

DATE: February 5, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17609

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1973, the Applicant pleaded guilty to a false pretense or forgery and sentenced to three years confinement (suspended). Because the misconduct is remote in time and because of clear evidence of rehabilitation, the criminal conduct concerns are mitigated. However, 10 U.S.C. § 986 prohibits the granting the Applicant a security clearance absent a waiver by the Secretary of Defense. The Applicant also owes approximately \$6,600.00 on six bad debts. He has failed to mitigate the financial concerns. Clearance is denied.

STATEMENT OF THE CASE

On June 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant stating DOHA could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) On July 10, 2003, the Applicant answered the SOR and requested a hearing. The case was assigned to me on November 18, 2003. A Notice of Hearing was issued on November 19, 2003, scheduling the hearing, which was held on December 4, 2003.

The Government's case consisted of nine exhibits (Gov Ex). The Applicant relied on his own testimony and two exhibits (App Ex). Following the hearing, the Applicant submitted two sets of additional documents, provisions having been made for their submissions following the hearing. Department Counsel (DC) having no objection to their admission, the submissions were admitted. The transcript (Tr.) of the hearing was received on December 15, 2003.

FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J) and Financial Considerations (Guideline F). The Applicant does not deny the allegations. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 68-years-old, has worked for a defense contractor since February 1998, and is seeking a security clearance. He had a security clearance while employed 17 years with his previous employer. The Applicant is regarded by those who know him as a well liked, reliable employee and a good role model for other employees. The Applicant has received numerous awards for outstanding performance and dedication.

In 1973, the Applicant owned a night club and one of his customers asked him to cash two checks for \$2,000.00 each, which had been stolen. The Applicant does not remember if he asked the individual for identification or not. The checks resembled money orders. The Applicant counter signed one and gave it to his beverage distributor and deposited the other in his bank account. The Applicant was arrested and pleaded guilty to a false pretense or forgery charge. (Gov Ex 4) He was sentenced to three years confinement (suspended), three years probation, required to make restitution and assessed court costs. The Applicant does not know what happened to the person who gave him the checks.

In October 1981, the Applicant and his spouse filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. The Applicant married his wife in 1978 and they became overextended. In May 1982, unsecured debts of approximately \$8,000.00 were discharged. (Gov Ex 8) Following the bankruptcy they reaffirmed their mortgages of \$52,000.00 and three other debts totaling approximately \$3,000.00.

In October 1991, the Applicant and his spouse filed for bankruptcy protection under Chapter 13, the wage earners' plan, of the Bankruptcy Code. They listed assets of \$108,126.00 and liabilities of \$74,803.24. Their first and second mortgages were approximately \$56,000.00 of their liabilities. Approximately \$11,000.00 of his liabilities was unsecured debt. Their combined gross monthly income was approximately \$4,000.00 and their combined monthly take home pay was almost \$3,000.00. The Applicant's mother-in-law stayed with them and required the services of a license practical nurse (LPN) when the Applicant and his wife were at work. His mother-in-law was bed ridden for 5 ½ years prior her death. Her medical and related expenses contributed greatly to the bankruptcy. In July 1994, the final accounting indicates \$7,099.66 had been paid in principal and interest on the Applicant's listed debts. At that time, the Applicant's case was dismissed because he failed to continue the plan's payments. He was ordered to pay his debtors all sums due.

The SOR alleges the Applicant owes eight creditors \$6,797.00. The status of the specific debts alleged in the SOR follows.

SOR Paragraph	Amount	Type of Debt	As listed in the SOR	Current Status
2.a.	\$85.00	swimming pool service	disputed by Applicant	Paid
2.b.	\$521.00	credit card	charged off February 2001	Contacted by mail and offered to pay the account in full.
2.c.	\$1,228.00	credit card	charged off May 2003	Contacted by mail and offered to pay the account in full.
2.d.	\$347.00	credit card	charged off March 2001	Contacted by mail and offered to pay the account in full.
2.e.	\$815.00	credit card	charged off April 2001.	Same creditor as 2.c.
2.f.	\$867.00	department store credit card	charged off May 2001	Contacted by mail and offered to pay the account in full.
2.g.	\$2,826.00	uncertain	charged off March 2001	Contacted by mail and offered to pay the account in full.
2.h.	\$108.00	telephone bill	charged off October 1996	Paid
	\$6,797	total owed		

The Applicant has one credit card, a gasoline credit card, which he pays in full each month.

The current fair market value of his home is \$140,000.00 with a \$100,000.00 mortgage. The Applicant's and his wife's

combined monthly income is now \$6,381.37 and their monthly expenses total \$5,231.75. Their monthly disposable income (income less expenses) totals \$1,150.00. The Applicant's wife is entitled to social security monthly retirement benefits of \$925.00 beginning February 2004. The Applicant is a life member in a community service organization which supports hospitals for burn victims.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

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

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year; ⁽²⁾

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- f. There is clear evidence of successful rehabilitation;
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Financial Considerations (Guideline F) 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.

Conditions that could raise a security concern and may be disqualifying include:

- 1. A history of not meeting financial obligations. (E2.A6.1.2.1.)
- 3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)

Conditions that could mitigate security concerns include:

None Apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his judgment, reliability, and trustworthiness. In 1973, the Applicant pleaded guilty to false pretense related to two stolen checks which totaled \$4,000.00. The Applicant was sentenced to three years confinement (suspended), three years probation, ordered to pay court costs and make restitution. Because of his 1973 arrest and conviction, Disqualifying Condition (DC) b. (3) applies and because he was sentenced to more than one year in jail, DC c. (4) applies.

