

DATE: August 1, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25432

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant owes a judgment of approximately \$68,000.00. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from a debt of such magnitude. Clearance is denied.

STATEMENT OF THE CASE

On December 13, 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 10, 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 May 8, 2003, scheduling the hearing, which was held on May 19, 2003. The Government's case consisted of five exhibits (Gov Ex). The Applicant relied on his own testimony and three exhibits (App Ex). The transcript (Tr.) of the hearing was received on May 28, 2003.

FINDINGS OF FACT

The SOR alleges financial considerations (Guideline F). The Applicant denies the allegations. 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 59-years-old, has worked for a defense contractor since January 1999, and is seeking to obtain a security clearance. The Applicant is a truck driver who owns his own rig and specializes in moving oversize loads. (App Ex C) His monthly income is approximately \$10,000.00 with monthly expenses and debt payment of approximately \$2000.00 with a net remainder of \$6,000.00 per month. He has assets totaling approximately \$1.5 million.

The regional vice president of the trucking firm, for which the Applicant works, states the Applicant is an honest person

of great character and integrity.

The Applicant's credit report lists two judgments entered against the Applicant, two accounts "NOT RATED," and 13 other accounts as "PAYS AS AGREED." (Gov Ex 3) One of the judgments listed is a February 1997 default judgment for an overdue credit card debt of approximately \$2,000.00. The Applicant indicates he has not been contacted by this company concerning this account; he has lived at the same location for approximately 19 years, and is listed in the local telephone book. The Applicant is in good standing on another account, opened in 1993, with the same credit card company. (App Ex A)

Once he became aware of the credit card judgment, he went to the local courthouse attempting to get information about the matter without success. He was informed he could either hire a private investigator or wait for the company to contact him. There are a number of other individuals living in the same area who have the same or very similar names as his name. (App Ex A) The Applicant contacted the credit card company and they were unable to locate any account in his name that has been charged-off, or on which any money was owed. In February 2001, this item was removed from his credit report.

His credit report also lists an August 2000 judgment by his home state (hereinafter referred to as State A). In June 2000, suit was brought against the Applicant and a corporation. ⁽²⁾ In June 2000, the Applicant filed an answer to the State's petition indicating ownership of the wells had changed in 1992, when he sold the leases. Until that date, the Applicant alleges all state rules and regulations were in compliance. In his answer to the suit, the Applicant alleged all forms, required at the time of the transfer of operators, were timely and properly filed. The State A commission contacted the Applicant to determine if the Applicant had any right to the equipment on the wells. The Applicant informed State A commission the operator owned the equipment. (Gov Ex 5, Defendants Original Answer)

In August 2000, the final judgment was entered against the Applicant. The State A obtained a judgment for administrative penalties (\$7,500.00), civil penalties (\$20,000.00), the cost of plugging oil wells (\$33,490.23), court costs and attorneys' fees (\$7,000.00), and penalties for failing to file a franchise tax report or pay franchise tax for 1989 and 1993. (Gov Ex 5) Together these amounts total \$67,990.23 with interest at ten percent per annum until paid. The suit stems from oil wells that had been plugged after it was determined the wells had been abandoned or were not being operated and they were likely to leak saltwater, oil, or gas which could cause a serious threat of pollution or injury to public health.

Following the entry of judgment, the Applicant sent a number of letters to the State Attorney General's office trying to settle this matter. (App Ex A) In the letters to the State Attorney General's office the Applicant alleges the cost of plugging the wells should have been offset by the salvage value of equipment at the well sites. This equipment included pipe, wellheads, pump jacks, oil tanks, and other equipment. The Applicant has figured the value of this equipment at \$141,000.00.

Ownership of the wells actually changed ownership in April 1994 and not 1992 as alleged in the Applicant's answer to the State's petition. (App. Ex. A, Tr.33, 34) In a proposal (App Ex B) between the Applicant and the purchaser of the oil wells it was proposed the purchaser would properly treat four wells and put the leases back into State A compliance. The purchaser was to give the Applicant a 10 percent overriding royalty interest on the leases. The proposal is undated, however the Applicant indicates it was faxed in April 1994. The wells have not been under his control since the transfer and he could not have lawfully entered onto the land to correct any environmental problem had one existed.

