

DATE: January 5, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26018

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of delinquent debts incurred between 1997 and 1999 during periods of inadequate revenue associated with a private business start-up. The listed debts exceed \$61,000.00 and remain significant amidst continued Applicant resistance to addressing his debts since joining his defense contractor employer. Additionally, Applicant omitted most of his debts when answering his March 2002 security clearance application. His concealment of relevant information about his finances raises security concerns about his judgment and reliability. Only the criminal implications of his omissions are mitigated. Clearance is denied.

STATEMENT OF THE CASE

On October 20, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on November 13, 2003, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on May 20, 2004 and timely filed a response to the FORM, which will be considered herein. The case was assigned to me July 6, 2004.

SUMMARY OF PLEADINGS

Under Guideline F, Applicant is alleged to have accumulated 11 delinquent debts that exceed \$61,000.00. Under Guideline E, he is alleged to have falsified his March 2002 security clearance application (SF-86) by omitting his delinquent debts exceeding 180 days (save for one debt) when responding to question 38 and by omitting all of his delinquent debts exceeding 90 days when answering question 39.

For his answer to the SOR, Applicant admitted most of the allegations relating to his delinquent debts. He denied making no effort to address his debts (claiming efforts to resolve his indebtedness from March 1997 through October 1999 and claimed there was no risk of his engaging in illegal acts to pay off his debts because of his intention to avoid paying them despite his alleged ability to pay them. Applicant also denied falsifying his SF-86, attributing his omissions to his concern over employees of his company knowing the details of his personal financial life, when answering question 38, and claiming the absence of any debts currently 90 days delinquent among his non-delinquent debts, when answering question 39. Applicant claimed to have spent a lifetime serving his country as a member of the military holding security clearances and as a civilian employee of DoE. He claimed he is not a risk to compromise classified information.

FINDINGS OF FACT

Applicant is a 59-year-old research associate for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Before his retirement in 1989, Applicant enjoyed over 22 years of meritorious military service, and contributed another five years of valuable civilian employment to the DoE before accepting a reduction in force option in 1994.

After leaving DoE, Applicant and his wife formed a private business of their own, which they financed for the first two years of its existence with their personal credit cards. Facing unanticipated business obstacles in August 1996, they tried new approaches to keeping their business operating and continued using their credit cards to finance their personal and business expenses. By 1997, they had maxed out their credit cards and stopped paying on them.

In November 1997, Applicant secured regular employment with a local company and began making regular payments on his credit card debts. When the income generated from his personal business began to decline in early 1999, though, he again looked for creative ways to reduce his debts. First, he refinanced his auto loan. Then he applied for and entered into a debt consolidation program with CCC. But after making \$1,100.00 monthly payments for six months to CCC with continued business losses, Applicant and his wife elected to drop out of their debt consolidation program and see their debts charged off. Realizing he and his wife had paid over \$30,000.00 in payments on his credit cards without any appreciable reduction in principal, they chose to rule out bankruptcy, accept the charge offs, and pay no more on their old credit card balances (*see ex. 6*).

Despite opportunities to pay on his old debts with his current job and net available resources every month, he has stayed with his decision to pay nothing on his old debts, concentrating instead on keeping his current debts up to date. Since accepting full time employment with his present employer in April 2001 Applicant has evidently been able to maintain his current expenses and debts in timely payment status.

Asked to complete an SF-86 in March 2002, Applicant admitted to accruing debts over 180 days delinquent within the previous seven years when answering question 38, but listed only one debt. He attributes his omissions of his remaining delinquent debts to his concerns over employees in his company learning the details of his debt problems. In answering question 39 of his SF-86, he answered in the negative to having debts currently 90 days delinquent, claiming he interpreted the question to encompass existing debts (and by implication none of his old debts that had been written off).

None of Applicant's omissions can be reconciled with his experience and understanding of Government background investigations. His failure to explain his omissions in ways compatible with good-faith misunderstandings preclude him from averting inferences of knowing and wilful omission.

Not until confronted with his credit report by an interviewing DSS agent in a July 2002 interview did Applicant acknowledge his delinquent debts. In answering the interviewing agent's questions about his debts, Applicant essentially agreed with the charge-offs and delinquencies reflected in the March 2002 credit report shown him (*see ex. 6*).

Applicant is credited with meritorious military and civilian service. His loyalty to the United States is not in question in this proceeding.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

The Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 1. The behavior was not recent.

MC 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).

MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 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.

Mitigating conditions:

MC 2 The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

MC 3 The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant accrued considerable delinquent debt between 1997 and 1999 while financing his private business with his personal credit cards, which he has only minimally addressed since dropping out of his debt consolidation program in 1999. Applicant's listed delinquent debts (11 in all) total over \$61,000.00, which have for the most part been charged off with no manifest Applicant intention to address.

Based on Applicant's considerable accumulation of delinquent debt, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for Guideline F apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts). While his accrued debts are accompanied by some extenuating circumstances (*viz.*, lack of sufficient revenue from his start-up business to meet his business and personal expenses), for the most part his finances have permitted modest attempts to pay on his old creditors with the resources available to him after he joined his defense contractor in April 2001.

Applicant's debts are neither extenuated nor mitigated enough to enable him to take advantage of any of the mitigating conditions at this time. The tight financial situation he and his wife experienced during the two plus years they devoted to their start-up private business between 1997 and 1999, while problematic at the time, do not appear to have been so significant or prolonged as to preclude his addressing his assumed debts after he returned to work with his defense contractor in April 2001. That Applicant does not intend to pay for any of his delinquent debts does not ease any of the security risks associated with his ongoing default of his business and personal debts. Significant delinquent debt attributable to an applicant that is neither extenuated nor mitigated by good-faith resolution raises implicit security risks over the potential for needed funds and recurrent judgment lapses. The government does not have to wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *Cf. Adams v. Laird*, 420 F.2d 230, 238-39 (DC Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

In Applicant's case, neither extenuation nor mitigation is demonstrated sufficiently to enable him to invoke either MC 3 (conditions largely beyond the person's control) or MC 6 (initiated a good-faith effort to repay overdue creditors) of the Guideline, based on either his financial circumstances in 1997 to 1999, or his repayment efforts after he had returned to full-time employment.

Where (as here) there is insufficient evidence of repayment efforts after the conditions that contributed to an applicant's delinquent debts have passed, the Appeal Board has cautioned against crediting the applicant with either non-recent financial difficulties (MC 1 of the Guidelines) or excusing him from addressing his delinquent debts (even those accrued because of extenuating circumstances). *See* ISCR Case No. 03-01059 (September 2004).

Taking into account all of the circumstances of Applicant's accumulated debts, the absence of sufficient attention he has shown with his debts in the past, and his repeated intentions to avoid repaying his delinquent debts, unfavorable conclusions warrant with respect to subparagraphs 1.a through 1.l of the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's omissions from his June 2002 SF-86. So much trust is imposed on persons cleared to see classified information that deliberate omissions of material information about an applicant's finances cannot be easily reconciled when assessing an applicant's clearance eligibility.

By omitting his past delinquent debts when responding to questions 38 and 39 of his SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security suitability. Applicant attributes his omissions, respectively, to his wanting to keep personal information about his finances from his coworkers when answering question 38 and his misunderstanding over whether question 39 was designed to cover his older charged off debts as well as the state of his current debts. Applicant's explanations are not enough to avert drawn conclusions of knowing and wilful concealment. Applicant's omissions invite application of one Disqualifying Condition (DC) of Guideline E of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is difficult to credit Applicant with, since he failed to make prompt, voluntary disclosures of his omitted debt delinquencies when afforded the opportunity to do so in his follow-up DSS interview. Not only has the Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has precluded availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of an earlier DSS interview opportunity. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification) of the Adjudicative Guidelines for personal conduct.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 2.a and 2.b of Guideline E.

That none of Applicant's SF-86 omissions resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. The Appeal Board has repeatedly stated that the Government may prove applicant engaged in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's belated coming forward with his full disclosure of delinquent debts attributable to him in his ensuing DSS interview represented a positive shift in his attitude about withholding information about his debts, even if made only after being confronted with a credit report. His meritorious work record merits consideration, too, in weighing the extent

of his exhibited rehabilitation. Given his considerable meritorious military history and isolated nature of his omissions, his disclosures are enough to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to take advantage of MC 6 (clear evidence of successful rehabilitation) of the Adjudication Guidelines at this time. Favorable conclusions warrant with respect to subparagraph 3.a of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E: 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

Sub-para. 1.i: AGAINST APPLICANT

Sub-para. 1.j: AGAINST APPLICANT

Sub-para. 1.k: AGAINST APPLICANT

Sub-para. 1.l: AGAINST APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge