

DATE: March 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09179

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

George E. Day, Esq.

SYNOPSIS

Applicant's financial problems, to include Ch. 7 bankruptcy followed by more overdue debts, is mitigated by evidence of renewed and successful effort to pay or reduce his obligations. Also mitigating is condition of personal hardship caused by supporting a large family on a limited income. Single instance of alcohol-related misdemeanor offense is mitigated by three years' sobriety and law-abiding behavior. Clearance is granted.

STATEMENT OF THE CASE

On July 9, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

The Applicant responded to the SOR in a written answer dated August 2, 2002, in which he requested a hearing. The case was assigned to me on October 24, 2002. On November 4, 2002, a Notice of Hearing was issued scheduling the hearing on November 21, 2002. At the hearing the Government submitted six documentary exhibits (Gov. Exs. 1-6). Applicant testified, and he submitted eight documentary exhibits (App. Exs. A-I). The transcript was received by DOHA on November 27, 2002.

FINDINGS OF FACT

The Applicant is fifty-two years old, and he is employed by a defense contractor as a technology specialist. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraphs 1 and 2 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline F - Financial Considerations). The Government alleges in this paragraph that Applicant is ineligible for clearance because of recurring financial problems causing doubt as to his personal reliability in serious matters, including his security responsibilities.

After completing high school, Applicant enlisted in the US Army in 1969, and he was trained in the field of avionics. He was assigned to a combat division in Vietnam where he maintained communications equipment and sometimes performed as a door gunner on a helicopter. He completed his Army service in 1972, and he was honorably discharged in the rank of sergeant.

After leaving active duty, Applicant held a series of jobs during the next 15-20 years, in addition to attending college. He gained some experience in computer technology, but after being laid off he became a firefighter for several years, until the death of his first wife. (Tr. 34.) Subsequently, he entered law enforcement for two years and then managed a computer store for over four years. Later he became a security guard while he attended college. In 1988 Applicant married a woman who had two children, and another child was born to the couple in 1989. With Applicant's two children from his first marriage, the couple had five children.

In addition to the demands of motherhood, Applicant's wife experienced health problems preventing her from continuing full-time employment. Applicant's income as a security guard was combined with funds he received from a student loan, but these amounts were not sufficient to pay growing bills which arose out of supporting a large family on a small income.

In 1992, Applicant surveyed his financial situation and realized he could not pay all of his bills with his then-current income. At the hearing, Applicant testified his wife could not work and "[W]hat I was bringing home with four children and then one on the way was just not sufficient to survive [. . .]" (Tr. 41.)

Furthermore, Applicant was unable to continue college any longer, and his student loan became due and payable after he left school to find a full-time job. After penalties and interest were added the loan escalated to approximately \$31,000. Applicant could not pay all his bills, and in 1992 he and his wife declared bankruptcy. Thinking he would reduce the adverse impact to his credit rating, Applicant reaffirmed his home mortgage, his car loan, and a debt to a department store. As it turned out, this was not a prudent decision because the reaffirmed debts left Applicant in a marginal position financially, and he continued to have more difficulty paying his debts.

In about 1995, Applicant and his wife decided to move to another state so the wife could be near her father, a retired military officer and real estate investor who expressed an interest in helping his daughter and her family. Applicant tried to sell his house, but he could not find a buyer. He rented the residence, but the renters later defaulted and left the house unsecured when they moved out. The house was vandalized, causing heavy damage, and Applicant could not afford necessary repairs. Applicant defaulted on the mortgage, and the loan was foreclosed, leaving Applicant with a deficiency balance of approximately \$8,800. Applicant continued to pay down his student loan, primarily through wage garnishments and confiscation of his tax returns. However, by 2001, Applicant owed about \$30,000 on his student loan, and his payments were in arrears.

After his move to a new state, Applicant secured suitable full-time employment, but it was not enough pay off his debts. Applicant incurred no new debts, but his existing indebtedness continued for several years without being resolved. When the Government's SOR was issued on July 9, 2002, Applicant's debts were described as follows:

No. 1: VA foreclosure, deficit balance. \$8,800 owed, minus diverted tax refund.

