

DATE: February 6, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05665

REMAND DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

When the Applicant completed her SF 86 she falsified her answer to question 39. The question asked if she was more than 90 days delinquent on any debt. She answered "No" even though she had three debts that were more than 90 days delinquent. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from the falsification. Clearance is denied.

STATEMENT OF THE CASE

On April 1, 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 [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. A Notice of Hearing was issued on July 24, 2002, scheduling the hearing which was held on August 8, 2002. On December 16, 2002, a decision was made, which the Applicant chose to appeal. On May 7, 2003, the Appeal Board issued a Decision and Remand Order.

The SOR alleged in SOR subparagraph 2.a. that the Applicant had falsified material facts on her Security Clearance Applicant, Standard Form (SF) 86, dated November 24, 1999. The Applicant answered "no" to question 39, which asked the Applicant if she was currently over 90 days delinquent on any debt? The SOR did not list specific debts the Applicant had concealed or tried to conceal from the government, but instead stated the Applicant "had been more than 90 days delinquent on several debts that" she later included in her November 20, 2000 Chapter 7 bankruptcy.

The Appeal Board found SOR subparagraph 2.a. lacked specificity and remanded the case with the following instructions:

(1) The Administrative Judge shall permit the parties reasonable opportunity to supplement the record evidence with respect to SOR subparagraph 2.a., to include the right of either party to ask for a supplemental hearing.

(2) The Administrative Judge had discretion to allow either party to move to amend SOR subparagraph 2.a. to reflect the record evidence or for other good cause.

(3) After allowing sufficient time to supplement the record evidence to issue a new decision consistent with the provisions of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.35.

On August 1, 2003, an order was sent to the Applicant and to Department Counsel (DC) which provided each party 30 days, until the close of business on September 2, 2003, to supplement the record. Each party was provided an additional 10 days to respond to opposing party's supplemental material. The order specifically stated that either party could request a supplemental hearing and could move to amend SOR subparagraph 2.a.

A copy of the order was mailed to the Applicant along with the SOR and a copy of the Appeal Board Decision and Remand Order. A copy of the Appeal Board Decision and Remand Order was not provided with the order to DC. Neither party responded by the Order's deadline.

On October 27, 2003, the DC made a Post Hearing Filing of Department Counsel Regarding the Remand Order. DC moved to amend the SOR to conform to the evidence. Specifically adding the following to the SOR at the end of SOR subparagraph 2.a.:

above, and willfully sought to conceal those delinquent debts to include:

(1) Each of the delinquent debts listed on Schedule F of that Bankruptcy filing, as incurred in the years 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, delinquent over 90 days and still unpaid on November 24, 1999, for which she later sought to have discharged from liability as set forth in subparagraph 1.c., above.

(2) Each of the delinquent debts listed on Schedule F of that Bankruptcy filing as incurred in the months of January, February, March, April, May, June, July, in August 1999 delinquent over 90 days is still unpaid and November 24, 1999, for which she later sought to have discharged from liability as set forth in subparagraph 1.c., above.

DC also moved to amend the SOR to allege the Applicant falsified material facts in regard to question 38., which asked her about financial delinquencies of more than 180 days. In her SF 86 response to the question, the Applicant had listed a single debt. DC alleges Applicant failed to list those debts incurred between 1990 and 1998 and those debts incurred between January and August 1999, which were listed on Schedule F of her bankruptcy filing as over 90 days delinquent and unpaid as of November 24, 1999. The motion to amend the SOR was granted.

FINDINGS OF FACT

On November 24, 1999, the Applicant completed her Security Clearance Application, SF 86. She answered "no" to question 39, which asked if she was currently over 90 days delinquent on any debt? On November 20, 2000, the Applicant filed for Chapter 7 bankruptcy protection listing assets of approximately \$5,000.00 and liabilities of \$99,000.00 of which all but \$3,000.00 was owed to creditors holding unsecured nonpriority claims.

In her May 2001 sworn statement (Gov Ex 2) the Applicant states, ". . . the only reason I can give for the information listed here not being on the form is one of oversight and not concealment. I was in a hurry to get my form done." The Applicant, in her answer to the SOR, denied the falsification allegation stating she was not delinquent on any debts. It was only after applying for a loan she discovered some of her prior debts, which she thought had been resolved, were in fact unresolved. At the hearing, the Applicant stated that as of November 1999--the date she completed her SF 86--she was current on her rent, car payment, and electrical bill. However, she did not have all of her forms or creditor information with her when she completed her SF 86 and did not make any effort to determine if she had old, unpaid bills. (Tr. 80)

The Applicant's credit reports lists four accounts which were 90 days or more delinquent. These accounts were: Fidelity, Providian, AAFES, and First Premier. It is not possible from the credit reports to determine these accounts were delinquent on November 24, 1999, the date the Applicant completed her SF 86. The credit reports only indicate how many times these accounts were 90 days or more delinquent, not when the delinquencies occurred. Additionally, three

of the accounts are not listed on the Applicant's Schedule F, Creditors Holding Unsecured Nonpriority Claims. The Schedule F does reflect a bank debt of \$125.00 incurred November 15, 2000, which was after the SF 86 was completed. The credit reports, however, indicate the account was opened in May 1999 and the last activity on the account occurred in July 1999.

