

KEYWORD: Financial; Criminal Conduct

DIGEST: Applicant's financial problems resulted from a business failure largely due to events beyond his control. His business records were stolen, he experienced a business downturn caused by the fall in the market value of his inventory, and he suffered a loss of revenue from an employee's failure to bill customers. Two years ago, Applicant initiated a good-faith effort to repay overdue creditors and has repaid \$4,600.00 of \$21,235.00 in delinquent indebtedness addressed by the SOR. The record also fails to establish that Applicant's failure to file federal income tax returns was willful. He filed for extensions and made estimated tax payments that exceeded or equaled his actual tax liability for tax years addressed by the SOR. Clearance is granted.

CASENO: 02-22862.h1

DATE: 02/25/2005

DATE: February 25, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22862

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn Antigone Trowbridge, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's financial problems resulted from a business failure largely due to events beyond his control. His business records were stolen, he experienced a business downturn caused by the fall in the market value of his inventory, and he suffered a loss of revenue from an employee's failure to bill customers. Two years ago, Applicant initiated a good-faith effort to repay overdue creditors and has repaid \$4,600.00 of \$21,235.00 in delinquent indebtedness addressed by the SOR. The record also fails to establish that Applicant's failure to file federal income tax returns was willful. He filed for extensions and made estimated tax payments that exceeded or equaled his actual tax liability for tax years addressed by the SOR. Clearance is granted.

**STATEMENT OF THE CASE**

On August 14, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On September 6, 2003, Applicant answered the SOR and requested a hearing. The case was assigned to me on April 7, 2004. A notice of hearing was issued on April 7, 2004, and the hearing was held on April 28, 2004. During the hearing, eight Government exhibits (Govt Ex) and the testimony of Applicant were received. The transcript (Tr) was received on May 18, 2004.

Without objection by Department Counsel, I granted Applicant until May 12, 2004 to provide documentation pertaining to the status of his indebtedness. On ay 8, 2004, Applicant submitted documentation. I had previously marked two of those documents at the hearing as Applicant Exhibits A and B. The remainder of his submission I have marked Applicant as Ap Ex C.

## FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 58-year-old information technologist employed by a defense contractor since May 2001. He is seeking a security clearance.

Applicant owned and operated a business between November 1989 and May 2001. He sold computers and provided computer support. The business was Applicant's only source of earned income from April 1996 until May 2001. On the night of March 20-21, 1996, Applicant's business was burglarized. Various equipment was vandalized or stolen. Among the items stolen was a computer that contained records of customers, orders, job estimates, and schedules. Applicant suspects a former disgruntled employee or job applicant whom he did not hire may have been responsible for the break-in. Although he had insurance, Applicant was unable to recover for the loss because his insurance carrier had gone out of business. Business failure forced Applicant to close his computer store in April 1999 and terminate all operations of his business by May 2001. Applicant attributes his business failure to the decline in the cost of computers, leaving him with an inventory that exceeded market value. He was also unable to collect on a number of customer accounts because his office manager, whom he fired, had failed to bill the customers.

Although Applicant and his wife did not file their personal federal income tax returns by the due date for tax years 1997 through 2001, they did file for extensions and made estimated payments of their anticipated tax liability from the business. On April 10, 2003, Applicant and his wife filed their joint federal income tax return for tax year 1997. Internal Revenue Service (IRS) denied their claim for a \$10,915.00 refund because their return was filed more than three years from the due date. On September 11, 2003, Applicant and his wife filed their joint federal income tax return for tax year 1998. IRS denied their claim for a \$3,713.00 refund because their return was filed more than three years from the due date. On September 11, 2003, Applicant and his wife filed their joint federal income tax return for tax year 1999. IRS denied their claim for a \$2,378.00 refund because their return was filed more than three years from the due date. In 2003, Applicant and his wife also filed their joint federal income tax returns for tax year 2000 and tax year 2001. (SOR ¶ 2.a).

In December 1996, Applicant opened a credit card account with a bank. By May 31, 2001, Applicant had not paid a \$12,626.00 balance on the account. The bank charged off the balance as a bad debt and transferred the account to a debt collector. Applicant began repaying the account with a payment of \$100.00 on June 10, 2002. By the date of the hearing, Applicant had paid a total of \$2,300.00 on the account, reducing the balance to \$10,326.00. (SOR ¶ 1.b).

In January 1998, Applicant opened a credit card with a bank. By May 31, 2001, Applicant had not paid a \$8,248.00 balance on the account. The bank charged off the balance as a bad debt and transferred the account to a debt collector. Applicant began repaying the account with a payment of \$100.00 on June 10, 2002. By the date of the hearing, Applicant had paid a total of \$2,300.00 on the account, reducing the balance to \$5,948.00. (SOR ¶ 1.c).