Mitigating Condition (MC) a. (5) mitigates the Applicant's 1973 criminal conduct because the conduct is not recent, having occurred 30 years ago. The Applicant's case in mitigation becomes stronger as the Applicant has not been involved in any criminal conduct since 1973. The Applicant is regarded by those who know him as a likable, reliable employee and good role model for other employees. The Applicant is a life member in a community service organization which supports hospitals for burn victims. There is clear evidence of successful rehabilitation. Therefore, MC f. (6) applies. I find for the Applicant as to SOR subparagraph 1.a.

Because the Applicant was sentenced to more than one year in jail, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.b. Unless the Applicant is able to obtain a waiver from the Secretary of Defense, the Department of Defense is prohibited by 10 U.S.C. § 986 from granting the Applicant a clearance. I am not making a recommendation concerning a waiver of Title 10 U.S.C. 986 because the decision denying or revoking a clearance is not being made solely as a result of 10 U.S.C. 986.

The Government has satisfied its initial burden of proof under Guideline F, Financial Consideration. Under Guideline F, an Applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations. A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk that is inconsistent with the holding of a security clearance. Here, the Applicant's history of sporadic payment of his debts provides concern. Disqualifying Conditions (DC) 1⁽⁷⁾ and 3⁽⁸⁾ apply.

The Applicant has paid two debts totaling \$193.00. I find for him as to SOR subparagraphs 2.a. and 2.h.

In October 1991, the Applicant and his spouse filed for bankruptcy protection under Chapter 13, wage earners' plan, because of the expenses incurred caring for the Applicant's mother-in-law. His mother-in-law was bed ridden for 5 ½ years prior to her death and required the services of an LPN. The Applicant's liabilities were approximately \$75,000.00 of which approximately \$56,000.00 were mortgages. Approximately \$11,000.00 of his liabilities was unsecured debt. As of July 1994, the Applicant had paid approximately \$7,100.00 on his debts through the wage earner's plan before his case was dismissed for failing to make his payments. I do not find against the Applicant because he had to resort to bankruptcy protection contributed to by his mothers-in-law's medical expenses. However, this was his second time he had to result to bankruptcy protection. Additionally, he defaulted on his repayment plan. I find against the Applicant as to SOR 2.i.

In October 1981, the Applicant and his spouse filed for bankruptcy protection under Chapter 7 when they became overextended. Unsecured debts of approximately \$8,000.00 were discharged. Following the bankruptcy they reaffirmed approximately \$55,000.00 of their secured debts for their mortgages and other debts. I do not find against the Applicant because he had to resort to bankruptcy protection. I find for the Applicant as to SOR 2.j.

The Applicant currently owes six creditors approximately \$6,600.00. Following the hearing, he contacted each of the creditors and offered to pay the full amount he owes them. The Applicant has \$40,000.00 equity in his home and the monthly disposable income of him and his wife is slightly over \$2,000.00 per month. The Applicant has had monthly disposable income sufficient to have paid some of these six debts or at least made payment on them, but has not done so.

None of the mitigating factors (MC) apply here. The conduct is recent⁽⁹⁾ in that the debts are still owed. It is not an isolated incident⁽¹⁰⁾ because there are six debts. There is no indication the debts or the inability to repay them was caused by factors beyond the Applicant's control⁽¹¹⁾ and the Applicant has not received any financial counseling.⁽¹²⁾ Affluence was not alleged.⁽¹³⁾

For MC 6⁽¹⁴⁾ to apply there must be an "ability" to repay the debts, the "desire" to repay, and evidence of a good faith effort to repay. Following the hearing, the Applicant mailed a letter to each of the six creditors stating he wanted to pay the amount owed them in full. Although the Applicant has a desire to repay his debts, there is no evidence he has reached an agreement with his creditors. The mere desire to pay past due debts is insufficient. The Applicant's promise to pay is problematic because he promised to make monthly payments to the bankruptcy court under the Chapter 13 wage earners' plan. That plan was dismissed when the Applicant failed to make the required monthly payments. The Applicant intends to pay these debts, but mere intent is insufficient for a favorable finding. A systematic, concrete method of handling past due liabilities is needed, but is not present here. The Applicant has provided no cancelled checks, money order receipts, other receipts, letters from the creditors, or other evidence showing payment has been made. I find against the Applicant as to SOR subparagraphs 2.b., 2.c., 2.d., 2.e., 2.f., and 2.g.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Criminal Conduct, Guideline J.: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2 Financial Considerations, Guideline F.: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: Against the Applicant

Subparagraph 2.f.: Against the Applicant

Subparagraph 2.g.: Against the Applicant

Subparagraph 2.h.: For the Applicant

Subparagraph 2.i.: Against the Applicant

Subparagraph 2.j.: 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 the Applicant. Clearance is denied.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
3. DC b. A single serious crime or multiple lesser offenses.
4. DC c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.
5. MC a. The criminal behavior was not recent.
6. MC f. There is clear evidence of successful rehabilitation.

7. DC 1. A history of not meeting financial obligations. (E2.A6.1.2.1.)

8. DC 3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)

9. MC 1. The behavior was not recent.

10. MC 2. It was an isolated incident.

11. 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). (E2.A6.1.3.3.)

12. MC 4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.

13. MC 5. The affluence resulted from a legal source. (E2.A6.1.3.5.)

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