

DATE: June 25, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22469

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was a businessman who filed bankruptcy under Chapter 7 twice in 1998 to stave off creditors swarming around his suffering retail business. Neither bankruptcy was completed, both being used as tools to restructure Applicant's shop lease and other financial arrangements. His third Chapter 7 bankruptcy, filed and completed after his business closed, rid Applicant of various obligations. Applicant's fourth bankruptcy, a Chapter 13 petition, commenced about the time of the filing of the security clearance application (SCA). Only the third bankruptcy was disclosed on his SCA. Applicant mitigated the financial considerations security concerns, but did not mitigate the personal conduct security concern. Clearance is denied.

STATEMENT OF THE CASE

On July 28, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

Applicant submitted a signed and sworn statement, which was undated. He admitted the allegations contained in Paragraphs 1 and 2 of the SOR.

On April 1, 2004, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on May 6, 2004. The case was assigned

to me on May 20, 2004.

FINDINGS OF FACT

Applicant's 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 that evidence, I make the following additional findings of fact:

Applicant is 39 years old. He is married and has two children. He is currently employed with a defense contractor as a security officer. (Item 4 at 1-4; Item 5 at 1, 6-8)

Applicant had a retail business that he owned from 1995 to 1998. Applicant found his business failing after he attempted to expand, but could not obtain the needed capital to do so. Consulting with an attorney, Applicant, through his attorney, filed the first Chapter 7 bankruptcy petition in July 1998 to stave off creditors and increase his cash flow over a short period of time. The bankruptcy petition was not perfected after being filed, and it was dismissed by the bankruptcy judge. (Item 5 at 1, Item 10; Answer; Response)

Several months later, in September 1998, Applicant was in arrears on his business lease payments. His landlord threatened eviction unless Applicant paid an additional \$6000 security deposit. Applicant again consulted and retained the same attorney who advised him on the first bankruptcy. The advice was the same, to file a second Chapter 7 bankruptcy petition and attempt to generate needed funds and/or find a suitable business partner. Neither effort was successful, and Applicant vacated his business location in November 1998, and the business closed. This Chapter 7 petition was also filed in an imperfect form, knowing the bankruptcy court would dismiss it, but in the meantime Applicant had sufficient time to attempt his business recovery plan. (Item 4 at 2, Item 5, Item 11; Answer; Response)

In 1999 Applicant filed another Chapter 7 bankruptcy, and represented himself. After filing the petition, Applicant found the Chapter 7 procedure would not alleviate him from the unemployment compensation taxes he owed the state and the sales taxes he owed. His home was under foreclosure because the mortgage lender wanted to be paid. Applicant reaffirmed that debt. At that point, Applicant realized he should retain a bankruptcy attorney, which he did do. When Applicant filed that bankruptcy action, he listed the September 1998 bankruptcy petition as the only bankruptcy action filed in the previous seven years. (Items 5 and 6, Item 9 at 12)

Applicant sought employment with a defense contractor in November 1999. He received his security clearance application (SCA) in December 1999. He completed and submitted it to his security administrator in January 2000, although the date on the SCA is February 24, 2000. Applicant admits signing the SCA on that date. Applicant did not disclose the first two filings for Chapter 7 protection, nor the pending Chapter 13 bankruptcy petition. Applicant only disclosed the October 1999 Chapter 7 bankruptcy filing. He did not submit written information concerning his February 2000 Chapter 13 filing to his employer, as he was instructed to do. It was not until at least July 2002 that his employer received written notification from Applicant of the last filing. (Response at 1-2; Answer; Item 3, Item 4 at 9)

Applicant's third Chapter 7 bankruptcy petition received a discharge order from the bankruptcy court on March 31, 2000. In September 2002 Applicant was discharged in Chapter 13 bankruptcy. He sold his home in May 2003, used the proceeds to satisfy the Chapter 13 plan, and the balance of funds were used to buy a new residence. He kept current with his financial obligations from then onward. (Response at 2; Item 3 at 2)

Applicant failed to pay part of the sales tax he collected during a portion of 1998 to the state where the business was located. He also failed to pay unemployment compensation taxes, as he was required to pay. (Answer; Response; Item 8 at 10, 16, 60, 61)

