

DATE: September 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-18737

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Bruce Robert Kay, Esq.

SYNOPSIS

Applicant has a history of criminal, financial, and personal conduct concerns. Applicant was criminally charged with failure to pay child support and contempt in 1993. Financial considerations concerns arose as a result of Applicant owing 15 creditors in excess of \$76,000.00. Personal conduct concerns arose as a result of Applicant failing to list all past judgments and civil law suits filed against him on his security clearance application. Applicant has successfully mitigated criminal and personal conduct concerns. However, he has not mitigated financial considerations concerns and has failed to submit any evidence showing debts have been or are being resolved. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 18, 2003, DOHA issued a Statement of Reasons (SOR) [\(1\)](#) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on September 10, 2003, and elected to have a hearing before an administrative judge.

DOHA received the case on April 7, 2004, and it was assigned to me the same day. On June 1, 2004, DOHA issued a notice of hearing scheduling a hearing for June 30, 2004. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered eight documents, which were admitted without objection as Government Exhibits (GE) 1 through 8. The Applicant offered two documents, which were admitted without objection as Applicant Exhibits (AE) A and B, and one document for administrative notice, which was admitted without objection as Appellant Exhibit 1. I left the record open until September 30, 2004, a period of 90 days, without government objection, to afford Applicant the opportunity to submit evidence mitigating financial considerations concerns. No evidence was submitted by the Applicant. DOHA received the transcript on July 28, 2004.

FINDINGS OF FACT

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

Applicant is a 57-year-old married man. He was married to his first wife from March 1971 to June 1980. That marriage ended in divorce. Applicant remarried to his second and present wife in January 1981. Applicant has three adult children from his first marriage and two adult stepchildren from his second marriage.

Applicant attended university from September 1966 to June 1970, graduated in June 1970, and was awarded a bachelor of arts degree, majoring in political science. Applicant seeks a security clearance in his capacity as a business development partner in a company that conducts a significant portion of its business within the defense industry.

Following a criminal indictment in state court on May 20, 1992 for non-support of his three minor children, Applicant was found guilty pursuant to his plea on January 26, 1993. On the same day he was found guilty, he was sentenced to three years in jail, which was suspended for three years, and he was further awarded probation for five years. A balance of \$25,046.61 of non-support arrearage was owed on the day of trial. GE 2. [\(2\)](#)

Applicant submitted documentation that his past due child support payments were current, that his three children for whom the support was intended are now adults, and that he had overpaid child support to the administering state agency by approximately \$350.00. AE B. Furthermore, Applicant had requested an audit from the state agency tasked with collecting child support. AE A. The government did not submit any evidence to rebut nor did they challenge Applicant's evidence reflecting child support payments were current.

Applicant testified his ex-wife "ruined my life, ruined everything that had happened in terms of money. Prior to the divorce, . . . , I owned a couple of houses, cars, I had great credit." Tr. 50. He further testified ". . . I've never had the opportunity to recover fully from all of the problems I had in the divorce and that incarceration back from 1993." Tr. 54. Applicant stopped making child support payments after his ex-wife took his children out of state and he was unable to see them. He further added his non-payment of child support was a mistake.

Under Guideline F, the SOR alleged Applicant was in arrears on 15 debts totaling \$76,419.68. Applicant testified the judgment debt in the amount of \$1,768.48 listed in SOR Para. 2.b. has been paid. Tr. 65-66.

Applicant through counsel indicated he was going to take whatever debt he had accumulated over the years to include those listed in the SOR under Guideline F and file chapter 13 bankruptcy. Such filing was to take place within one week from the date of hearing. Tr. 71-72. As previously indicated, Applicant's counsel requested the record be kept open to show evidence of payments to the chapter 13 trustee. No post-hearing evidence of any sort was received.

On April 21, 2003, Applicant submitted his security clearance application. He was cited for deliberately failing to list a judgment in the amount of \$1,911.03 filed against him on July 16, 1996 in response to question 37, which queried whether he had any judgments against him in the last seven years which had not been paid. He did list a judgment in the amount of \$400.00. The judgment in question was 6 years, 9 months old at the time of submission.

Applicant was further cited for deliberately failing to list all civil court actions he had been a party to in the last seven years to include a civil suit for rent arrearage in the amount of \$21,204.63, which was filed in September 1994, and subsequently resolved in January 1995; a civil suit for a lien filed for state unemployment compensation in the amount of \$5,466.99, which was entered on October 20, 1995; a civil suit filed by his mother him for breach of contract, which was filed on April 3, 1997, and discontinued on January 22, 1998; and a civil suit filed for back rent and attorney's fees, which was filed in April 1997 and dismissed due to inactivity over 24 months in December 1999. The first two suits are clearly outside the seven year window, the third and fourth civil suits were six years old at the time Applicant submitted his security clearance application. The Applicant did list a civil suit filed against him by an appliance company, which was filed in April 2001.

When queried about the falsification allegations, Applicant testified, (referring to completing his security clearance

application) "I don't know, and I still didn't know as I spoke today don't know everything that is on my credit report. I called my wife, I said I got to fill this out . . . I've got today and tomorrow to fill it out. We've got to put this stuff down. To the best of our knowledge, we collaborated on what was owed and I put down in there, as you see, there may be things that are not on here that I don't know, forgot about. I will be glad to discuss anything with you, there was never an intent on my part to hide anything. It's very clear in the directions that the worst thing you can do is to hide anything. And, I'm not going to put myself or my company in that position. And, while they're deemed to be whatever you call them, I did not intentionally lie or leave anything out. I may have left things out, they were not intentional. I can not be any more, any stronger about that than that statement. And, I apologize that they were left out." Tr. 133-134.

