

DATE: February 13, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22474

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Peter J. Jankell, Esq.

SYNOPSIS

Applicant filed for Chapter 13 bankruptcy protection in 1994 and 2000 and failed to list the 1994 filing on his security clearance application. Applicant's financial problems were due to conditions largely beyond his control. He is in the process of putting his financial house in order and has mitigated the financial security concerns. His omission of the 1994 bankruptcy filing from his security clearance application was not deliberate. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 11 September 2003, under the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in a writing notarized on 7 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 4 November 2003. I scheduled a hearing for 25 November 2003, but postponed it at the request of Applicant's attorney. On 5 January 2003, I convened a hearing, by video teleconferencing, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 13 January 2004.

FINDINGS OF FACT

Applicant is a 40-year-old communications lead operator for a defense contractor. He served 12 years in the U.S. Navy, from 1983-1995, achieving the paygrade of E-5. He held a top secret clearance. He has worked for his current employer for eight years and holds a secret clearance.

In July 1994, when he returned from a deployment in support of military operations in Somalia, Applicant discovered his wife had not been paying the family's bills and the mortgage company was foreclosing on their house. Tr. 19-20.

Applicant's wife had been receiving his pay to pay the bills. Tr. 21.

In August 1994, to forestall the foreclosure, Applicant filed a Chapter 13 bankruptcy. The bankruptcy was discharged in January 1997. Although the bankruptcy gave Applicant some breathing room and he was able to pay off his delinquent debts, he acquired more debt than he was able to pay in a timely manner.

In June 2000, Applicant again filed a Chapter 13 bankruptcy with unsecured debts totaling \$3,285 and secured debts totaling over \$93,000. Applicant's divorce became final in November 2000. Applicant was required to pay \$789 per month in child support as well as assume most of the debts of the marriage. On 5 September 2001, Applicant voluntarily requested dismissal of the bankruptcy. As part of the divorce settlement, Applicant was awarded the home and he needed to retitle it in his name alone. He refinanced the home at the same time. Once the mortgage was refinanced and his child support obligation was reduced from \$789 to \$500 per month-he convinced the court he was already providing insurance for his child-Applicant believed he could handle his debts without the need for the bankruptcy proceeding.

The following chart summarizes the delinquent debts alleged in the SOR and their status.

| ¶ | Nature and Amount | Status | Record |
|------|-----------------------------|-------------------------------------------|------------|
| 1.a. | Owes car dealer \$189 | Still unpaid-amount due is now over \$300 | Tr. 27, 30 |
| 1.b. | Delinq credit acct \$1,422 | Paid off and account voluntarily closed | Ex. B |
| 1.c. | Delinq finance acct \$3,384 | Charged off acct | Ex. B |
| 1.d. | Delinq store acct \$775 | Paid off | Tr. 33 |

Applicant had a delinquent debt to a car dealer. SOR ¶ 1.a. Applicant thought he paid this debt off in 1999. Ex. B. Apparently because the computer was not working at the time of his payment (Ex. B), the dealer was unable to give Applicant an accurate balance. Applicant currently owes \$346 to the auto dealer. Tr. 27.

Applicant completed his security clearance application on 26 August 2000. Ex. 2. Question

33 asked if, in the past seven years, Applicant had filed a petition for bankruptcy. Applicant answered yes, listed his 2000 Chapter 13, but failed to list his 1994 Chapter 13 bankruptcy.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.

See Egan, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged Applicant had several delinquent debts (¶¶ 1.a.-1.d.), requested dismissal of a Chapter 13 bankruptcy in September 2001 (¶ 1.e.), and had debts of over \$100,000 discharged in 1997 as a result of a Chapter 13 bankruptcy petition filed in 1994 (¶ 1.f.). An applicant 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 by substantial evidence and Applicant's admissions that Applicant has a history of not meeting his financial obligations (DC E2.A6.1.2.1.) and was unable or unwilling to satisfy his debts (DC E2.A6.1.2.3.). In part, the debts appear to have resulted from conditions that were beyond Applicant's control (MC E2.A6.1.3.3.)-his wife's profligate spending while he was deployed and the costs associated with his divorce. As Department Counsel pointed out, the fact that one of Applicants debts was charged off, another is outstanding, and he filed two bankruptcies is a concern.⁽³⁾ However, after carefully reviewing all of the evidence and listening carefully to Applicant's testimony, I am convinced his financial situation no longer represents a security concern. Although Applicant sought protection under the bankruptcy statute, he did not use the statute to avoid his debts, but merely to give him breathing room to pay off his obligations. He has made good-faith efforts to resolve his debts. MC E2.A6.1.3.6. Applicant will pay off the small debt he owes to the car dealer. The charged off debt is not symptomatic, in this case, of an individual who is trying to avoid his just financial obligations and does not make Applicant vulnerable to engage in illegal acts to generate funds. I find for Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his security clearance application by failing to disclose he had filed for Chapter 13 bankruptcy in 1994. ¶ 2.a. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions that Applicant failed to accurately complete his SCA by not listing his 1994 bankruptcy filing in answer to question 33. But the issue is whether Applicant deliberately omitted listing the 1994 bankruptcy filing. After carefully observing Applicant's demeanor and considering his testimony, I am convinced his failure to list the 1994 bankruptcy filing was not deliberate, but merely an inadvertent mistake. Applicant filed the bankruptcy some six years before he completed his SCA and has not tried to hide his financial situation. I find for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Applicant claims 11 U.S.C. § 525 prohibits the Department of Defense from considering his bankruptcies. The statute provides that, with a few exceptions not here applicable, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act." The decision to grant or deny a security clearance is a matter of executive discretion. *See Department of the Navy v. Egan*, 484 U.S. 518, 527-29 (1988). Regardless, applicants are not denied security clearances because they file for bankruptcy. It is the underlying financial situation that is the basis for denials. The bankruptcies are merely evidence of how Applicant's financial situation has changed, or not, as a result of his exercise of this option. *See* ISCR Case No. 97-0016, 1997 DOHA LEXIS 885 at **10-11 (App. Bd. Dec. 31, 1997).