Applicant relied on his attorney to advise him of the legal strategies to save his business. Applicant is of the view that all these bankruptcy filings were part of the same action, one case, different portions of that same case. The four petitions each had different filing numbers in the Bankruptcy Court. (Items 8 to 11)

Applicant failed to disclose fully on his Security Clearance Application (SCA) that in the previous seven years he filed bankruptcy in July 1998 and September 1998 under Chapter 7 of the U.S. Bankruptcy Code, and also filed Chapter 13 bankruptcy on February 24, 2000 (Question 33). (Response; Answer; Item 4 at 1, 9-10)

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 judgement, 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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See

Exec . Or. 12968 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline F - Financial Considerations:

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1.

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

(1) A history of not meeting financial obligations. Directive, ¶ E2.A6.1. 2.1.

(3) Inability or unwillingness to satisfy debts. Directive, ¶ E2.A6.1.2.3.

Applicable conditions that could mitigate security concerns include:

(1) The behavior was not recent. Directive, ¶ E2.A6.1.3.1.

(6) The individual initiated a good-faith effort to repay overdue creditors or otherwise

resolve debts. Directive, ¶ E2.A6.1.3.6

Guideline E - Personal Conduct:

(A) 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. Directive, ¶ E2.A5.1.1.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; Directive, ¶ E2.A5.1.2.2.

©) Conditions that could mitigate security concerns include:

None

CONCLUSIONS

I conclude that under Guideline F (Financial Considerations) the Government proved its case. Therefore, the Disqualifying Conditions (DC) 1 (*a history of not meeting financial obligations*) and DC 2 (*an inability or unwillingness to satisfy debts*) apply. Applicant's delinquent debts arose from the failure of his private business in 1998. He could not pay the debts from his income.

The Mitigating Conditions (MC) that apply here are MC 1 (the behavior is not recent) and MC 6 (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts). Applicant's retail business failure was six years ago in 1998. Applicant filed a Chapter 7 bankruptcy to dispose of the debts he could by that legal mechanism. Other debts could not be removed by a Chapter 7 bankruptcy, so Applicant filed a Chapter 13 bankruptcy. On that installment plan he paid his unpaid sales taxes and unemployment taxes. Applicant has used a legal mechanism under federal law to resolve is debts. I conclude this Guideline for Applicant.

Regarding Guideline E (Personal Conduct), I conclude the Government proved its case. The SOR alleges Applicant

falsified material facts on the SCA, Question 33, which asked if Applicant had filed a petition under any chapter of the bankruptcy code. Applicant only disclosed the October 1999 Chapter 7 bankruptcy petition that he filed without an attorney. On that petition Applicant disclosed the September 1998 bankruptcy petition filing. If he disclosed it in that document, he should have disclosed it on the SCA. Applicant states he did not understand the question asked in Question 33. However, that question is simple and straight-forward. It was not within Applicant's power to make legal distinctions on what bankruptcy filing he would disclose, regardless of the outcome of any filing. Question 33 asked for disclosure of all filings in the past seven years. He should have disclosed all filings. He did not do so. Applicant was in the process of filing a Chapter 13 at the same time he was completing his SCA, but he did not disclose that filing or its intended filing. Lastly, the bankruptcy judge entered orders dismissing the first two Chapter 7 bankruptcy filings. Applicant takes the position that they were not actually filed. If the judge had to enter an order dismissing them, then they were filed, and Applicant is wrong, both in his erroneous interpretation and his failure to disclose. Applicant was trying to cast his financial history in the most favorable light to himself by hiding what was a reasonable exercise of the bankruptcy laws by failing to disclose the truth about them. Therefore, DC 2 (*the deliberate, concealment, or falsification of relevant and material facts from any personal security questionnaire or similar form used to determine security clearance eligibility or trustworthiness*) applies to this case.

I conclude there are no MC which apply to these facts. Therefore, I find against Applicant under Guideline E.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

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

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is not clearly consistent with the interest of national security to grant a security clearance to Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge