

DATE: November 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13988

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of several larceny offenses that occurred between 1963 and 1965, and was sentenced to at least two concurrent three-year penitentiary sentences. He also has a history of financial delinquencies that have not been resolved. He failed to disclose his criminal history and a tax lien in a Questionnaire for National Security Positions (SF 86) he submitted on May 3, 2000. He has mitigated the security concern caused by his personal conduct in providing false answers in the SF 86, but has failed to mitigate the financial considerations concern. Further, he is unable to mitigate the security concern his criminal conduct has created because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On May 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F for financial considerations, Guideline J for criminal conduct, and Guideline E for personal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR on June 24, 2003, and requested a hearing. Applicant admitted he was convicted of three larceny offenses and sentenced to three years in prison. He admitted one and denied four financial consideration allegations. He also denied one personal conduct allegation and provided a qualified admission to the second allegation.

This case was assigned to me on July 25, 2003. A notice of hearing was issued on August 19, 2003, scheduling the hearing for September 4, 2003. The hearing was conducted as scheduled. The government submitted six documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-6 and admitted into the record over Applicant's objection.⁽²⁾ Applicant testified at the hearing and submitted five documentary exhibits that were marked as Applicant's Exhibits A-E, and admitted into the record without an objection. The record was held open to provide Applicant the opportunity to submit additional documents in support of his case. He submitted a letter on September 10, 2003, that was marked as

AE F, and seven additional documents on September 16, 2003 that were marked as AE G-M. Department Counsel submitted a memorandum dated November 7, 2003 in which he stated he had reviewed all of Applicant's post-hearing submissions and did not object to them being considered. Accordingly, AE F-M were admitted into the record. The transcript was received on September 15, 2003.

FINDINGS OF FACT

Applicant's partial admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 58 years old and employed by a defense contractor as an intermediate automated data collector. He was originally hired by his present employer as a machinist on April 2000. Applicant was first married in August 1969 and divorced in November 1991. He has three adult children from that marriage.⁽³⁾ Applicant remarried on December 31, 1993, and although he is living separate and apart from that wife, he is supporting his two stepdaughters from that marriage who reside with him.

Applicant was charged with larceny of an automobile on April 1, 1963, convicted of that offense on July 15, 1963, and placed on three years probations. He was again charged with larcenies of automobiles on October 22, 1964 and November 22, 1964. He was convicted of the two 1964 charges and sentenced to serve three years in the state penitentiary, the sentences to run concurrently.⁽⁴⁾

Applicant had joined the United States Navy in July 1963, and was serving on active duty at the time he was sentenced to the penitentiary. He received a General Discharge from the Navy. No further information is of record as to the characterization of that discharge.

Applicant has approximately \$11,815 in delinquent medical expenses that have been submitted for collection.⁽⁵⁾ Applicant denied in his SOR response that he was indebted to these creditors in claimed reliance upon his belief that he had medical insurance that should have paid for these expenses or upon a claim that he had previously paid them himself. As his testimony was developed at the hearing, it is apparent that most, if not all, these debts were incurred during periods when Applicant was unemployed and uninsured. Applicant also has a delinquent telephone bill in the amount of \$724.00 that has been submitted for collection, and that was incurred by his stepdaughter making long-distance phone calls to her father. Lastly, Applicant has a collection account in the amount of \$254.00 on which the nature of the creditor cannot be determined that dates back to 1995. Applicant testified he has no knowledge of this account.

Applicant submitted AE G-M as evidence of his efforts to satisfy his creditors. Most, if not all, payments evidenced by those documents were made to creditors other than those alleged in the SOR. Further, Applicant still has more than \$10,000.00 in outstanding collection accounts, even if some of the payments evidenced by AE G-M are in full or partial settlement of collection accounts listed in the SOR. While he is working part-time employment to raise additional funds to satisfy his delinquent accounts, there is no reasonable expectation he will be able to satisfy them in the near future.

Applicant submitted a Questionnaire for National Security Positions (SF 86) on May 5, 2000 in which he answered "No" to question 21: *Your Police Record - Felony Offenses - Have you ever been charged with or convicted of any felony offense?* In his SOR response and testimony he credibly asserted that because his offenses occurred almost forty years ago he had resolved to put that chapter of his life behind him and had totally forgotten about them.

Applicant also answered "No" to question 36: *Your Financial Record - Tax Lien - In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?* GE 3 discloses that a tax lien was filed against him in April 1996. In his SOR response and testimony he credibly asserted that he believed the tax lien was filed longer than seven years prior to his submission of the SF 86.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and C, are most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁸⁾, although the government is required to present substantial evidence to meet its burden of

proof.⁽⁹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁰⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹²⁾

No one has a right to a security clearance⁽¹³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁵⁾

CONCLUSIONS

Under Guideline F, a security concern exists when a person has significant unpaid debts. 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, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant has more than \$10,000.00 in delinquent accounts that have been submitted for collection. His assertions that he did not pay most of the accounts because he believed they were covered by medical insurance is belied by the fact that he was aware that he was unemployed and not covered by employer provided health insurance when many of the debts were incurred. The various receipts he submitted post-hearing fail to establish that Applicant has made any meaningful effort to resolve these accounts.

Disqualifying Conditions (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case. Mitigating Condition (MC) 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)* also applies. However, the listed accounts have been delinquent from nearly three years to as much as eight years, with Applicant having made little effort to resolve them until, possibly, very recently. Guideline F is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. Applicant was convicted of at least three felonies between 1963 and 1965 and sentenced to three years in a state penitentiary for two of the offenses listed in the SOR. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

I find that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply in this case. However, because of the statutory disqualification imposed by 10 U.S.C. § 986, Applicant is unable to mitigate his criminal conduct. Guideline J is decided against 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. Applicant did provide incorrect answers to two questions in the SF 86 he submitted. However, I have considered Applicant's appearance, demeanor, and manner of testifying, along with his obvious lack of sophistication and lack of experience in preparing documents such as the SF 86, and am convinced he did not intend to deliberately omit or conceal information by providing the incorrect answers. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: 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 Applicant. .

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The general nature of Applicant's objection was that he did not agree with the contents of all the documents. He did not articulate any legally cognizable objection, but rather appeared to be unable to comprehend that failure to object to the admissibility of a document did not preclude him from contesting the contents of that document.
3. A fourth child died two day after being born.
4. GE 6 makes clear that Applicant was sentenced to concurrent penitentiary terms on three charges in cases B1837, B1838 and B1973. However, because the 1963 offense alleged in subparagraph 2.a. occurred in a different state it does not appear that was one of the offenses for which he was sentenced to the penitentiary. Additionally, GE 4 makes clear that the offense alleged in subparagraph 2.d. was actually the date Applicant was received in the penitentiary and not a separate offense. Finally, GE 4 makes several references to an arrest occurring on March 9, 1965. Accordingly, I find the evidence supports finding two concurrent three year penitentiary sentences that were alleged in the SOR, although a third sentence appears to have been imposed but not alleged.
5. SOR subparagraph 1.c. alleges delinquent accounts totaling \$20,928.00. However the subparagraph 1.c. accounts listed in GE3 actually total \$10,928.00. Those same accounts are listed twice in GE 5 with totals of \$11,945.00 and \$10,099.00. I have relied upon the actual amount listed in GE 3 in computing Applicant's total delinquent medical accounts that have been submitted for collection.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
8. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

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

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

14. *Id* at 531.

15. *Egan*, Executive Order 10865, and the Directive.