No. 2: Student Loan. \$30,000 owed. Payments overdue.

No. 3: Department store. \$1,125. Charged off as bad debt in 1999.

In addition to these overdue debts, Applicant's Personal Financial Statement of November 7, 2001 (Gov. Ex. 2.), indicated his monthly expenses were equal to his monthly income without payment on the above debts. Therefore, Applicant could pay his current expenses, but his overdue debts would not be paid or reduced. However, in his written

answer to the SOR and in his testimony, Applicant persuasively explained he has taken measures to increase his take-home pay and resolve his debts.

To assist in resolving these problems, Applicant's sister and his father-in-law provided significant financial assistance to Applicant and his wife. Applicant's sister gave him the sum of \$10,000 (App. Ex. C.), and his father-in-law agreed to permit Applicant's family to live in a rental property at no cost, until Applicant's finances are brought under control (App. Ex. B). Upon careful examination of supporting documents provided by the donors, I find their financial assistance is an irrevocable and bona fide gift. The file contains no evidence indicating the assistance is either a loan or contingent upon a quid pro quo.

With this infusion of capital, Applicant's financial situation has improved markedly. He presents documentary evidence to support a finding that his debts described above have been reduced or eliminated, as follows:

No. 1: VA deficiency balance of \$7,645. Amount due paid to VA by official check for \$7,645 dated July 24, 2002. (Attachment to App. Answer to SOR.)

No. 2: Student Loan. \$30,000 owed, \$2,888 overdue. Account brought current by official check for \$2,888 dated July 24, 2002. (Attachment to App. Answer to SOR.). Applicant now makes monthly payments of \$250 per month toward current balance.

No. 3: Department store \$1,125 charged off. Applicant paid a negotiated settlement amount, and account now reflects a zero balance. (App.Ex. A.)

As these payoffs indicate, Applicant has used the financial assistance afforded him to resolve the indebtedness in the SOR. Debt 1 is paid in full; Debt 2 is brought current and Applicant pays an agreed amount each month; Debt 3 is paid in full. As to Applicant's financial statement, these payoffs have reduced his expenses and left him with a monthly surplus of approximately \$250 after he makes all monthly payments, to include \$250 toward his student loan. Applicant's car loan is now paid in full. (Tr. 55-56.)

As to his reliability, Applicant has a long history of productive and unbroken employment, and his work ethic is praised by supervisors and co-workers. (App. Exs. D-H.) Applicant's most recent performance appraisal rates him as a very high achiever with excellent promotion potential.

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges in this paragraph that Applicant is ineligible for clearance because of past criminal conduct involving a charge of spousal battery. There is evidence of alcohol involvement.

Between 1972 and 2000, Applicant consumed alcohol to excess approximately once a month or once every two months. (Tr. 64.) However, Applicant's alcohol abuse did not cause him personal problems or job-related difficulties during this time.

On January 28, 2000, Applicant and his wife got into a heated verbal argument. This argument turned into a shoving contest, and Applicant pushed his wife. The police were called and Applicant was arrested for battery. Applicant was given twelve months' deferred prosecution contingent upon his satisfactory completion of enumerated parole-type requirements, including counseling. Applicant completed all requirements, and on February 7, 2001, charges were dismissed without prosecution. (Gov. Ex. 5.) Applicant has no other encounters with law enforcement before or after this isolated incident.

At the time of the incident Applicant had been drinking, and he overreacted to a slight made by his wife. Applicant testified credibly that he made a mistake, partly because of his alcohol abuse on that day, and he stopped drinking for good after he was arrested. Applicant testified he has not consumed alcohol since January 28, 2000, a period of almost three years. (Tr. 50.) I find Applicant's testimony convincing.

POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline F - Financial Considerations. *The concern.* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Disqualifying Conditions applicable:

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts.

