

DATE: April 9, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21864

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant--a 57-year-old married man employed by a defense contractor as a telephone mechanic--falsified his security-clearance application when he deliberately omitted or concealed two incidents of bad checks resulting in arrest and criminal charges. Applicant's evidence in mitigation or extenuation is insufficient to overcome the negative security implications stemming from the falsifications, the related criminal conduct, as well as a history of not meeting his financial obligations. Clearance denied.

STATEMENT OF THE CASE

On June 25, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E for personal conduct, Guideline J for criminal conduct, and Guideline F for financial considerations.

On July 22, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record. In his Answer, Applicant's responses to the SOR allegations are mixed, admitting some, admitting some with qualifications, and denying other allegations.

On October 23, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for November 25, 2002, at a location near Applicant's place of employment.

At the hearing, Department Counsel offered four documentary exhibits (Exhibits 1 - 4); no witnesses were called. Applicant appeared without counsel, offered his own testimony, and offered four documentary exhibits (Exhibits A - D). DOHA received the hearing transcript on December 4, 2002.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 57-year-old married man. He and his spouse have two children, ages 11 and 8. Applicant is employed by a defense contractor as a telephone mechanic installing telephones and telephone lines in buildings. He has worked for his current employer since October 1991. In conjunction with his employment, Applicant is required to hold a security clearance.

Applicant is active in his local community as demonstrated by his involvement with a church.⁽²⁾ The church's pastor has known Applicant for more than 20 years and vouches for Applicant's general character and honesty.

From May 1963 to May 1967, Applicant served on active duty in the U.S. Air Force serving as a security policeman. He was honorably discharged at the rank of sergeant (pay grade E-4).

On two occasions Applicant was charged with the misdemeanor offense of "fraudulent check." On the first occasion, in October 1997 Applicant wrote a \$20 check to a local restaurant and the check bounced. After the check was returned NSF, Applicant went to the restaurant and paid it. Nevertheless, in January 1998 the local sheriff's office issued an arrest warrant for Applicant. He reported to the sheriff's office where he was fingerprinted and briefly held in a jail cell until being brought to court where he was released. The next month Applicant appeared in court, the merchant did not, and the court dismissed the charge.

The second occasion took place in about December 1999 when Applicant wrote an NSF check for \$25 to a medical-service provider. Applicant also made good on this check after learning it had bounced. Nevertheless, in August 2000 the local sheriff's office issued an arrest warrant for Applicant. He again reported to that office where he was fingerprinted and briefly held in a jail cell until being brought to court where he was released. The next month, on or about September 27, 2000, Applicant appeared in court, pled guilty and was awarded a sentence of 30 days confinement, which was suspended conditioned on paying a \$166 fine. Applicant paid the fine and served no confinement.

A credit report⁽³⁾ was obtained as part of Applicant's background investigation. In summary, it revealed two accounts 30-days past due, one account 90-days past due, two accounts 120-days past due, six accounts in a collection/charge off status, and one foreclosure, but no repossessions.⁽⁴⁾ Concerning the five debts alleged in the SOR, the record shows as follows:

- Foreclosure proceedings started against his residence in approximately June 1995 after Applicant fell 90-days past due with his monthly mortgage payments.

On or about October 13, 2000, Applicant completed and signed a security-clearance application.⁽⁵⁾ For Questions 12 through 43, he submitted a "clean" application in that he answered all questions "No," thereby denying any potential derogatory information called for by the scope of the particular question. Concerning the falsification allegations in the SOR, Applicant answered Question 26 "No" indicating he had not been arrested for, charged with, or convicted of any offenses within the last seven years not otherwise listed in the application. Applicant also answered Question 35 "No," thereby denying having any property repossessed within the last seven years. Also concerning his financial record, Applicant answered Questions 38⁽⁶⁾ and 39⁽⁷⁾ in the negative thereby denying any past-due debts for the relevant periods.

Applicant was also interviewed during the background investigation and that interview resulted in a written statement.⁽⁸⁾ In his August 2001 statement, Applicant agreed that the credit report accurately reflected the foreclosure account and the collection accounts. He explained the circumstances surrounding the foreclosure (family medical problems) and said he had obtained a waiver from the VA for any unpaid balance. Concerning the collection accounts, he explained the three medical bills, which were apparently not covered by his insurance, stemmed from his hospital stay following a car accident. The remaining \$5 collection account was for a returned check fee that he had forgotten to pay.

Applicant's hearing testimony was consistent with this explanation. In addition, other than making a single \$25 payment on the largest medical bill in July 2002, Applicant had made no payments on the four collection accounts. He did so on the advice of a financial counselor he and his spouse having been working with for the past year or so to improve their overall credit. Applicant was unable to find any information on the \$5 collection account.⁽⁹⁾ He also presented evidence that his checking account was in good standing with no NSF items within the past year.⁽¹⁰⁾ Although Applicant produced some correspondence⁽¹¹⁾ relating to the home foreclosure, he did not produce the actual "waiver" document issued by the VA.

