

DATE: May 16, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18881

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Pamela Benson, Esq., Department Counsel

Lynette Adresen, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 53-year-old computer systems administrator, willfully failed to file his federal income tax returns for three years, had a history of bad debts, and deliberately falsified his security clearance application. Applicant failed to sufficiently mitigate these security concerns to demonstrate it is clearly in the national interest 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 13 December 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 considerations (Guideline F), personal conduct (Guideline E), and criminal conduct (Guideline J) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 24 January 2003. The case was assigned to me on 3 March 2003. On 3 April 2003, 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 nine exhibits. Applicant testified on his own behalf and submitted a total of 22 exhibits, including those attached to his answer. DOHA received the transcript (Tr.) of the proceeding on 11 April 2003.

FINDINGS OF FACT

Applicant is a 53-year-old computer systems administrator. Ex. 1; Tr. 24, 26. He speaks three languages, including French and Japanese. He is a certified firefighter and emergency medical technician. Tr. 21-25. Although he claimed to be "the only source of income for the household," (Tr. 29), he later admitted that his wife is a "secretary for an architectural firm," buys her own clothes, and contributes to the rent for their home. Tr. 53-54. He lives with his wife and 25-year-old son, who is still a student. For half of each year, his mother lives with them. Tr. 30.

The evidence at the hearing established the state of Applicant's debts was as follows:

SOR ¶ 1.a. In January 2003, Applicant paid off a debt of approximately \$1,264 that had been charged off by the creditor in 1996 because of delinquency. Tr. 30-31.

SOR ¶ 1.b. In January 2001, Applicant paid off a credit card debt of approximately \$303 that had been charged off by the creditor in 1996 because of delinquency. Tr. 31.

SOR ¶ 1.c. In December 2002, Applicant settled his debt of over \$7,000 with a bank by paying \$722.26 to a creditor who had purchased the debt from the bank. Exs. E, F, G.

SOR ¶ 1.d. In May 2002, Applicant settled a delinquent account of approximately \$231 with a federal bank by paying a collection agency. Tr. 37.

SOR ¶ 1.e. In May 2002, Applicant settled a delinquent account of \$75 with a hospital. Answer.

SOR ¶ 1.f. Applicant has not satisfied a debt of \$86 that has been delinquent since 1994 because he cannot find the creditor. Tr. 42.

SOR ¶ 1.g. On 22 May 2002, Applicant paid a collection agency over \$250.00 in settlement of a debt he owed a medical practice. Exs. K, L.

SOR ¶ 1.h. In January 2003, Applicant settled a debt with a creditor for a debt of over \$900 that the Government alleged was the result of a judgment obtained in 1996. Exs. M, N, O, P.

SOR ¶ 1.i. Applicant accrued over \$35,000 in taxes, interest, and penalties with the IRS because he failed to pay his federal income tax returns from 1993-2001. Applicant entered into a repayment plan with the IRS to satisfy the debt. He has been making payments. Tr. 43-45.

SOR ¶ 1.j. Applicant has a positive cash flow and can pay the remaining tax debts over time. Ex. 8 at 7.

Applicant failed to file his federal and state tax returns for 1997, 1998, and 1999. Tr. 45-46. Applicant claims that the tax forms "baffled" him (Tr. 46), was ignorant of how financial matters "are supposed to work," and decided not to file until he could pay. Tr. 20. He did not file his federal tax forms until after he was confronted by an agent of the Defense Security Service (DSS) in October 2000. *See* Ex. 8 at 4. He did not file his state taxes until after the SOR was issued. *See* Ex. V.

In his security clearance application, Applicant answered "no" to questions 38 and 37. Question 38 asked if, in the past seven years, Applicant had been more than 180 days' delinquent on any debts. Question 37 asked if, in the past seven years, Applicant had any judgments entered against him that had not been paid. Ex. 1 at 8. All of the debts alleged as being outstanding in the SOR were more than 180 days' delinquent. There is no evidence that there were any judgments against Applicant.

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of 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*, 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)).

Once the Government establishes a disqualifying condition 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2. The decision to deny an applicant a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for granting a clearance.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged under Guideline F that Applicant had several unsatisfied debts (SOR ¶¶ 1.a., c., f., g., h.), several debts that had only recently been satisfied (SOR ¶¶ 1.b., d., e.), owed a debt of approximately \$35,000 to the IRS (SOR ¶ 1.i.), and had the money to pay off these debts (SOR ¶ 1.j.). Under Guideline F, an applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established by substantial evidence that Applicant has a history of not meeting his financial obligations. DC 1. He has been unable or unwilling to satisfy his debts. DC 3. His positive cash flow suggests that he was able but unwilling. He was more concerned with making sure his son completed college debt-free than with paying his lawful debts. *See* Ex. 8 at 4; Tr. 23. While that may be a laudable goal, it demonstrates Applicant's priorities.

Although there is no evidence Applicant received any financial counseling, he has resolved all but his tax debts, and he is working on them. MC 4. But, the timing of his efforts to pay off his debts-only after being confronted by the DSS agent and faced with possibility that he would not get a clearance-suggests that this was not a good faith effort worthy of application of MC 6. *See* Tr. 39 (Applicant admitted that his security clearance was a primary motivating factor in getting him to pay off his debts). Applicant's mitigating evidence is not sufficient to overcome the financial considerations security concerns. Finding is against Applicant.

The SOR ¶ 1.h. alleged Applicant owed approximately \$917 as a result of a judgment, there is no evidence in the record that any judgments were rendered against him. Nevertheless, Applicant recognized the debt and paid it off. *See* Ex. 8 at 3; Exs. K, L, M, N, O, P. Finding is against Applicant.

The SOR ¶ 1.j. alleged Applicant prepared a personal financial statement on 20 October 2000 that showed Applicant had a positive cash flow and was able to pay his debts. While the statement is true and is appropriate evidence to consider in determining the security worthiness of Applicant, it is not disqualifying. Finding is for Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant deliberately falsified answers on his security clearance application to question number 38 (SOR ¶ 2.a.) and question number 37 (SOR ¶ 2.b.), and willfully failed to file state income tax returns for 1997, 1998, and 1999 (SOR ¶ 2.c.). 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 Government established by substantial evidence that Applicant falsified relevant and material facts about his debts in the previous seven years that had been delinquent more than 180 days-question 38 on his security clearance application. The issue is whether or not it was deliberate. *See* DC 2. After observing and listening to Applicant testify, I am convinced that his failure to report these delinquent debts was deliberate. His excuses are unconvincing. Even at the hearing, Applicant continued to obfuscate the facts by suggesting that his wife did not contribute to the household finances (Tr. 29), and then later had to admit that she paid for her own clothes and contributed to the rent payment (Tr. 53). The mitigating conditions listed under Guideline E are not applicable. The finding is against Applicant.

The Government did not establish that any judgments had been entered against Applicant. Thus, the finding as to whether he deliberately falsified his answer concerning unpaid judgments (SOR ¶ 2.b.) must be for Applicant.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged under Guideline J that Applicant willfully failed to file his federal income tax returns, in violation of 26 U.S.C. § 7203, for tax years 1997 (SOR ¶ 3.a.), 1998 (SOR ¶ 3.b.), and 1999 (SOR ¶ 3.c.). Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a misdemeanor for any person required to file a federal income tax return to willfully fail to timely do so. 26 U.S.C. § 7203. Applicant admits he willfully did not timely file his federal tax returns for 1997, 1998, and 1999. He was waiting to file until he could pay. Tr. 20. The Government established criminal conduct by substantial evidence through Applicant's admissions. DC 1. His failure to file income tax returns may not be serious crimes, but they amount to "multiple lesser offenses." DC 2. Under the circumstances, none of the mitigating conditions listed under the guideline directly apply to Applicant. There is no clear evidence of successful rehabilitation. *See* MC 6. Filing the returns, and attending to his other debts, appears motivated by the need for a security clearance rather than genuine rehabilitation. Finding is against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

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.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against 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. Clearance is denied.

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.