

DATE: March 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20201

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1990, the Applicant pleaded guilty two counts of second degree robbery and criminal possession of stolen property and was sentenced to serve a minimum of one and one half years. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from the Applicant's criminal conduct, finances and personal conduct. However, 10 U.S.C. § 986 prohibits the granting the Applicant a security clearance absent a waiver by the Secretary of Defense. I do not recommend a waiver. 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 Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated response received on July 6, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On October 9, 2003, the Applicant received a complete copy of the file of relevant material (FORM) dated September 30, 2003, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. In the FORM, Department Counsel presented eight exhibits (Items). On October 28, 2003, the Applicant responded to the FORM. The government had no objection to the response. I was assigned the case on December 22, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J), financial considerations (Guideline F), and personal conduct (Guideline E). The Applicant denies he has failed to satisfy his debts and denies deliberately omitting, concealing, or falsifying facts. He admits the remaining 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 34 years old, has worked for a defense contractor since November 1999, and is seeking a security clearance. The Applicant's supervisor is very impressed with the Applicant's work and dependability. The Applicant is regarded by those who know him as a valued staff member.

On September 10, 1990 and September 16, 1990, the Applicant was arrested and charged with unauthorized use of an automobile. He had been a passenger in a stolen vehicle. He had no knowledge the vehicle had been stolen. Prosecutions of both charges were declined. In August 1997, the Applicant was arrested and charged with simple assault and domestic violence. Prosecution of the charge was declined. There is no evidence of record indicating these charges were felonies, nor does the Applicant admit they were felonies.

In December 1990, the Applicant was arrested and charged with robbery in the second degree; robbery in the second degree an armed felony; and criminal possession of stolen property in the fourth degree. In August 1991, he pleaded guilty to the charges and was sentenced to serve a minimum of one and one half years and a maximum of four years confinement on the two counts of robbery in the second degree, and sentenced to serve a minimum of one year to a maximum of three years confinement on the criminal possession of stolen property in the fourth degree charge. The sentences were to run concurrently. (Item 5)

The Applicant admits owing two debts. He owes approximately \$3,700 on a student loan and he owes child support. A summary of the debts follows.

Account		Current Status
2.a. Student loan \$5,085	\$1,512 tax refund intercepted. Attachment D. Debtor is deducting \$62.42 per month.	Being Paid.
2.b. Delinquent loan \$ 3,732	Auto Loan.	<u>PAID</u> . Same debt as 2.f. owed
2.c. Student loan \$ 5,216	Is being paid as agreed. See Attachment E.	Being paid. Same debt as 2.a.
2.d. Telephone bill \$91.00	Paid in Full. See Attachment G.	<u>PAID</u> .
2.e. Past due child support \$12,000	Child support services refunded his money. See Attachment H.	No evidence of record of an arrearage for child support.
2.f. Civil judgment \$3,213.00	Auto loan. Paid in Full. See Attachment I.	<u>PAID</u> .

The Applicant had purchased a used car and made six to eight monthly payments on it. When the car developed engine trouble and the dealer failed to honor the warranty, the Applicant returned the car to the dealer. The Applicant's credit report lists an auto debt (SOR 2.b) opened in January 1998 and written off in November 1998. The debt was purchased by another lender (Attachment 1.a). The judgment creditor in the civil judgment (SOR 2.f) indicates the debt had been owned by a number of creditors before the judgment creditor. The judgment resulted in a wage garnishment against the Applicant of \$300 every two weeks. The garnishment started in February 2002 (Attachment I.) and the debt was satisfied as of September 27, 2002.

In 1990, the Applicant obtained a student loan (SOR 2.a). This was the only student loan he has ever obtained. He initially made payments on the debt, then stopped. SOR response Attachment E indicates the debts reflected in SOR 2.a and 2.c are the same debt. The Applicant spoke with the creditor and told them he was unable to make payments so long as the previously listed garnishment was being made.

In July 1993, the Applicant's daughter was born. He was ordered to make \$250 per month child support payments (SOR 2.e). In his answer to the SOR the Applicant made a qualified admission concerning this debt. In his answer to the SOR the Applicant denies owing \$12,000 for past due child support. He states he has received no documentation from the

child support services (CSS) regarding this matter. Initially, he made his payments, however, when he changed jobs his automatic payroll deduction stopped. He started making payments through CSS. In June 2003, he received a refund check from CSS (Attachment H). On checking with CSS he was told if child support payments are not claimed by the party receiving the payments, they are returned to CSS where they are held for a proscribed time period. If not claimed after the time period, the money is returned to the party providing the support. In his answer to the FORM, the Applicant submitted a form from the Office of Child Support Enforcement indicating no delinquent child support obligations as of July 1998. The Applicant alleges this account was closed July 9, 1998.

The Applicant is married with two child children living with him. As of April 2002, the Applicant's and his wife's monthly take home pay was approximately \$3,500. Their monthly expenses were approximately \$2,800 which left a balance of approximately \$700 per month.

On September 27, 2000, the Applicant completed a Security Clearance Application, Standard Form (SF) 86. He answered "Yes" to question 21, which asked him about his felony offenses. In response to the question, he listed his 1990 armed burglary and 1997 simple assault and domestic violence arrest. He did not list his two 1990 arrests for unauthorized use of an automobile. The Applicant believes the arrests for unauthorized automobile use were not felonies and therefore he was not required to list them in response to question 21.