In April 2001, a \$361.00 debt for cellular service that Applicant had incurred but had not paid was written off by the creditor as a bad debt and transferred to a debt collector. Applicant has not paid the account. He testified he should not be obligated to pay it. According to his testimony, he cancelled the service but the creditor did not post his cancellation until after an automatic renewal of his service for another year. The cancellation then resulted in the debt as an early termination charge for the renewal year. (SOR ¶ 1.a).

On May 29, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) and provided a sworn statement. In addition, he provided a personal financial statement reflecting a monthly net remainder of \$1,019.00 after payment of debts and expenses. Currently, his net remainder has increased by approximately \$800.00 per month. In addition to the debts addressed by the SOR, Applicant makes regular payments on other loans and other credit card debts. These include a \$36,000.00 business loan, approximately half of which he has repaid and a \$22,200.00 credit card balance that he has reduced by approximately \$6,000.00 in a two year period.

Applicant is also paying for his son to attend a state university.

## 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information Within Industry* § 2 (February 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the

Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the 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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the conditions listed in the Directive's guidelines and the applicant's security worthiness. *See* ISCR Case No. 95-0611 at 2 (May 2, 1996). (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (December 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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive ¶ E2.2.2.

## CONCLUSIONS

### Guideline F: Financial Considerations

The concern under Guideline F is that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. The Directive ¶ E2.A6.1.1. Conditions that could raise a security concern and may be disqualifying include *a history of not meeting financial obligations*, ¶ E2.A6.1.2.1 (Disqualifying Condition 1). They also include *an inability or unwillingness to satisfy debts*, ¶ E2.A6.1.2.3 (Disqualifying Condition 3).

The record reflects Applicant's history of not meeting financial obligations of more than \$21,000.00, as well as his inability or unwillingness to satisfy those debts. Nearly all of that indebtedness consists of two credit card accounts that were charged off as bad debts and transferred to a debt collector in May 2001 (SOR ¶ 1.b,c). This record raises both Disqualifying Condition 1 and Disqualifying Condition 3.

Conditions that could mitigate security concerns under Guideline F include ¶ E2.A6.1.3.3 (Mitigating Condition 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)*. Mitigating Condition 3 applies to Applicant's financial condition from several standpoints. No sooner had Applicant had undertaken his business on a full time basis than it was he was adversely affected by a burglary and vandalism, including the theft of the computer containing his business records. His loss was further complicated by his inability to recover on his insurance due to the insurance carrier's failure. Applicant also experienced a business downturn when the price of computers fell and he had an inventory for which he had paid more than the market value. In addition, his office manager's failure to bill customers further contributed to the failure of his business. All of these events that were beyond his control help explain and mitigate Applicant's financial problems.

Conditions that could mitigate security concerns under Guideline F include ¶ E2.A6.1.3.6 (Mitigating Condition 6), *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. The record corroborates that Applicant has repaid a total of \$4,600.00 on the two major delinquent debts addressed by the SOR (SOR ¶ 1.b, c). In addition to averaging a \$100.00 per month on each of these debts, he has also documented debts to other creditors not addressed by the SOR. Based on this effort over a two year period, Applicant has demonstrated that he has initiated a good-faith effort to repay overdue creditors. Therefore, I find in favor of Applicant with regard to SOR ¶ 1.b and c.

With regard to the only other debt addressed by the SOR (SOR ¶ 1.a), Applicant's refusal to pay it appears reasonable. There is nothing in the record to rebut his explanation that the debt constitutes a cancellation charge that was only assessed because of the creditor's failure to apply the cancellation to his account until after automatically renewing his account for another year. Given much larger other debts that Applicant has undertaken to repay, including those not addressed by the SOR, it is reasonable to conclude that he would not refuse this one much smaller one if he did not have a valid basis for his position. Therefore, I find in favor of Applicant with regard to SOR ¶ 1.a.

#### Guideline J: Criminal Conduct

The concern under Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. The Directive ¶ E2.A10.1.1. Conditions that could raise a security concern and may be disqualifying under Guideline J include ¶ E2.A10.1.2.1 (Disqualifying Condition 1), *allegations or admission of criminal conduct, regardless of whether the person was formally charged*. Applicant's failure to file federal income tax returns for a five year period raises Disqualifying Condition 1.

The record fails to establish criminal conduct on behalf of Applicant. First of all, his failure to file timely returns stemmed from the theft of his business records. Moreover, Applicant not only filed for extensions for the tax years in question but he made estimated payments of his tax liability. In fact, he paid \$17,000.00 more than his actual tax liability for tax years 1997-1999. The record demonstrates that Applicant did not willfully fail to file his federal income taxes. Therefore, I find in favor of Applicant with regard to SOR ¶ 2.

## FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

## DECISION

In light of the evidence of record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

*Signed*

**Roger E. Willmeth**

**Administrative Judge**

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.