The government indicated they were not going forward with SOR ¶ 3.c.

Three of Applicant's partners testified as to his excellent work ethic, reputation for honesty, and the contribution he has made to the defense industry. Tr. 19-38.

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.

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

Criminal Conduct - Guideline J

In the SOR, DOHA alleged that Applicant was criminally charged with one count of non-support and two counts of contempt for which he was he was convicted pursuant to his guilty plea and sentenced to three years in jail, which was suspended for three years, (¶¶ 1.a. and 1.b.). *The Concern*: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

The Government established its case under Guideline J by Applicant's admissions and evidence presented. Applicant's conviction for failure to pay child support and contempt occurred in January 1993. Although Applicant was sentenced to three years in jail, his sentence was suspended for three years. He has since paid his child support arrearages and his three children are emancipated adults. Lastly, when this SOR allegation was drafted, the Smith Amendment was applicable, which would have precluded Applicant from being granted a security clearance unless given a secretarial waiver. As indicated in footnote 2, the Smith Amendment been further amended and in order for the "new" Smith Amendment to be applicable, Applicant would had to have served one year in jail, which did not occur in this case. Accordingly, SOR ¶ 1.b. is no longer applicable.

Applicable Criminal Conduct Disqualifying Conditions (CC DC) are: E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*); and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*). In light of the fact this conviction and sentencing occurred in 1993 and the Applicant has taken corrective action, applicable Criminal Conduct Mitigating Condition's (CC MC) are: E2.A10.1.3.1. (*The criminal behavior was not recent*); E2.A10.1.3.4. (*. . . the factors leading to the violations are not likely to recur*); and E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*). I find for Applicant on this concern.

Guideline F - Financial Considerations

In the SOR, DOHA alleged Applicant had 15 delinquent debts in excess of \$76,000.00. (¶¶ 1.a. through 1.o.). *The Concern*: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established its case under Guideline F by Applicant's admissions and evidence submitted. His inability to satisfy his outstanding financial obligations gives rise to Financial Considerations Disqualifying Conditions (FC DC) E2.A6.1.2.1. (*A history of not meeting financial obligations*); and FC DC E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*).

As reflected above, Applicant through counsel indicated he would be filing chapter 13 bankruptcy and requested the record be held open for 90 days after the hearing to submit evidence of payment compliance to the trustee. Inasmuch as no evidence was submitted, this concern remains unmitigated.

Applicable Financial Considerations Mitigating Conditions (FC MC): None. I find against Applicant on this concern.

Personal Conduct - Guideline E

In the SOR, DOHA alleged Applicant had deliberately falsified his responses on his security application submitted April 21, 2003, pertaining to past judgments and civil court actions (¶¶ 3.a. through 3.c.). *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.

Posing potential security concerns are Applicant's failing to list one of his past unpaid judgments within the past seven years and failing to list four civil suits filed against him allegedly within the past seven years. He did list one of the judgments against him and did list one of the civil suits filed against him. The government established that the Applicant

did not list an unpaid judgment, (SOR ¶ 2.a.), that should have been included when responding to question 37; and that Applicant did not list two civil suits, (¶ 2.b.(3) and (4)), that should have been included when responding to question 40. SOR ¶¶ 3.b.(1) and (2) occurred outside the seven year window and Applicant was not required to list them. The civil suit filed by Applicant's mother and the civil suit for back rent and attorney's fees were over six years old at the time Applicant completed his security clearance application.

Applicant testified convincingly that he made a good faith attempt to be as accurate as possible when completing his security clearance application and given limited time constraints he had to complete it and the number of items he would have had to list, it is not difficult to believe that he could have inadvertently missed something. Certainly, what he did list put the government on notice that his financial situation was less than perfect. Applicant's explanation of his failure to list the missing information is persuasive enough to avert inferences of knowing and wilful omission. There being no conduct substantiated, no need to show extenuation and mitigation arises. Little could be gained by Applicant from a wilful omission given the fact he had already provided enough adverse information regarding his financial situation. While Applicant could reasonably have been expected to be more diligent when responding to this inquiry, his judgment lapses are not enough to impute knowing and wilful falsification under Guideline E. I find for Applicant on this concern.

The government indicated they were not going forward with SOR ¶ 3.c.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1.: Guideline J: FOR APPLICANT

Subparagraphs 1.a.-1.b.: For Applicant

Paragraph 2.: Guideline F: AGAINST APPLICANT

Subparagraphs 2.a.-2.o.: Against Applicant

Paragraph 3: Guideline E: FOR APPLICANT

Subparagraphs 3.a.-c. For Applicant

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

DECISION

In light of all of 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.

Robert J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

2. In 2000, a federal statute, commonly referred to as the "Smith Amendment," was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. 10 U.S.C. § 986 (c)(1) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the

decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001). At the time the SOR in this case was issued, the Smith Amendment was applicable.

As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year. 10 U.S.C. § 986(c)(1) (2004). In light of the 2004 amendment, this case no longer falls under the 2000 Smith Amendment.