

DATE: May 24, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01444

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of delinquent debts that arose during his marriage and he has been unwilling to address on the advice of his attorney pending the outcome of his pending divorce. Without any material repayment efforts or concrete plan for addressing his debts in the future he is unable to mitigate security risks associated with his continuing debt delinquency problems. Compounding his debt difficulties, Applicant falsified his security clearance application (SF-86) by omitting his two 1993 bad check writing charges, which ultimately were not prosecuted. Applicant mitigated allegations associated with the underlying criminal implications of his check writing offenses. Clearance is denied.

STATEMENT OF CASE

On July 18, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 20, 2003, and requested a hearing. The case was assigned to me on January 20, 2004, and was scheduled for hearing on February 18, 2004, and rescheduled for hearing on February 19, 2004. A hearing was convened as rescheduled for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of 11 exhibits; Applicant relied on one witness (himself) and five exhibits. The transcript (R.T.) of the proceedings was received on March 10, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been (a) arrested and charged in May 1989 with passing worthless

checks, to which he pleaded no contest and was sentenced to make restitution, pay a fine and serve 15 days in jail, (b) arraigned and charged in May 1993 with passing worthless checks (*nolle prossed* in June 1993) and (c) arraigned and charged with two counts of passing worthless checks in July 1993 (*nolle prossed* in March 1994).

Under Guideline F, Applicant is alleged to have been accumulated delinquent debts: 27 in all totaling in excess of \$13,000.00.

Under Guideline E, Applicant is alleged to have falsified his SF-86 of December 1998 by failing to disclose his criminal arrests and charges and the unsatisfied September 1998 judgment taken against him (covered in subparagraph 2.b).

For his response to the SOR, Applicant admitted all of the allegations against him except the allegations that he falsified his SF-86. In explanation, he claimed he misread the SF-86 instructions regarding offenses that did not result in fines exceeding \$150.00 (re: subparagraph 3.a). And he claimed he did list the September 1998 judgment under a different name than the one listed as the judgment-garnishment creditor of March 1999.

FINDINGS OF FACT

Applicant is a 33-year-old electronic technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant and spouse (W) first began to experience financial problems in 1989, when W was between jobs and they did not manage their money very carefully. Between 1989 and 1993, Applicant wrote three bad checks. He was arrested for the first bad check in May 1989 and charged with passing worthless checks. After pleading no contest to the charges, he was sentenced to make restitution, serve 15 days in jail, and pay a fine. Applicant complied with all of the court's conditions, including his making restitution, but never actually served any time in jail (*see ex. A; R.T., at 47*). Applicant was twice arraigned on worthless check charges in 1993. On the first charge (in May 1993), the charges were *nolle prossed* upon Applicant's showing he paid the check before the summons issued. Applicant was arraigned on a second worthless check charge in June 1993 after being picked up and taken up to jail. However, he paid the check before any summons issued. As a result, this charge was *nolle prossed* as well. Applicant attributes his bouncing checks to poor bookkeeping, and not to any knowing and wilful issuing of bad checks (R.T., at 68). Because of his no contest plea and sentencing on the 1989 charges, his explanations are insufficient to avert findings of knowing and wilful issuance of a bad check as to the 1989 charge. As to his ensuing 1993 charges that were each *nolle prossed* upon proof of voluntary payment, his explanations of unintended issuance of checks without sufficient funds to cover them are accepted.

W experienced a series of work-related injuries between 1994 and 1997. She was able to return to work without treatment following the first three of her injuries, but could not after suffering a more serious back injury in October 1997. After suffering this last injury, she was hospitalized and has been unable to return to work. Her medical treatment for her last injury has been considerable. In the beginning, W's medical bills were covered by her employer's insurance company. This changed in 1998, however, following a change in management with her employer. Thereafter, her insurance was canceled without any family notification. Her struggles to obtain appropriate workmen compensation involved the workmen compensation board, her employer and her insurance company, and was not resolved until 1999 when W settled with her insurance company. With the settlement proceeds W received, she bought a home, instead of paying off any of her joint and several debts.