The Applicant would like to settle this matter with State A, but is not willing to settle at the amount currently being demanded. If he pays the judgment, the Applicant believes all incentive would be lost to get State A to negotiate this debt.

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. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must 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.

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: E2.A6.1.3.

2. It was an isolated incident. (E2.A6.1.3.2.)

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 the 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 Government has satisfied its initial burden of proof under Guideline F, (Financial Considerations). 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 position of risk that is inconsistent with the holding of a security clearance. Under Guideline F, an Applicant 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 credit report lists a February 1997 judgment for a \$2,000.00 overdue credit card debt. Even though a default judgment was entered against the Applicant, he states he has never been contacted by this company about this account, he has lived at the same location for approximately 19 years, and is listed in the local telephone book. More important, the Applicant is in good standing on an account with the same credit card company. The Applicant's credit report reflected 13 other accounts in good standing. There are a number of other individuals living in the same area who have the same or names very similar to his. The Applicant contacted the credit card company and it was unable to locate any account in his name which had been charged-off or on which any money was owed. In February 2001, this item was removed from his credit file. I find the Applicant does not owe this debt and I find for him as to SOR subparagraph 1.a.

State A obtained a judgment of approximately \$68,000.00 against the Applicant. Disqualifying conditions (DC) 1⁽³⁾ and 3⁽⁴⁾ apply. As of August 2000, the Applicant knew State A had obtained the judgment. As of August 2002, the Applicant knew the government was concerned about this debt when he was sent, and he responded to, written financial interrogatories. (Gov. Ex. 2) Since August 2002, the record is silent as to any action taken by the Applicant to pay, negotiate, or resolve this judgment other than his statement that he would like to settle this matter in an amount less than being demanded by State A.

The debt is isolated to a single judgment making Mitigating Conditions (MC) 2⁽⁵⁾ applicable. The Applicant is current on all other obligations and maintains good credit except for the payment of this judgment. Even though MC 2 is found applicable, this does not mandate that a favorable finding must be made. There may be the only judgment, but it is a very sizable--\$68,000.00--debt, even for someone whose assets are as large as those of the Applicant.

None of the other mitigating conditions apply in the Applicant's favor. 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. A systematic, concrete method of handling this judgment is needed, which is not present here. Based on the Applicant's stated assets, he has the ability to pay this debt, but has chosen not to pay in order to force State A to negotiate with him concerning this judgment. He believes if payment is made, State A will lose all incentive to resolve this matter. Almost three years has passed since entry of the judgment and the Applicant has not paid it or reached an agreement with State A.

The conduct is recent (MC 1)⁽⁷⁾ in that the judgment remains unpaid. There is an indication the Applicant has sent letters to the State Attorney General's office concerning the judgment, but the matter remains unresolved. Therefore, MC 4⁽⁸⁾ does not apply. There is no indication the obligation resulted from factors beyond his control. I find MC 3⁽⁹⁾ does not apply. He alleges the wells were sold and all forms were properly filed with the state. However, this argument was raised in his answer to the original suit and found to be insufficient by the court who rendered the judgment against him.

The Applicant has excellent credit except for this single debt. Even when the positive consideration of MC 2 is applied to the Applicant, because there is only one debt, I find the Applicant has failed to present sufficient mitigation to overcome his financial irresponsibility concerning the \$68,000.00 judgment. I find against the Applicant as to SOR subparagraph 1.b.

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.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. In fairness to the Applicant, this decision should not be construed as a determination that the Applicant cannot or will not attain at some future date the reform and rehabilitation necessary to justify the award of a DoD security clearance. Should the \$68,000.00 judgment be resolved, and the Applicant be afforded an opportunity to reapply for a security clearance, he may well demonstrate persuasive evidence of his security worthiness.

FORMAL FINDINGS

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

Paragraph 1. Financial Considerations (Guideline F): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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. Clearance denied.

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. The Applicant was the designated registered agent of the corporation, which was in existence between February 1980 in February 1994.
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. MC 2. It was an isolated incident.
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 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.
9. 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.)