's period of unemployment and temporary employment. In April 1998 he was earning--as the sole breadwinner for his family--a gross annual salary of approximately \$60,000; his personal financial statement disclosed he was making payments in the amount of \$677 to nine creditors on a monthly basis. FORM item 6. Credit reports in 1998 and 1999 show that he was current on three revolving department store accounts. FORM items 7 and 8. In his response to the FORM he advises--without corroboration--that he has discontinued reliance on credit and has paid down a significant portion of the total.⁽³⁾

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

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:

[1st] A history of not meeting financial obligations;

Conditions that could mitigate security concerns include:

[3rd] 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);

[6th] The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The Adjudicative Guidelines contained in enclosure 2 of the Directive provide in part:

Although adverse information concerning a single criterion *may not be sufficient* for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

(Emphasis added.) The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

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 upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. (4)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. ⁽⁵⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline F.

The Applicant has a history of financial difficulties that has resulted in a number of delinquent debts, some portion of which remain outstanding. This evidence falls within the scope of DC #1, which is identified on page 3 *supra*. He has demonstrated a willingness and some ability, though living on a modest budget, to pay down/pay off the delinquent debts and not incur additional debt beyond his means. His past due debts were not incurred due to misbehavior such as excessive gambling, drug abuse, alcoholism, or other issues of security concern. Nor does there appear to this Administrative Judge to be a ratio of past due debt to annual income that is abnormal or otherwise out of line in our economy. Nevertheless, the Government has shown that its security concerns have met a *prima facie* threshold.

In mitigation, the Applicant's financial difficulties are largely attributable to conditions beyond his control, *i.e.*, a prolonged period of unemployment and temporary employment in 1994-95. This evidence falls within the scope of MC #3, which is identified on page 4 *supra*. There is some evidence in his SOR admissions, his FORM response, ⁽⁶⁾

and FORM items 5 and 6 that he has made occasional and/or periodic payments against his delinquent debts. This evidence falls within the scope of MC #6, which is also identified on page 4 *supra*. He has not tried to evade his creditors, deny his legitimate debts, or hide behind a statute of limitations argument. He acknowledged his debts, of course, on his security clearance application (SF-86). Whether an applicant has made a "good-faith effort" must be judged in part in relation to the means and opportunities available. Having been asked to submit an application for a security clearance for his job at the outset of 1998, the Applicant was able to make payments against his delinquent debts while he had just graduated, his job seemingly secure, and he was raising a large family.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on page 4 *supra*. The nature and extent of the Applicant's indebtedness is of considerable security concern when it is recalled that money problems and/or financial greed often lies at the heart of the motivation for espionage. The circumstances in which his indebtedness was incurred and in which he addressed it within the last three years weigh in the Applicant's favor. The probability of additional debt incurred in the future beyond his means is quite small. Therefore, SOR ¶1 (financial considerations) is concluded favorably to the Applicant.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: For Applicant

Subparagraph 1.n.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. In his SOR answer the Applicant stated that he wished to have "a review by Administrative Judge." In a telephone conference call among the Applicant, the Department Counsel, and this Administrative Judge on November 9, 2001, the Applicant confirmed that he waived his right to a hearing and had so informed DOHA sometime in August 2001.

2. One delinquent debt was admittedly reduced to a money judgment against the Applicant in October 1995 for approximately \$475 plus costs (SOR ¶1.g). The Applicant paid off another creditor in full in July 1999 (SOR ¶1.n) and noted in his SOR answer that the allegation in SOR ¶1.k dealt with the same delinquent debt as the one cited in SOR ¶1.i.

3. Small payments to nine creditors on delinquent debts had been made as of the summer of 1998. FORM item 5. SOR ¶1.f, ¶1.h, and ¶1.j acknowledge that the Applicant made small payments on three delinquent debts in 1999.

4. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

5. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of

persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

6. Self-serving statements of an applicant must be weighed carefully to determine their reasonableness and consistency with contrary evidence. An Administrative Judge is not required as a matter of law to accept them on their face, even though they are unrebutted. Yet, an applicant's testimony in his own behalf is admissible evidence and may be credible, even though uncorroborated. New or additional evidence, *e.g.*, receipts, credit statements, or cancelled checks, may not be considered if first provided on appeal. Item 29 of the additional procedural guidance (encl. 3 to the Directive).