

DATE: August 27, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00602

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

James Katz, Esq.

SYNOPSIS

From 1997-2002, Applicant purposefully decided to pay for his daughter's college education rather than pay his city wage taxes. Although he has made efforts to resolve this debt since receiving the SOR, he still has not completed paying these taxes and admits he would probably do the same thing again if a family emergency arose. Applicant failed to demonstrate it is clearly consistent with the national interest to grant him a clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 6 January 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-Applicant failed to meet the financial considerations (Guideline F) and personal conduct (Guideline E) personnel security guidelines of the Directive. Applicant answered the SOR in writing dated 4 February and 28 March 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 2 May 2003. The case was originally scheduled to be heard on 20 June 2003, but delayed when Applicant sought counsel. On 23 July 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. DOHA received the transcript (Tr.) of the proceeding on 1 August 2003.

The case was left open for Applicant to file additional exhibits. Exhibits S-V were received by mail and admitted without objection from Department Counsel.

FINDINGS OF FACT

Applicant is 50 years old. Ex. 1 at 1. He has been married 28 years and has two daughters: his older daughter was born in 1977; his younger daughter was born in 1986. Tr. 31; *but see* Ex. 1 at 3 (Applicant claimed on his security clearance application (SCA) that his daughters were born in 1972 and 1982). The older daughter has been blind since birth. Tr. 32-

34.

After receiving a technical degree, Applicant became a skilled cabinet maker. Tr. 103. In January 1981, he was diagnosed as having a brain tumor. In August of that year, the tumor was removed. After the operation, Applicant was blind for six weeks and out of work for three years. Tr. 34-35, 103-04. When he was able to return to work, Applicant found employment in the mail room of the company at which his wife was working in State 1. In May 1984, Applicant, his wife, and older daughter moved from State 1 to State 2 so the older daughter could avail herself of better schooling and services for the blind.

Shortly after the birth of his younger daughter in 1986, Applicant was promoted to the cleaning staff. Sometime thereafter, Applicant received a security clearance and has held one ever since. Tr. 105-06. As a result of the promotion, Applicant was required to work the night shift. Because Applicant could not handle the burden of caring for his two daughters while his wife was at work, Applicant's wife found it necessary to leave the work force so she could care for the children. That cut the family's income almost in half. Tr. 40. The resulting financial difficulties forced Applicant and his wife to file for bankruptcy protection in 1993. Tr. 41-42. On 11 March 1994, Applicant's debts were discharged as a result of a Chapter 7 bankruptcy proceeding. Ex. 2. By then, Applicant's wife had returned to work part-time. Tr. 42.

From September 1996-May 1998, Applicant's wife again left the work force so that she could assist her older daughter with college. Apparently, the college did not provide adequate assistance for blind students. For two school years, Applicant's wife went to school full time with her daughter to provide transportation, reading, and note taking assistance. Tr. 43-45.

When Applicant's wife had to leave her job to assist their older daughter at college, Applicant stopped paying his city wage tax. Tr. 73. "I took the wage tax money and put [the older daughter] through college with it." Tr. 115. If he had another family emergency, Applicant would probably do the same thing again. Tr. 123. Since receiving the SOR, Applicant has paid his delinquent city wage taxes from 1999-2002. He still owes the city wage taxes for 1997 and 1998.

Applicant's younger daughter was injured at school and was subsequently treated for the injury. The two resulting medical bills are in dispute. Applicant believes they are covered by his medical insurance and has made efforts to resolve the matter. Tr. 48-49, 62-63.

On 27 December 1999, during his Christmas vacation, Applicant was ordered to go to his company's security office to complete an SCA for the periodic update of his security clearance. Apparently an earlier application he had submitted was lost. Tr. 108. He did not phone his wife for assistance in completing the SCA. Tr. 58-60. Later, when he was interviewed by a Defense Security Service (DSS) agent about his SCA, Applicant was asked to produce a copy of the bankruptcy. He went home and searched for it, but was unable to find it. He advised the DSS agent he was unable to find the bankruptcy materials. Tr. 116.

Applicant still has difficulty processing information. "He has a delay in understanding." Tr. 37. He needs someone with his interests in mind to assist him in completing forms. He has a problem remembering things, especially dates. Tr. 37-38, 110. He has difficulty in understanding written documents and retaining what he has read. When he is under stress, "he just goes blank." Tr. 57.

Applicant's wife helped compose Applicant's answer to the SOR. Tr. 61-62. He did not understand question 38-"In the last 7 years, have you been over 180 days delinquent on any debt(s)?"-to apply to the debts that were discharged in bankruptcy or the city wage taxes he owed. He thought it applied to the main bills-"Like gas bills, electric bills." Tr. 112.

His employer and co-workers find Applicant to be responsible and trustworthy. Tr. 80, 89.

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. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged Applicant had debts discharged in Bankruptcy in 1994 (¶ 1.a.), is indebted to a hospital in the amount of \$924 (¶ 1.b.), is indebted for another hospital account in the amount of \$224 (¶ 1.c.), and admitted having continuing financial difficulties including failing to pay the city wage taxes since 1997 (¶ 1.d.). 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 financial obligations (DC 1) and has been unable or unwilling to satisfy his debts (DC 2). Applicant's debts led to his discharge in bankruptcy in 1994, he failed to pay his city wage taxes from 1997-2002, and he has debts for medical treatments received by his younger daughter.

The debts that led to the 1994 bankruptcy appear, in large part, to have been beyond his control. MC 3. Applicant was out of work for three years after his brain surgery and, once he returned to work, the demands of his two daughters limited his wife's ability to maintain a job to supplement Applicant's income. Finding is for Applicant on ¶ 1.a.

Applicant's debts to the hospital for treatment of his daughter are in dispute. He and his wife are making good faith efforts to resolve these debts by working with the hospital and the medical care insurer. MC 6. Finding is for Applicant on ¶¶ 1.b. and 1.c.

From 1997-2002, Applicant purposefully failed to pay his city wage taxes so he could use the money to pay for his older daughter's college education. DC 2. Although he is now making a good faith effort to pay these taxes, he only started to do so after receiving the SOR. Applicant still has not paid the city wage taxes for 1997 and 1998, and he admits that he would probably do the same thing if another family emergency arose. Applicant's failure to pay his taxes is not just recent history. Applicant was also delinquent in paying municipal/city taxes of over \$10,000 from 1989-93. Ex. 2 at 11 (listed as a priority claim in his 1994 bankruptcy petition). Under the circumstances, his recent efforts to pay the city

wage taxes are not sufficient to fully mitigate security concerns regarding this debt. Applicant has demonstrated that he is willing to forsake his obligations to his government to benefit his family. Finding is against Applicant on ¶ 1.d.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant refused to cooperate with agents conducting his security clearance investigation (¶ 2.a.) and falsified his SCA by answers to questions 38 and 33 on his SCA by denying that, in the past seven years, he had been more than 180 days delinquent on any debts (¶ 2.b.) and had filed for bankruptcy protection (¶ 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 failed to establish that Applicant refused to cooperate with agents conducting his security clearance investigation by failing to provide post-bankruptcy financial records. The only evidence of record on this point is Applicant's testimony that he tried to provide whatever records were requested, but had difficulty finding some of them. Finding is for Applicant on ¶ 2.a.

The Government established by substantial evidence that Applicant failed to correctly answer questions 33 and 38 on his SCA. He claimed that, in the previous seven years, he had no debts delinquent more than 180 days and no bankruptcies. The evidence established that he failed to acknowledge his wage tax delinquencies from 1997-2002 (¶ 2.b.), his bankruptcy (¶ 2.c.), and several delinquent debts that were the subject of the bankruptcy (¶¶ 2.b.(1) - 2.b.(3)) were within seven years of his SCA. A reasonable person could conclude Applicant deliberately omitted, concealed or falsified this relevant material from his SCA. DC 2.

Applicant asserts his omissions were not deliberate. Because of his cognitive difficulties, especially with dates, he did not realize the bankruptcy and debts were within seven years of his completing the SCA. The record evidence (Ex. P and the testimony of Applicant's wife) established his cognitive difficulties. In fact, the SCA confirms Applicant's problems. Applicant noted that his daughters were born in 1972 and 1982, but, Applicant's wife testified to the children's ages and months of birth that, when calculated out, reveal the children were born in 1977 and 1986 respectively. However, this does not excuse his failure to list the delinquent taxes for years 1997-2002. Applicant made a conscious decision to not pay these taxes. I am not convinced he did not know or understand he should have listed the tax delinquencies in his SCA. Therefore, I find against Applicant on ¶ 2.b. I conclude Applicant's omissions were not deliberate with regard to ¶¶ 2.b.(1), 2.b.(2), 2.b.(3).and 2.c.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.b.(1): For Applicant

Subparagraph 2.b.(2): For Applicant

Subparagraph 2.b.(3): For Applicant

Subparagraph 2.c.: For 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.