

DATE: June 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05871

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Pamela Benson, Esq., Department Counsel

Lynette Andresen, Esq. Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-one-year-old network engineer had history of financial difficulties. He failed to pay his debts, including his federal and state income taxes. He also failed to file federal and state tax returns and falsified his security clearance application by failing to list all of the liens that had been filed against him. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 6 January 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the financial considerations (Guideline F), criminal conduct (Guideline J) and personal conduct (Guideline E) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 18 February 2003. The case was assigned to me on 10 March 2003. On 12 March 2003, a Notice of Hearing was issued scheduling this case for 3 April 2003. On 27 March 2003, the Government moved to amend the SOR. On 3 April 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. I granted the Government's motion to amend. As the Applicant had not had 15 days to prepare for the matters contained in the amended SOR, I granted his request for a continuance until 1 May 2003. The Government's case consisted of seven exhibits. Applicant testified on his own behalf and submitted 11 exhibits. DOHA received the transcript (Tr.) of the proceeding on 9 May 2003.

FINDINGS OF FACT

Applicant is a 51-year-old network engineer with a master's degree in computer information systems. Ex. 1 at 1; Tr.24. He is married and has four children. Ex. 1 at 3; Tr. 25.

Question 36 of the security clearance application (SCA) Applicant signed and submitted on 19 October 2000 asked if "[i]n the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" Applicant answered, "Yes," and listed a \$600 lien from the court of common pleas. There is no evidence that a \$600 lien was recorded against Applicant in the past seven years. The evidence established the following liens against Applicant in the seven years before he completed the SCA:

(1) On 16 January 1990 a lien was entered on a judgment in the amount of \$1,125 for unpaid taxes recorded in a judgment on 23 June 1989. Applicant satisfied the judgment and the lien was released on 2 April 2001 (as alleged in SOR ¶ 1.f.). Ex. G at 1

(2) On 27 June 1995, a lien was entered on a judgment in the amount of \$4,584.83 for unpaid taxes recorded in a judgment on 10 August 1994 (as alleged in SOR ¶ 1.g.). Applicant satisfied the judgment and the lien was released on 30 August 1999. Ex. 5 at 3; Ex. I.

(3) In June 1994, a lien was entered on a judgment for the state Department of Taxation on 9 June 1993 for approximately \$2,165 (as alleged in SOR ¶ 1.h.). Ex. G at 4. Applicant paid the judgment on 9 July 1996. Ex. 5 at 2.

(4) On 26 October 1994, a lien was entered on a judgment in the amount of \$99.69 for unpaid taxes recorded in a judgment on 29 March 1994 (as alleged in ¶ 1.i.). Ex. I at 2. Applicant paid the judgment on 28 October 1994. Ex. 5 at 5.

In addition, Applicant has other unpaid debts:

(1) Debt of \$109 from 1997 written off by a cellular telephone company-Applicant subsequently paid off this debt on 23 March 2003. Ex. 3 at 4; Ex. C at 1.

(2) Traffic ticket of \$50 from 1997 referred for collection-Applicant subsequently paid off this debt on 23 March 2003. Ex. 3 at 6-7; Ex. C at 1.

(3) Delinquent account with communications company from 1996 for approximately \$68 referred for collection-Applicant paid off this debt on 23 March 2003. Ex. 3 at 7; Ex. C at 1.

(4) Delinquent account with hospital #1 for \$50 referred for collection-Applicant paid this debt on 23 March 2003. Ex. C at 1.

(5) Delinquent account with hospital #2 for \$117 referred for collection. Answer. It was paid on 30 April 2003. Ex. F.

(6) Applicant failed to file his federal income taxes for tax years 1994, 1995, 2000, and 2001. He has not satisfied delinquencies of \$2,195. Tr. 39; Answer at 1. He did not timely file his federal tax returns, or a request for an extension, for tax year 2002. Tr. 39-40

(7) Applicant failed to file his 1998 state income tax return. He is indebted to state for \$5,888.39 for unpaid taxes, penalties, and interest. Ex. 5 at 6; Tr. 37-38; Ex. D.

(8) Applicant failed to file his 1999 state income tax return. He is indebted to state for \$6,373.09 for unpaid taxes, penalties, and interest. Tr. 38; Ex. 5 at 7; Ex. D.

Applicant also failed to file state tax returns for tax years 1990-91 and 1998-2001. Ex. 5.

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 Secretary of Defense have established for issuing a clearance.

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*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR as amended, DOHA alleged under Guideline F that Applicant had a history of financial difficulties. Specifically, he had a number of debts he had not satisfied (¶¶ 1.a.-1.f); three state tax liens that had been satisfied (¶¶ 1.g.-1.h); an outstanding debt for federal taxes to the IRS; that the combined income of Applicant and his wife is sufficient to pay off his debts (¶ 1.k); and three debts to the state for unpaid taxes (¶¶ 1.1-1.n). Under Guideline F, an individual 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 his financial obligations (DC 1) and has been unable or unwilling to satisfy these debts (DC 3). Applicant contended that his financial difficulties stemmed from a business failure in 1988, and thus, were beyond his control. MC 3. But Applicant admits making choices on which bills he would pay and which he would not, and that paying for the college education of his four children was more important than paying his debts. Tr. 15. Therefore, neither MC 3 or any other mitigating condition applies. Finding is against Applicant except for subparagraphs 1.k. and 1.l. The fact that Appellant was, at times, able to pay his debts (SOR ¶ 1.k.) is relevant and material evidence of his security suitability, however, it is not a disqualifying condition. The record contains no evidence relevant to the allegation in SOR ¶ 1.1.

Guideline J-Criminal Conduct

In the SOR as amended, DOHA alleged under Guideline J that Applicant willfully failed to file federal tax returns for 1994, 1995, and 2000 (¶ 2.a.); and failed to file state income tax returns for 1990-91 and 1998-2001 (¶¶ 2.b.-2.g.). Under Guideline J, a history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

Any person who is required to do so and willfully fails to file a federal tax return is guilty of a misdemeanor. 26 U.S.C. § 7203. Appellant asserted that he thought he was going to receive a refund and that he thought he did not have to file a return under those circumstances. Tr. 17. After carefully listening to Applicant and observing his demeanor, I find his statements to be incredible. In fact, he owed the IRS money. Furthermore, without filing a return, how would the IRS know whether they owed him a refund? Applicant committed multiple misdemeanors. DC 2. None of the mitigating conditions listed under this guideline apply. Finding is against Applicant on SOR ¶ 2.a.

It is a felony to knowingly fail to file a state income tax return. *See Ex. 7* at 1-2. I am convinced Applicant knew of his duty to file, but did not do so because it was inconvenient and to do so would notify the tax authorities that he owed them money. The Government established that Applicant knowingly failed to file state income tax return for tax years 1990-91 and 1998-2001. Applicant committed multiple serious offenses. DC 2. None of the mitigating conditions apply. Finding is against Applicant.

Guideline E-Personal Conduct

In the SOR as amended, DOHA alleged under Guideline E that Applicant falsified his security clearance application by listing only one of the liens that had been levied against him in the previous seven years. 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 deliberate omission, concealment, or falsification of relevant and material facts from a security clearance application is conduct that raises a security concern. DC 1. Applicant claims he did not deliberately omit any information from his SCA. I am convinced Applicant knew of these liens. DC 1 applies. None of the mitigating conditions listed under this Guideline apply.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Paragraph 3: Guideline E: AGAINST APPLICANT

Subparagraph 3.a. Against 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.