Mitigating Conditions applicable:

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

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

Mitigating Conditions applicable:

2. The crime was an isolated incident;
6. There is clear evidence of successful rehabilitation.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in financial mismanagement or criminal activities demonstrating a lack of trustworthiness and respect for the law. On a commonsense basis, these unfavorable personal characteristics might easily lead to a disregard of laws, rules, and regulations designed to protect classified defense secrets from unauthorized disclosure.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to

demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "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, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, Applicant is an honorably-discharged veteran of the Vietnam war who demonstrated his reliability and steadfastness in a combat environment. After his departure from active duty in 1972, Applicant lost his first wife, and he became the sole provider for two children. ⁽¹⁾ In 1988, Applicant married a woman who had two children, and with a child of their own, Applicant and his wife were the parents of five children.

For several years after leaving the Army, Applicant was employed at a series of jobs that did not pay enough for Applicant to meet living expenses generated by his wife and family. However, there is no evidence Applicant was a careless spender who reached beyond his limited budget. Nevertheless, Applicant found he could not pay his growing debts, and in 1992 he declared bankruptcy. As part of bankruptcy proceedings he reaffirmed three debts that, realistically, he could not pay in the future on his limited income.

Applicant entered college, but he failed to pay his student loan. Applicant's home mortgage was foreclosed because Applicant did not keep up required payments. He also failed to pay the department store debt he reconfirmed during bankruptcy. Therefore, DC1 has application due to Applicant's history of not meeting his financial obligations. DC2 applies because Applicant was unable or unwilling to satisfy his debts.

However, Applicant presents persuasive evidence in mitigation. With respect to the home foreclosure, his renters abandoned the property, leaving it vulnerable to vandalism. Applicant could not sell the house nor could he pay the repair costs. Also, Applicant borrowed about \$30,000 as a school loan, but he could not complete school, and he became obligated to repay the loan without benefit of an advanced education. Applicant's limited income and family expenses precluded him from paying the reconfirmed debt to a department store. Additionally, his wife left her employment due to illness. Thus, Applicant experienced adverse conditions largely beyond his control that contributed significantly to his indebtedness, and MC 3 has application.

With help from his relatives, Applicant has taken positive measures to eliminate or reduce his debts. He received financial help in the form of monetary gifts or waivers, and no repayment is expected. He used this money to pay off or reduce his outstanding debts. His deficiency balance with the mortgage company is now paid in full. Furthermore, he has brought his student loan current, and he makes regular payments on the balance. Therefore, MC6 applies because Applicant is making a good faith effort to repay his creditors.

Applicant's financial position has stabilized, and his work record supports a conclusion he will remain employed and solvent, with a good chance he will receive promotions that will substantially increase his salary. I conclude Applicant has rebutted the Government's adverse evidence concerning his overdue debts, now paid off or current.

With regard to the allegation of criminal conduct, Appellant exercised bad judgment three years ago when he was drinking and he pushed his wife during an argument. For this misconduct he was arrested and required to attend counseling. DC1 applies because of Applicant's knowing violation of criminal law. However, the incident was isolated, and Applicant has stopped drinking entirely for three years. Therefore, MC2 has application. Also, Applicant took seriously the classes he attended, and he has not engaged in similar behavior since this incident occurred. MC6 is considered in Applicant's favor.

On balance, it is concluded Applicant has now brought his indebtedness under control by paying off two debts entirely and bringing another into a current status. His single alcohol-related altercation is mitigated by three years' sobriety without a repeat of this misconduct. His work record indicates he is a reliable and trustworthy employee in the workplace, and he has good prospects for added responsibility and an increased income. Applicant has met his burden of showing rehabilitation and changed circumstances with regard to allegations of excessive debts and criminal conduct. Upon a review of the "whole person concept" I conclude Applicant has also brought himself favorably with these

adjudication factors, based upon evidence discussed above.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Financial Considerations: For the Applicant.

Subparas. 1.a.-1.e.: For the Applicant.

Paragraph 2. Criminal Conduct: For the Applicant.

Subpara. a.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

Burt Smith

Administrative Judge

1. Presumably, a second marriage ended in divorce, and in 1988 Applicant married his present (third) wife. (See SF86, block 8, Gov. Ex. 1.)