

DATE: September 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30825

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

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FOR APPLICANT

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SYNOPSIS

Applicant has successfully mitigated the financial considerations security concern based on his payment of delinquent debts and his stable financial condition. But he deliberately falsified his response to Question 37 of a security-clearance application completed in December 2000 when he failed to disclose an unpaid judgment for approximately \$1,500 entered against him in October 2000. His explanation or claim of mistake or misunderstanding is not credible given the totality of circumstances. Clearance is denied.

STATEMENT OF THE CASE

On November 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F for financial considerations, Guideline E for personal conduct (falsification of a security-clearance application), and Guideline J for criminal conduct (a cross-allegation to the falsification alleging a violation of 18 U.S.C. § 1001). Applicant answered the SOR on December 8, 2003.

The case was assigned to another administrative judge to conduct a hearing on May 25, 2005, and it was reassigned to me on June 20, 2005, due to caseload considerations. The delay from December 8, 2003, until May 25, 2005, is explained by the case's protracted and tangled procedural history, which was covered in detail during the hearing and will not be repeated here (Appellate Exhibits 1 - 4; Tr. at 9 - 44). A notice of hearing was issued on July 18, 2005, scheduling the hearing for August 29, 2005. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the hearing transcript on September 7, 2005.

FINDINGS OF FACT

Applicant's admissions to SOR allegations 1.a, 1.b, 1.c, and 1.d are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 48-year-old man who is a native-born U.S. citizen. He is divorced from his first wife. He has a 22-year-old daughter and a 24-year-old stepdaughter.

Starting in November 1976, Applicant served on active duty with the U.S. Army until his retirement after 21 years of service. He was honorably discharged at the rank of sergeant first class (paygrade E-7). His military training and education includes completing the primary leadership development course, the basic noncommissioned officer course, and the advanced noncommissioned officer course. Applicant served in administrative positions in the Army and routinely worked with classified information for many years, including assignments on high-level staffs in the Nation's capital (Exhibits A and B). He held a security clearance issued by the Army since about 1980, and he was never accused of or cited for mishandling or failing to safeguard classified information. But in arch 1988, the Army's Central Personnel Security Clearance Facility took action to "hold in abeyance" the determination or processing of Applicant's security clearance (Exhibit 12). It did so based on a past-due account for \$798 with a furniture company. In June 1988, after he provided proof the account was in good standing, the Army granted Applicant a security clearance and access to sensitive compartmented information.

While serving in the Army, a state tax authority obtained a judgment for more than \$1,000 against Applicant for unpaid tax for tax year 1982 (Exhibit 8). The judgment was taken in approximately 1985, and it was satisfied in 1986.

He is now employed as the facility security officer (FSO) for a company engaged in defense contracting. He started working for the company as the facilities manager upon his retirement from the Army in about December 1997, and he was subsequently promoted to his current position. His annual salary is about \$66,000, plus an annual bonus of about \$5,000. In addition, his income includes \$1,500 per month in military retirement pay. He owns a home with a market value of about \$240,000, and he estimates home equity of about \$80,000. His other financial assets include a 401(k) retirement account with a balance of about \$30,000 and about \$12,000 in government savings bonds.

The SOR alleges in ¶ 1 that Applicant was indebted to creditors for two charged-off bad debts and for two unpaid judgments. Applicant has since paid or otherwise resolved these debts.

The charged-off bad debt for \$654 in subparagraph 1.a is for a cell phone account Applicant opened on behalf of a friend who had bad credit. Contrary to their oral agreement, the friend did not make the necessary payments for the account. The account was charged-off in June 1998. Applicant settled the account in full in May 2004 (Exhibit F).

The charged-off bad debt for \$91 in subparagraph 1.b and the unpaid judgment for \$1,558 in subparagraph 1.c are interrelated, as both concern automobile financing with a major car company. The account was charged-off in May 1999. The unpaid judgment (which will be discussed in detail below) was entered against Applicant in October 2000 (Exhibit 18). It appears the judgment was satisfied in April 2002, and the charged-off bad debt was resolved in February 2003 (Exhibit G; Tr. at 103-107).

The unpaid judgment for \$5,619 in subparagraph 1.d is from a joint credit card account Applicant had with his then wife. The balance became overdue and collection action resulted in a judgment against Applicant in January 2001 (Exhibit 19). The judgment was settled for a lump-sum payment of \$4,200 in August 2004 (Exhibit H).

Exhibit 18 is the documentary evidence concerning the judgment for \$1,558 against Applicant. These documents establish that in about July 2000, the auto credit company filed a civil complaint in state court against Applicant. The complaint stated, among other things, that Applicant had bought a vehicle via an installment contract, which had since been assigned to plaintiff. Applicant made payments per the contract for a period but then defaulted, and the vehicle was never repossessed. Demand was made upon Applicant, but he did not pay. The complaint sought the balance due on the contract, plus interest and attorney's fees.