Between 1998 and 2002, Applicant and W accumulated consumer and medical-related debts. All told, Applicant and W amassed over \$13,000.00 in delinquent debts, most of which he has not paid despite evidenced ability to do so in his September 1999 personal financial statement (*see ex. 2*). Past Applicant attempts in June 1999 to enlist the assistance of consumer credit counseling (CCC) to pay his old debts through debt consolidation were not successful for lack of sufficient funds to cover the estimated monthly payment to CCC (R.T., at 52-53). Applicant and W considered but elected not to pursue bankruptcy.

Before receiving the SOR, Applicant documents his satisfying some of his listed debts. He satisfied the \$389.00 civil judgment taken against him by creditor 2.a by a check for \$454.11 in September 2000 (*see ex. B*). The home in which he was renting at the time was foreclosed on judicially in July 1997 by the lender. In the foreclosure judgment taken by

the lender, Applicant and W are listed as defendants. Applicant had no interest in the home and does not know why he was named as a defendant (R.T., at 49-50). While the judgment taken reserved the right of the lender to obtain a deficiency judgment for any balance due after the foreclosure sale of the subject property, there is no indication in the record that the creditor ever incurred a deficiency or sought monetary relief for one from Applicant or anyone else. Nor does the judgment indicate what interest Applicant and his spouse had in the property other than their named tenant status. Based on the produced judgment and Applicant's own explanations of his circumstances at the time, Applicant is excused of any responsibility for the foreclosure.

As for the balance of Applicant's debts, Applicant (on his lawyer's advice) has made no arrangements to satisfy any of them pending dissolution of his marriage to W. Applicant had separated from W in February 2003 and started divorce proceedings against her in March 2003 (R.T., at 58-59). He expects the court to allocated the couple's debts equally but has yet to receive any definitive advice from his divorce lawyer on how to allocate his debts. Uncertain as to how the court might divide his joint and several debts and fearful any payments now without court allocation might prejudice him in allocating in some or all of the debts to W, he has deferred them pending a final decision from the court hearing his divorce petition (*see ex. C*). Should the court unexpectedly allocate all of the debts in issue to him (instead of W), Applicant assures he would probably file for bankruptcy. Only if the allocated debts do not exceed \$6,500.00 would he be able to borrow from the federal credit union to cover the debts (R.T., at 66-67).

Asked to complete an SF-86 in December 1998, Applicant omitted his 1989 and 1993 charges arising out his three bad check writing incidents when answering question 23f. Applicant attributes his omissions of his arrests to a mistaken reading of the question. Alternately claiming in his DSS statement that he was never physically arrested on any of his check writing incidents, and that he was picked up and taken to the county jail following his June 1993 incident, he changed his rationale in his answer to believing listing of the incidents was excused because they did not involve fines exceeding \$150.00. At hearing, he returned to his original rationale cited to in his DSS statement: that he did not believe he had been arrested in connection with any of the three bad check writing incidents because no summons issued before the charges were dropped (R.T., at 36-37). As to the question's coverage of charges, he claims he simply missed it. Because Applicant's 1989 offense fell outside the established 7-year time period, no inferences need be drawn as to intentions for omitting this offense. However, his 1993 offenses are clearly within the covered 7-year period. Considered collectively, Applicant's misreading explanations as to these two 1993 incidents are too inconsistent to be accepted as good faith mistakes. Because question 23f is so clear in its coverage of arrests and charges, avoidance of falsification inferences requires very convincing explanations as to how the writer could have mistaken the question. Applicant by his conflicting statements does not provide convincing explanations for his omission of his two 1993 offenses. As a result, he cannot avert inferences his omissions were knowing and wilful.

