

DATE: September 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28033

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had difficulty meeting his financial obligations for about three years following a job layoff in November 1998. As of March 2002, he was not making any payments on consumer delinquencies totaling about \$3,421.50, and was in arrears \$2,056.00 in his child support for two children. With his wages from his defense contractor job, Applicant and his common law spouse have had at least \$1,000.00 remaining each month after expenses. Through garnishment, he has reduced his child support arrearage by two-thirds, but has neglected other accounts that have been either charged off or placed for collection. Financial considerations persist because of his failure to address several of his outstanding debts. His omission of these financial delinquencies from his security clearance application engenders personal conduct concerns that are unmitigated. Clearance is denied.

STATEMENT OF CASE

On January 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR) to the Applicant that 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on personal conduct (Guideline E) related to deliberate omission from a March 2002 of his October 2001 arrest for simple assault, seven accounts delinquent over 180 days, and an April 1999 civil judgment in the amount of \$503.00, and on financial considerations (Guideline F) due to the outstanding debts.

Applicant filed an undated response to the SOR allegations and requested a hearing before a DOHA Administrative Judge. His response was received by DOHA on February 4, 2003. The case was assigned to me on April 7, 2003, and a formal notice was issued on May 2, 2003, scheduling the hearing for May 22, 2003. At the hearing held as scheduled, the Government submitted five exhibits, which were entered into the record, Exhibit 4 over Applicant's objection.

Applicant's case consisted of three exhibits and his testimony. A transcript of the hearing was received by DOHA on June 3, 2003. The record was held open for ten days following the hearing for Applicant to submit evidence of payment of some of his delinquent debts. No additional documentation was received.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted his arrest for simple assault in October 2001 and the outstanding delinquencies alleged in subparagraphs 1.b.(2), 1.b.(4), 1.b.(5), and 1.c.(1). He also acknowledged the omission of the arrest as well as any delinquent debts on his March 2002 security clearance application, but denied any intent to conceal or deceive. After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 36-year-old electrical detail planner employed by a defense contractor since March 2002. He was granted an interim clearance shortly after he completed a security clearance application (SF 86) on March 21, 2002, disclosing a wage garnishment of \$93.00 weekly since February 2002 for court-ordered child support. Applicant's clearance was withdrawn on issuance of the SOR, but he was allowed to retain his salaried position pending final adjudication of his secret clearance.

Applicant fathered two children by different women in 1990. He has been under court order to pay child support since December 1992, for one of the girls only since September 1997 when paternity was established through a test ordered by the court. He has two other biological children (now ages 5 and 10) and a thirteen-year-old stepdaughter through his relationship with his common law spouse, with whom he has been in a committed relationship since about 1990. Their relationship has not been without incident, as he was arrested for simple assault (domestic) in October 2001 after she complained he struck her in the face during an argument. The charge was dismissed in court with no fines or court costs assessed.

With his earnings from his job as an assistant foreman for a passenger railroad company from 1991 to 1998, Applicant managed to meet his financial obligations, albeit with some juggling of payments.⁽¹⁾ Having exhibited leadership, sound judgment, organizational ability, and personal integrity on the job, Applicant was nonetheless laid off in October 1998. At the time of his layoff, Applicant's annual earnings amounted to about \$26,000.00. Over the next three years, he worked at a variety of low paying jobs (at an hourly wage of less than \$9.00 from August 2001 to March 2002) while his common law spouse earned \$14.00 an hour as a pharmacy technician.⁽²⁾ With their income insufficient to pay all their obligations (including daycare) yet too much to go on public assistance, his common law spouse resorted to Chapter 7 bankruptcy to discharge her of her debts. Applicant just stopped paying on several of his accounts, including his child support obligations.

On the recommendation of his cousin, Applicant applied for a position with his present employer in 2002. Hired as a second class mechanic at an hourly wage of \$14.00, Applicant completed a security clearance application on March 25, 2002, on which he responded negatively to question 26 concerning whether he had been arrested, charged with, or convicted of any criminal offense in the last seven years. Since the October 2001 domestic assault charge had been dismissed with no finding of culpability, Applicant mistakenly thought the question did not apply to him. Applicant listed a wage garnishment for child support, but responded negatively to inquiries of any unpaid financial judgments awarded in the last seven years (question 37), any debts delinquent over 180 days in the last seven years (question 38), and any current delinquencies more than 90 days late (question 39). Applicant denies any intentional concealment, claiming he thought he needed to list only debts incurred in the last 7 years (Ex. 2); he took some advice that if a debt is over seven years old, it is written off and he had no credit cards as of the time he executed his SF 86 (Transcript p. 36). When confronted with the fact that some of the delinquencies were incurred within seven years of his execution of the SF 86, Applicant responded he knew the debts were charged off, but he did not know a charge off would be delinquent (Transcript p. 68). He subsequently admitted he knew he still had to pay a charged off debt. (Transcript p. 68). Applicant later returned to his initial excuse--he thought the debts were more than seven years old, so he did not list them (Transcript p. 69). His inconsistent explanations belie his claim of good faith omission. Applicant also testified he was not going to drive 63 miles each day to put down something that would stop him from obtaining a clearance (Transcript p. 38). While his claim of no knowledge of the judgment award is accepted, he is found to have deliberately failed to list the delinquent debt owed the cable company in response to questions 38 and 39 on the SF 86.