The Applicant answered "No" to question 26, which asked him to list any other times he was arrested or charged with or convicted of any offense not elsewhere revealed on the form, which had occurred during the preceding seven years. He did not list the two arrests for unauthorized automobile use because they occurred ten years prior the completion of his SF 86.

The Applicant answered "No" to question 37, which asked him to reveal any unpaid judgments. At the time the SF 86 was completed, the Applicant was unsure of the status of his debts. In December 2001, he received a summons concerning the civil judgement. The Government concedes there was no evidence of a judgment against the Applicant imposed prior to the SF 86 being completed. In response to question 38 he did indicate he was 180 days delinquent on his student loan and child support.

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 as well. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts proven must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole people's 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:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
- 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.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

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:

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

Personal Conduct (Guideline E) 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.

Conditions that could raise a security concern and may be disqualifying also 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 disqualifies, 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, the applicant then has the burden of establishing her 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 her 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 1990, the Applicant was arrested twice for unauthorized automobile use, and also arrested for second degree armed robbery and criminal possession of stolen property. In 1997, he was arrested for simple assault and domestic violence. For the robbery charge the Applicant was sentenced to serve a minimum of one and a half years and a maximum of four years confinement on the two counts of robbery in the second degree, and sentenced to serve a minimum of one year to a maximum of three years confinement on the criminal possession of stolen property in the fourth degree charge. Because of his 1990 robbery arrest and conviction, Disqualifying Condition (DC) b. [\(2\)](#) applies and, because he was sentenced to more than one year in jail, DC c. [\(3\)](#) applies.

Mitigating Condition (MC) a. [\(4\)](#) mitigates the Applicant's 1990 criminal conduct because the conduct is not recent, having occurred 13 and one half years ago. C a. also applies to his 1997 arrest, wherein the prosecution was declined, which occurred six and one half years ago. I find for the Applicant as to SOR paragraphs 1.a, 1.b., 1.c., and 1.d.

The evidence of record is insufficient to establish there is clear evidence of successful rehabilitation. MC f. [\(5\)](#) The only favorable evidence in the record is that the Applicant is regarded by those who know him as a dependable, hard worker, and valued staff member.

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.e. 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. Although the criminal conduct took place more than 13 years ago, there is little evidence of record as to successful rehabilitation or the Applicant's current life style. I do not recommend a waiver of Title 10 U.S.C. 986.

The Government has satisfied its initial burden of proof under Guideline F, (Financial Considerations). 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 evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with the holding of a security clearance. 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. The Applicant owed approximately \$9,000 on a student loan and on an auto loan that resulted in a civil judgment. Disqualifying Conditions (DC) 1-[\(6\)](#) and 3-[\(7\)](#) apply.

The Applicant had only one student loan. Evidence provided by the Applicant shows the debts listed in SOR 2.a. and 2.c. are the same debts. The Applicant's tax refund of \$1,512 was intercepted in February 2003 and applied to his student loan obligation. As of March 2003, the creditor has been deducting \$62.42 from the Applicant's checking account each month. Since the Applicant is making monthly payments, I find MC 6-[\(8\)](#) applies. I find for the Applicant as to SOR paragraphs 2.a. and 2.c.

The Applicant had a car loan (SOR 2.b) non payment of which ultimately resulted in a civil judgment (2.f). The judgment was paid through a wage garnishment. As of September 2002, the judgment was paid in full. I find for the Applicant as to SOR paragraphs 2.b. and 2.f. The Applicant has paid his \$91 telephone bill. I find for the Applicant as to SOR paragraph 2.d.

The Applicant owes child support for his daughter born in 1993, but denies owing any past due child support. His

unrebutted denial is strengthened by the June 2003 refund check he received from the CSS. When he investigated the matter, he was told unclaimed money is returned to the party providing the support. As of July 1998, he had no delinquent child support obligation as evidenced by the state Office of Child Support Enforcement form. There is no evidence of record showing the Applicant owes any amount for past due child support. I find for the Applicant as to SOR paragraph 2.e.

Since the Applicant has paid some of his debts, is making monthly payments on his student loan obligation, and there is no evidence he owes back child support, I do not find against him because his income exceeded his expenses. I find for him as to SOR paragraph 2.g.

The Government has failed to satisfy its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

In September 2000, the Applicant completed his SF 86. In response to Question 21, concerning felony arrests, the Applicant listed his 1990 robbery arrest and 1997 assault. He did not list his two 1990 arrests for unauthorized automobile use. There is no showing the unauthorized automobile uses were felonies and therefore he was not required to report them in response to Question 21. I find for the Applicant as to SOR paragraph 3.a. The same two arrests occurred more than seven years before the SF 86 was completed. Therefore, he did not have to list them in response to question 26. I find for the Applicant as to SOR paragraph 3.b. The government has conceded there is no evidence a judgment had been entered against the Applicant prior to the Applicant completing his SF 86. I find for the Applicant as to SOR paragraph 3.c.

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:

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

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: Against the Applicant

2. Financial, Guideline F: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

3. Personal Conduct, Guideline E: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: 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. DC b. A single serious crime or multiple lesser offenses.
3. 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.
 4. MC a. The criminal behavior was not recent.
 5. MC f. There is clear evidence of successful rehabilitation.
 6. DC 1. A history of not meeting financial obligations.
 7. DC 3. Inability or unwillingness to satisfy debts.
8. MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. (E2.A6.1.3.6.)