Concerning the alleged falsifications, Applicant maintains he had no intention to deliberately omit or conceal his criminal history or his derogatory financial history. Based on the record evidence as a whole, I specifically make the following findings of fact:

1. Applicant's "No" answer to Question 26, which concerned other criminal offenses not reported elsewhere in the security-clearance application, was deliberately false; his explanations to the contrary are not credible. repossessions. Moreover, the foreclosure action against Applicant's former residence does not constitute repossession as that word is commonly used and understood.⁽¹²⁾ Indeed, the government's own exhibit, the credit report, distinguishes between foreclosure and repossession. contrary are not credible.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following adjudication guidelines are most pertinent here: Guideline E for personal conduct, Guideline J for criminal conduct,⁽¹³⁾ and Guideline F for financial considerations.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁴⁾ The government has the burden of proving controverted facts.⁽¹⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Section 1-Personal Conduct

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's

past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, considering the record evidence as a whole, the government has established its case under Guideline E. I'm persuaded by substantial evidence that Applicant deliberately omitted or concealed material information when responding to three questions on his security-clearance application. (22) He omitted or concealed both bad check offenses, the home foreclosure, and four collection accounts in response to Questions 26, 38, and 39. Concerning Question 26, I cannot reconcile his explanation for his negative answer in light of his age, prior military service in the security police, and the fact that he was processed, fingerprinted, held at the sheriff's office, and went to court for both bad check offenses. This is especially so considering Applicant pled guilty to the most recent bad check offense on or about September 27, 2000, about two weeks before completing and signing his security-clearance application. Concerning Questions 38 and 39, given the financial troubles he had experienced, especially the foreclosure in 1995 and the \$85 medical bill referred for collection in May 2000, Applicant knew or should have known that he was required to make some sort of disclosure of his derogatory financial history. Instead, he revealed nothing.

By submitting a "clean" application, he painted a picture of a person without a history of financial troubles. That was not the case. His failure to fully reveal the bad check offenses and other derogatory financial information suggests he cannot be relied upon to tell the truth if the truth presents possible adverse consequences for his own interests, which is inconsistent with having access to classified information. And I have reviewed the mitigating conditions (MC) under Guideline E and conclude none apply given the record evidence. Accordingly, Guideline E is decided against Applicant.

Section 2-Criminal Conduct

Under Guideline J, criminal conduct is a security concern where a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. In addition to his two fairly recent bad check offenses, Applicant's falsification of his security-clearance application in violation of federal criminal law is evidence of a history of illegal behavior. These facts justify applying two disqualifying conditions, (23) which, in turn, raise security concerns about his judgment, reliability, and trustworthiness. And I have reviewed the mitigating conditions under Guideline J and conclude none apply given the record evidence. Accordingly, Guideline J is decided against Applicant.

Section 3-Financial Considerations

Under Guideline F, a security concern typically exists for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in their obligation to protect classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline F. The record shows (1) a history of not meeting his financial obligations, (2) illegal financial practices, and (3) inability or unwillingness to satisfy his debts. (24) The NSF checks, the foreclosure, and the collection accounts support these conclusions. The same facts also support a conclusion of financial irresponsibility. His financial

irresponsibility is a security concern because it raises the possibility he may be irresponsible, unconcerned, negligent, or careless in his obligation to properly safeguard or handle classified information.

I have reviewed the mitigating conditions under Guideline F and conclude none apply. Although Applicant presented some evidence that he and his spouse are working with a financial counselor to improve their overall credit, the evidence was not so strong as to persuade me that there are clear indications their financial problems are being resolved. (25) Likewise, given the four collection accounts are still outstanding, coupled with no affirmative evidence that Applicant did in fact receive the VA waiver for any outstanding balance stemming from the foreclosure, I cannot conclude Applicant has engaged in a good-faith effort to repay the creditors or otherwise resolve the debts. (26) Finally, although Applicant experienced family medical problems that contributed to the financial problems, those circumstances ended when his father passed away in October 1990 and his mother-in-law passed away in March 1994. Substantial time has since passed and Applicant's financial problems persist, and so, the relevant mitigating condition (27) cannot be applied. Accordingly, Guideline F is decided against Applicant.

To sum up, the record evidence establishes Applicant has a history of financial troubles including collection accounts and NSF checks resulting in criminal charges against him. Making the situation worse, Applicant deliberately omitted or concealed this derogatory information when completing his security-clearance application. Taken together, these facts and circumstances create a reasonable doubt about Applicant's fitness for access to classified information. As required by the clearly-consistent standard, that doubt is resolved in favor of protecting national security.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a : Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

SOR ¶ 3-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: 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 Applicant.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Exhibit A.
3. Exhibit 3.
4. Exhibit 3 at p. 2.
5. Exhibit 1.
6. Question 38 asked about having been over 180-days delinquent on any debts within the last seven years.
7. Question 39 asked about any debts that were currently over 90-days delinquent.
8. Exhibit 2.
9. Exhibit E.
10. Exhibit B.
11. Exhibits C and F.
12. Repossession is commonly understood to mean when a seller takes back or repossess an item of merchandise (cars, furniture, appliances, etc.) if the buyer misses an installment payment. Whereas foreclosure in common usage refers to enforcement of a lien, trust deed, or mortgage, often on residential real estate, in any method provided by law.
13. As revised by the Deputy Secretary of Defense in a memorandum, dated June 7, 2001.
14. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
15. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
16. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
17. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
18. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
19. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
20. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
21. *Egan*, 484 U.S. at 528, 531.
22. Disqualifying Condition (DC) 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 eligibility or trustworthiness, or award fiduciary responsibilities.").
23. DC 1 ("Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;") and DC 2 ("A single serious crime or multiple lesser offenses.").
24. DC 1 ("A history of not meeting financial obligations;"), DC 2 ("Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan

statements, and other intentional breaches of trust;") and DC 3 ("Inability or unwillingness to satisfy debts.").

25. 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.").

26. MC 6 ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.").

27. 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).").