During the course of its investigation into Applicant's background, the Defense Security Service (DSS) conducted a credit check on March 29, 2002, which revealed Applicant had several outstanding delinquent accounts charged off or placed for collection as well as child support arrearage of \$2,056.00. A credit card account opened in November 1994 had been charged off in the amount of \$300.00 (debt #1). Two revolving credit card accounts, opened in October 1995, had been charged off in the amounts of \$779.00 (debt #2) and \$2,010.00 (debt #3), respectively. In late April 1999, a local cable television provider was awarded a judgment against Applicant for \$503.50 (debt #4). Applicant turned in a cable converter box to the creditor three weeks before, which the cable company accepted, the value of which was not reflected in the judgment award. (3) A revolving charge account, opened in December 2000, had been charged off with \$556.00 owed (debt #5). An unpaid utility charge of \$52.00 was placed for collection in about December 2001 (debt #6). Applicant was in arrears \$202.00 and \$1,854.00 in his respective child support obligations. Applicant was making payments as agreed on debt #2, which had been sold in February 2002 to the lender owed debt #3. The creditor had extended new credit with a promise to increase his credit limit should he pay his delinquency. Applicant ignored his other debts, electing to focus on his delinquent child support to avoid possible seizure of his driver's license by the state or even his incarceration.

During an interview with a DSS agent on July 25, 2002, Applicant acknowledged debts #1, #2, #3 and #5 were more than ninety days delinquent. (4) Applicant volunteered he had an open account with the lender owed debts #2 and #3. He indicated he would pay off these debts through payment plans. Applicant questioned whether he owed debts #4 and #6, but promised to satisfy them if legally responsible. (5) Applicant executed a personal financial statement (PFS) on which he reported he and his common law spouse had \$1,109.00 in discretionary funds per month, excluding any payments on debts #1, #2, #3, and #5. (6) In January 2003, Applicant was transferred to a salaried position at work of detail planner, with an increase in his annual wages to \$35,000.00.

Applicant's child support payments have been adjusted three times since he commenced his employment with the defense contractor. Paying \$25.00 weekly for one daughter, Applicant was court ordered in March 2003 to pay increased child support of \$65.00 weekly for his other 13-year-old plus \$25.00 toward the arrearage. As of late May 2003, he owed \$55.23 in child support on one account and \$607.32 on the other.

At his hearing, Applicant testified he paid off debt #2, which is accepted as credible. Although he did not document satisfaction, his credit report of March 2002 reflects he was making payments as agreed. Other than obtaining the address of the creditor for debt #1, Applicant had done nothing to satisfy debt #1. He testified he paid \$161.00 toward the \$2,128.14 owed on debt #3, but presented no evidence of such payment. Applicant maintained he turned in his cable box so owes only \$209.00 rather than \$389.78 to the judgment creditor for debt #4. There is no evidence confirming the debt is only \$209.00. Applicant learned in December 2002 that debt #5 for \$556.00 had been placed for collection, Applicant did not follow up with any payment. The minor amount (\$52.00) owed on debt #6 remains unpaid with no attempt to contact the creditor.

Between them, Applicant and his common law spouse earn about \$76,600.00 annually as of May 2003.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enc. 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although

adverse information concerning a single guideline may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive, Enc. 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Guideline E

Personal Conduct

E2.A5.1.1. 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.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. 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.A5.1.3. Conditions that could mitigate security concerns include:

None.

Guideline F

Financial Considerations

E2.A6.1.1. The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations

E2.A6.1.2.3. Inability or unwillingness to satisfy debts

E2.A6.1.3. Conditions that could mitigate security concerns include:

E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment . . .)

E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Under Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct raising security concerns, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of Applicant, I conclude the following with respect to Guidelines F and E:

Under Guideline F, the security eligibility of an applicant is placed into question when the applicant is shown to have a history of excessive indebtedness, recurring financial difficulties, or a history of not meeting his financial obligations. The Government must consider whether individuals granted access to classified information are because of financial irresponsibility in a position where they may be more susceptible to mishandling or compromising classified information or material for financial gain. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. With three children at home and under court-order to pay child support for two other children born to him outside his relationship with his common law spouse, Applicant lacked the funds to meet all his financial obligations following a job layoff in November 1998. He stopped payment on several credit card accounts as well as his child support. By March 2002, four credit card accounts had been charged off with an outstanding aggregate balance of \$3,645.00. He also owed \$52.00 for telephone service, a financial judgment of \$503.50, and \$2,056.00 in back child support. Potentially disqualifying concerns in this case include E2.A6.1.2.1., a history of not meeting financial obligations, and E2.A6.1.2.3., inability or unwillingness to satisfy debts.