Sometime thereafter, communications took place between Applicant and the law firm representing the plaintiff. The result was Applicant was presented with a "consent judgment," which he signed on August 18, 2000 (Exhibit 18 at 2 - 3). In relevant part, the consent judgment provides as follows:

Defendant, [Applicant], in proper person, **consents to a judgment** in the amount \$1,487.76, plus prejudgment interest in the amount of \$70.90, plus post-judgment interest at the legal rate, plus attorney's fees in the amount of \$223.16 and court costs. Defendant further agrees to make payments to Plaintiff at the rate of \$150.00 per month, commencing 08/20/00, and each month thereafter **until the judgment is paid. Plaintiff agrees not to execute on the judgment so long as Defendant makes the payments as agreed** (Exhibit 18 at 2, emphasis added).

The case caption on the consent judgment indicates a trial date had been set for October 5, 2000. Applicant signed the consent judgment before a notary public. The attorney representing the plaintiff also signed the document. Also, the second page contained a section for the judge to sign an order that the judgment be entered. The judgment was entered October 3, 2000 (Exhibit 18 at 4). Subsequently, the judgment was recorded and a notice of lien was filed. Applicant made some of the monthly payments but then stopped, and the judgment remained unpaid until April 2002.

In December 2000, Applicant was required to complete a security-clearance application (Exhibits 1 and 2) for his position as FSO. The application requires a person to provide information about various subjects, including their financial record. In response to Question 37, ⁽²⁾ Applicant answered no, thereby denying that he had an unpaid judgment in the last seven years.

In August 2001, Applicant provided a written statement during the course of a background investigation (Exhibit 7). Addressing the judgment taken by the auto credit company, Applicant stated the debt came about when he totaled his car and his insurance policy did not cover the balance due on the loan. He also stated that up until the background investigation, he had no idea there was a judgment against him.

At the hearing, Applicant testified about completing the security-clearance application (Tr. at 112-117). He offered the following explanation for his negative answer to Question 37: (1) when he completed the security-clearance application, he had no idea there was a judgment; (2) his idea of a judgment was going to court and being told by a judge and signing documents to acknowledge a judgment; (3) he did not receive documents showing a judgment had been entered against him; (4) he found out about the judgment during the background investigation in August 2001; and (5) he denied any intent to mislead the government or deliberately make a false statement. Concerning the consent judgment (Exhibit 18), Applicant explained he signed it without receiving legal advice. Pointing to the third sentence on the first page (in bold above), Applicant explained he believed that so long as he made the monthly payments, there was no judgment against him.

Applicant presented favorable character evidence from several people who work with Applicant and know him well (Exhibits I, J, K, L, and N). These individuals, including the company CEO, believe Applicant is a valuable employee who is a suitable candidate for a security clearance.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽³⁾ There is no presumption in favor of granting or continuing access to classified information. ⁽⁴⁾ The government has the burden of proving controverted facts. ⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence. ⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard. ⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." ⁽⁸⁾ Once the government

meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline F, a security concern typically exists for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline F. The two charged-off bad debts and the two judgments demonstrate a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts.⁽¹²⁾ The same facts and circumstances demonstrate financial irresponsibility.

I reviewed the mitigating conditions under the guideline and conclude Applicant has successfully mitigated the security concern. Applicant has resolved the four debts in the SOR by payment in full or settlement. His actions constitute a good-faith effort to pay or otherwise resolve the indebtedness.⁽¹³⁾ Besides resolving the four debts in question, Applicant's overall financial situation is stable and he is not overextended. The record evidence is sufficient to conclude that Applicant has now established a financially responsible lifestyle. Accordingly, Guideline F is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided a false answer in response to Question 37 of the security-clearance application. Applicant's explanation for his negative answer does not rebut or explain away the falsification.

Applicant's defense to the falsification allegation is that he did not understand the consequences of signing the consent judgment (Exhibit 18). His explanation or claim is not credible given the totality of circumstances. First, when Applicant signed the consent judgment, he had been served with the complaint and he then had discussions or negotiations to resolve the matter. Second, when he signed the consent judgment on August 18, 2000, a trial date was pending for October. Third, Applicant's reliance on the third sentence of the consent judgment is misplaced, because it views the document with blinders on as opposed to viewing it as a whole. The first sentence states unequivocally that Applicant "consents to a judgment." The second sentence states the monthly payments will be made "until the judgment is paid." Also, the second page of the document is ready for the judge to sign the order entering the judgment, which took place in October 2000. Fourth, this was not the first time a judgment was taken against Applicant (Exhibit 8). Fifth, his explanation is most improbable because Applicant--an experienced, seasoned military man and security-clearance holder--had to know the unpaid judgment might cause a problem for his security clearance (e.g., Exhibit 12). For all these reasons taken together, I conclude that Applicant understood the consequences of signing the consent judgment. Likewise, I conclude that Applicant's negative answer to Question 37 was not an honest mistake or misunderstanding,

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but was instead a deliberate omission, concealment, or falsification. Given these circumstances, DC 2 applies against Applicant.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a security-clearance application is a serious matter, not easily mitigated or extenuated. Accordingly, Guideline E is decided against Applicant. For the same reasons, the cross-allegation to the falsification under Guideline J for criminal conduct is decided against Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline F: For Applicant

Subparagraphs a - d: For Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 3-Guideline J: Against Applicant

Subparagraph a: Against 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Question 37 asked "In the last 7 years, have you have any judgements (sic) against you that have not been paid?"
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. E2.A6.1.2.1. A history of not meeting financial obligations;" and E2.A6.1.2. 3. Inability or unwillingness to satisfy debts.

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

14. 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.