The Applicant's Chapter 7 Bankruptcy Schedule F lists 93 claims or debts. The date each claim was incurred is listed as well as the amount of the claim. The "date claim was incurred" may be the date the Applicant initially opened an account with the creditor or it may be the actual date the debt was made. The Applicant's credit reports list three debts that were later included in the Schedule F. The Applicant's credit reports list a \$194.00 Deutsche Telekom debt and reflects the last date of activity as March 1998. This account was incurred when the Applicant was on active duty in the military stationed in Germany. The same debt is listed on Schedule F which indicates a \$300.00 debt incurred in August 1996. October 1997, is the last date of activity on the Applicant's \$240.00 edia One cable service bill. This debt is listed in the Schedule F as \$400.00 debt incurred in April 1997. August 1997, was the last date of activity on the Applicant's \$1,778.00 Fresh Start Credit debt, which Schedule F lists as a "Consumer Credit/Judgments" incurred in January 1995.

The Applicant owed money on these three accounts at the time she completed her SF 86. The last activity on these accounts, prior to them being listing in her bankruptcy, occurred in 1997 and March 1998.

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

Personal Conduct (Guideline E) The Concern: 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (E2.A5.1.1.)

Conditions that could raise a security concern and may be disqualifying also include:

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 clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None apply.

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.* 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 disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. 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, the applicant then has the burden of establishing her 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 her 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*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The sole issue is whether Applicant's omission of her debts that were more than 90 days delinquent and 180 days delinquent from her security clearance application was a deliberate falsification or a good faith, inadvertent or careless omission. Merely being in debt is not the deciding factor.

The Applicant's Schedule F lists numerous debts, many of which were incurred prior to the time Applicant completed her SF 86, which occurred on November 24, 1999. The mere fact the debts had been incurred prior to November 1999 does not establish they were 90 days or more overdue when the SF 86 was completed. The Applicant's credit reports established she was 90 days or more delinquent on at least five accounts, however, this does not establish the Applicant falsified her SF 86. The credit reports fails to establish when the delinquencies occurred. Even if the record established the Applicant was repeatedly delinquent on numerous accounts, this would not establish she was delinquent on the date she completed her SF 86.

It must be established the Applicant was 90 days delinquent on November 24, 1999. The Applicant has stated she was current on the bills she was currently paying, which included her rent, car, and utilities. However she had numerous other overdue accounts which were not foremost in her mind because the creditors on those accounts were no longer actively seeking repayment. It was only when she made a loan application did some of these creditors again seek to have her pay her overdue debts to them.

There are three debts which were more than 90 days delinquent in November 1999 that should have been listed on her SF 86. The Deutsche Telekom debt was established when the Applicant was stationed in Germany. She indicates on her Schedule F that the bill was incurred in 1996. The Applicant's credit reports establish the last date of activity on the account was in March 1998. She owed \$194.00 on this debt, and had not made a payment during the previous 20 months, she was therefore more than 90 days delinquent when she completed her SF 86. She should have listed this debt in response to question 39, which asked the Applicant if she was currently over 90 days delinquent on any debt?

The Applicant owed \$240.00 on her cable service. The last date of activity on the cable service bill was October 1997. She owed this debt, and had not made a payment during the previous 13 months. Therefore, she was more than 90 days

delinquent when she completed her SF 86. This debt should have been listed in response to question 39.

The Applicant incurred a \$1,778.00 Fresh Start Credit debt. She lists this debt on her Schedule F lists as a "Consumer Credit/Judgments" incurred in January 1995. The last date of activity on this debt, before she completed her SF 86, was August 1997. She owed this debt, and had not made a payment during the previous 27 months. She was therefore more than 90 days delinquent when she completed her SF 86 and should have listed this debt in response to question 39.

The Applicant falsified her SF 86. I do not accept the Applicant's explanation for these omissions. I find against the Applicant as to SOR subparagraph 2.a. (1).

As to those debts listed on Schedule F that were incurred during 1999 between January and August, the record fails to establish they were 90 days delinquent on November 24, 1999. The credit reports and Schedule F establish the debts existed prior to the Applicant completing her SF 86, but the delinquencies of those debts, as of that date, have not been established. I find for the Applicant as to SOR subparagraph 2.a. (2).

Subparagraph 2.b. alleges the Applicant was "180 days delinquent," but lists the period of delinquency in subparagraph 2.b.(1) and 2.b.(2) as "delinquent over 90 days." Even though it has been established the Applicant was 90 days or more delinquent on three debts, this 90-day delinquency does not establish a 180 delinquency. Because of the disconnect in the time periods listed in SOR subparagraph 2.b., I find for the Applicant as to SOR subparagraph 2.b.(1) and 2.b.(2).

FORMAL FINDINGS

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

Paragraph 2 Personal Conduct (Guideline AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.a.(1): Against the Applicant

Subparagraph 2.a.(2): For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.b.(1): For the Applicant

Subparagraph 2.b.(2) For 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 is 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.