Besides his three check writing offenses, Applicant also omitted a judgment of garnishment taken against him in September 1998 by creditor 2.b when answering question 27b. Applicant claims he listed the judgment under the name of the collection agent handling the case when answering the question. His answer to 27d does include a yes and references a judgment taken about the same time (*i.e.*, in September 1998) by another firm. His ensuing garnishment did not attach until July 1999 (some eight months after completing his SF-86) and would not be covered, as such, by question 27b. No inferences of knowing and wilful falsification may be drawn against Applicant as to his omission of any judgment of garnishment under question 27b.

When interviewed by Agent A of DSS in September 1999 (some 10 months after completing his SF-86), Applicant acknowledged his 1989 and 1993 check writing incidents (*see ex. 2*). Whether he corrected his omissions before being confronted with the court records covering the respective incidents is unclear. Nothing covered in Applicant's signed, sworn statement or his testimony persuades his corrections were voluntary or timely.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the

relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

Financial Considerations

The Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

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).

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

Personal Conduct

The Concern: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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 clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating conditions:

DC 2 The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

DC 3 The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with a history of check writing offenses (three in all), financial problems stemming from past judgments and delinquent debts and security significant omissions in his SF-86 of his past check writing offenses. Applicant's actions raise security concerns about his judgment, reliability and trustworthiness.

Applicant's check writing offenses

Over the course of a five-year period when his finances were tight, Applicant wrote a series of checks without sufficient funds to cover them (first in 1989 and twice again in May and June of 1993). He was charged with passing a worthless check in each instance. Except for his 1989 offense, for which he pleaded no contest and was sentenced to make restitution and serve 15 days in jail, in addition to being fined, charges against him were *nolle prossed* as to the offenses he was charged with in 1993 on proof he had reissued good checks to the merchants affected.

Together, Applicant's acknowledged bad checks (the first accompanied by imputed knowledge and wilfulness) create enough of a potentially material pattern of misdemeanor criminal offenses to raise initial security concerns about his overall judgment and honesty. Applicant's actions are covered by two disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: specifically, DC 1 (allegations or admission of criminal conduct) and DC 2 (single serious or multiple lesser offenses).

For the repeated judgment lapses Applicant exhibited in issuing bad checks without properly tracking his available funds he has expressed considerable remorse and commitments to avert such mistakes in the future. To date, he has consistently avoided any repeat judgment lapses of this nature and may invoke one mitigating condition (MC) of the Adjudicative Guidelines for criminal conduct: MC 1 (the criminal behavior was not recent).

Except for the single offense of determined misdemeanor criminal passing of a worthless check, Applicant's check writing actions reflect mistaken judgment, but not criminal behavior. His 1993 offenses, while pertinent to ascertaining

any criminal invest involved irrespective of the absence of any charges brought, were never determined to be criminally motivated and are for purposes of the criminal conduct guidelines considered unproven offenses.

Able to claim over ten years without any recurrent bad check writing or other criminal offenses attributed to him, Applicant successfully overcomes adverse security concerns attributable to his past criminally based actions associated with his 1989 worthless less findings and judgment questions surrounding his *nolle prossed* 1993 bad check charges. Favorable conclusions warrant with respect to the allegations covered by Guideline J.

Applicant's accumulated debts

Applicant accrued considerable debts during his marriage to his former spouse (W). Since filing for divorce, he has been advised by his attorney to defer paying on his debts until after expected allocations from the court hearing his divorce case. Depending on what the court decides, he may or may not be positioned to address his outstanding debts. Should W be held accountable for the debts (as Applicant thinks will be the case), he would look to her to pay them, while still remaining jointly and severally liable to the creditors for them.