It is unclear when the debts were charged off, but the loss of his job with a significant decrease in his personal income over the ensuing three years is an unforeseen circumstance that mitigates the incurring of the delinquencies (*see* mitigating condition E2.A6.1.3.3., conditions that resulted in the behavior were largely beyond the person's control). Mitigating condition E.2.A6.1.3.6. (individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies with regard to debt #2. While he had an incentive to satisfy that debt in the form of credit extended to him on another account, his satisfaction of that delinquency after he began working for the defense contractor is viewed favorably. Applicant also paid down some of his child support arrearage, but since it is under threat of possible personal sanctions should he fail to make his child support obligations, these payments are not given the same weight in mitigation as completely voluntary efforts to repay creditors. Yet financial considerations linger primarily because of Applicant's failure to attend to his other delinquent debts. Applicant has not pursued any payment arrangements with several of his creditors, claiming the need to pay down his child support arrearage. As reflected in his PFS July 2002, Applicant had \$1,109.00 remaining each month after payment of expenses and he presented no proof of necessary, unbudgeted expenditure that made the funds unavailable for his delinquent debts. With the increase in his annual income in January 2003, Applicant testified to an increase in his child support obligation, but he still should have the funds to make at least minimum payments on the larger debts such as debt #3 and to pay off debt #6. His failure to take action on his promises to make arrangements to repay his outstanding obligations cast doubt upon the strength of his resolve to attend to his legitimate obligations, and precludes a favorable outcome as to SOR subparagraphs 2.a. and 2.b.

Additional doubts are raised for Applicant's security suitability because of his lack of candor about his indebtedness when he completed his security clearance application on March 21, 2002. Applicant listed his wage garnishment for child support, but did not reveal any of his consumer credit delinquencies. Applicant was found to have intentionally

concealed the debts as he did not want them to affect his job and security clearance with the defense contractor. The deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire raises serious personal conduct concerns (E2.A5.1.2.2.). Although Applicant also did not disclose on his SF 86 his arrest for simple assault in October 2001, it was due to his mistaken belief that it need not be listed since the charge had been dismissed with no costs or fines assessed and he had been told by the judge that it was as if the charge had not been filed. The Government having failed to prove Applicant knew of the financial judgment awarded the cable company, he was found not to have intentionally falsified his response to question 37 as well. SOR subparagraphs 1.a.(1) and 1.c.(1) are resolved in his favor.

Applicant's knowing and recent concealment of relevant and material financial delinquencies is potentially mitigated where the individual made prompt, good faith efforts to correct the falsification before being confronted with the facts (E2.A5.1.3.3.), or the omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (E2.A5.1.3.4.). Applicant did not deny his indebtedness when interviewed by the DSS agent on July 25, 2002, but it is not clear that he volunteered the information up-front before being asked about outstanding debts. Furthermore, by providing somewhat inconsistent explanations for the omissions at the hearing, Applicant has only compounded the doubts as to whether his representations can be relied on. The Government must be able to rely at all times on the representations of those granted access to the Nation's secrets. Applicant having placed his personal interest ahead of his obligation to be forthright, an adverse finding is warranted as to SOR subparagraph 1.b., including 1.b.(6) and 1.b.(7), as his reporting of the garnishment for child support does not relieve him of his responsibility to list the arrearage as delinquent debts.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.(1): Against the Applicant

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

Subparagraph 1.b.(3): Against the Applicant

Subparagraph 1.b.(4): Against the Applicant

Subparagraph 1.b.(5): Against the Applicant

Subparagraph 1.b.(6): Against the Applicant

Subparagraph 1.b.(7): Against the Applicant

Subparagraph 1.c.(1): For the Applicant

Paragraph 2. Guideline F: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against 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 Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified he started at \$8.21 an hour in 1991. When he was laid off, his hourly wage was \$15.86. (Transcript pp. 81-82).
2. Applicant testified he earned about \$15,000.00 each year during the November 1998 to November 2000 time frame, \$8,000.00 for eight months work as a cable technician thereafter, \$8.50 an hour for less than full-time work as a car transporter for three months in 2001, and \$8.85 an hour as an auto parts driver from November 2001 to March 2002. (Transcript pp. 84-85).
3. In SOR subparagraph 1.c.(1) the amount of the debt is alleged to be \$389.78. There is no proof the cable company agreed to accept less than the financial judgment award. The Government did not produce evidence documenting the debt to be \$389.78 instead of \$503.50.
4. He reported owing \$2,800.00 to the creditor holding debts #2 and #3, which is the aggregate outstanding balance on the two accounts. (Ex. 2).
5. When asked at the hearing about his failure to list the financial judgment awarded the creditor of debt #4, Applicant testified he was unaware of the judgment debt until his DSS interview. Court records (Ex. 5) indicate a default judgment was entered. Although Applicant was served personally, he did not appear in court.
6. Reported income was based on hourly wages of \$14.00 for him and \$17.00 for his common law spouse.