At the present, Applicant remains obligated, jointly and severally, on his old debts which exceed \$13,000.00 in the aggregate. While Applicant remains interested in addressing these debts once the divorce court determines who is responsible for them, he provides no documented plan for repaying the creditors should his wife fail to do so at some undefined future date. On the strength of the evidence presented, Government may invoke two Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Over time, our Appeal Board has shown general consistency in discounting promises to take repayment actions in the future when circumstances change or resources become available. *Cf.* ISCR Case No. 99-0012 (December 1, 1999); ISCR Case No. 98-0188 (April 29, 1999). Put another way, the assumed possibility an applicant might achieve resolution of his outstanding debts at some future date is not a substitute for a worthy track record of remedial actions, or evidence of financial reform or rehabilitation in the present. *Cf.* ISCR Case No. 98-0614 (July 12, 1999). Security clearance decisions are, of course, never an exact science, but rather involve predictive judgments about a person's security eligibility based on the person's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Without any meaningful documentation of repayment efforts or definitive plan to address his major debts with his current resources, Applicant lacks the mitigation necessary to absolve him of the judgment risks associated with being significantly in debt.

So, while Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Guidelines for finances to extenuate some of his debt delinquencies, he may not invoke the mitigating provisions of MC 6 (initiated good-faith effort to repay overdue creditors), absent more concerted efforts to address his old creditors to date. Unfavorable conclusions warrant, accordingly, with respect to subparagraphs 2.b and 2.d through 2.aa under Guideline F. By contrast, favorable conclusions warrant with respect to subparagraph 2.a (paid) and subparagraph 2.c (no interest in the property foreclosed upon by creditor 2.c).

Falsification Issues

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's 1993 arrest/charge omissions in his December 1998 SF-86. By intentionally concealing each of these incidents when answering question 23f pertaining to his arrests, charges, or conviction, he falsified his SF-86 within the meaning of Guideline E of the Adjudicative Guidelines for personal conduct. Applicant's omissions, as such, were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of one of the Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is difficult to credit Applicant with, since he failed to correct his 1993 arrest/charge omissions in his SF-86 before he was interviewed by a DSS agent over nine months later. Not only has our Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability

of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to correct his omissions earlier in a manifestly unprompted way. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant in the present case not only falsified his SF-86, but failed to correct his omissions in a timely and manifestly good-faith manner (free of confrontation).

Applicant is credited with listing his 1998 judgment in the same 1998 SF-86 when answering question 27b's inquiry about judgment of garnishment. Not only did Applicant list the judgment taken against him in September 1998 (although under another name) when answering question 27d, but the writ of garnishment that issued subsequent to the entry of judgment was not recorded until July 1999 (some seven months after Applicant completed his SF-86). Hence, the allegations covered by subparagraph 3.b of the SOR are concluded to be unsubstantiated. Favorable conclusions warrant, accordingly, with respect to subparagraph 3.b of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: AGAINST APPLICANT

Sub-para. 2.f: AGAINST APPLICANT

Sub-para. 2.g: AGAINST APPLICANT

Sub-para. 2.h: AGAINST APPLICANT

Sub-para. 2.i: AGAINST APPLICANT

Sub-para. 2.j: AGAINST APPLICANT

Sub-para. 2.k: AGAINST APPLICANT

Sub-para. 2.l: AGAINST APPLICANT

Sub-para. 2.m: AGAINST APPLICANT

Sub-para. 2.n: AGAINST APPLICANT

Sub-para. 2.o: AGAINST APPLICANT

Sub-para. 2.p: AGAINST APPLICANT

Sub-para. 2.q: AGAINST APPLICANT

Sub-para. 2.r: AGAINST APPLICANT

Sub-para. 2.s : AGAINST APPLICANT

Sub-para. 2.t: AGAINST APPLICANT

Sub-para. 2.u: AGAINST APPLICANT

Sub-para. 2.v: AGAINST APPLICANT

Sub-para. 2.w: AGAINST APPLICANT

Sub-para. 2.x: AGAINST APPLICANT

Sub-para. 2.y: AGAINST APPLICANT

Sub-para. 2.z: AGAINST APPLICANT

Sub-para. 2.aa: AGAINST APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.b: FOR 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge