

DATE: April 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33703

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Robert E. Bergman, Esq.

SYNOPSIS

Applicant began having financial problems in the late 1990s while living apart from his family due to employment demands. He resolved most of his delinquent debts in September 2000 by refinancing his home. There is no indication he intended to provide false or misleading information in the security clearance application he submitted in February 2001. Applicant has mitigated the security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On January 23, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F, for financial considerations, Guideline E, for personal conduct, and Guideline J, for criminal conduct.

Applicant submitted a sworn answer to the SOR that was received by DOHA on March 8, 2004, and requested a hearing. Applicant admitted one Guideline F allegation, and denied all other allegations.

This case was assigned to another administrative judge on September 24, 2004, who scheduled a hearing to be held on October 19, 2004. On October 12, 2004, that administrative judge granted Applicant's request for a continuance, and the case was thereafter reassigned to me on December 9, 2004, due to regional rotations. I caused a notice of hearing to be issued on January 13, 2005, scheduling the hearing for February 3, 2005. The hearing was conducted as scheduled.

The government submitted nine documentary exhibits that were marked as Government Exhibits (GE) 1-9. GE 1-8 were admitted into the record without objection. GE 9 was admitted into the record over Applicant's objection. Applicant testified, called his immediate supervisor to testify on his behalf, and submitted 26 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-26, and admitted into the record without objection. The transcript was received on February 14, 2005.

FINDINGS OF FACT

Applicant's admission to the one SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 52 years old, divorced, and the father of two children, ages 22 and 20. He was married in August 1981, and obtained a divorce in December 2003. He has been employed by a defense contractor since May 1981, presently as a program manager. He completed the course work to obtain a master of science degree in December 2000, but has not actually been awarded the degree because of unpaid tuition owing to the school.

Applicant's immediate supervisor testified he has worked closely with Applicant since about 1996. He considers Applicant to be one of the company's best engineers and routinely awards him the highest job appraisal ratings. Applicant is considered to be honest and trustworthy. Applicant has possessed a secret security clearance since March 1982, has complied with all security requirements, and there have never been any complaints or other allegations made to indicate he has mishandled classified material.

Applicant began to experience financial problems sometime between March 1996 and November 1997, after he was assigned to work at a location several hundred miles from the home he had resided in with his family since 1987. While he worked at the distant location, his family remained in the home and his wife assumed full responsibility for the family finances. Applicant's wife was provided with his total regular wages, while he subsisted on per diem and other apparent dislocation allowances provided by the employer during this time.

The SOR alleges 11 accounts, totaling \$38,522.00, that were either past-due, charged off as bad debts, submitted for collection, or on which a judgment had been entered against Applicant. All but one of the charged off and collection accounts occurred between April 1997 and April 1998. The judgments were entered against Applicant in April 1999 and August 1999. These accounts total \$33,094.00, and, based on the dates of the adverse entries in the credit reports, most likely began to fall into delinquency while Applicant was working away from home. The remaining two accounts consist of an account in the amount of \$1,228.00 that has been past due since May 2000, and Applicant's unpaid tuition in the amount of \$4,200.00 that was submitted for collection in May 2001.

Applicant took prompt action to resolve his financial problems when he became aware of them in 1997. He first entered into a repayment arrangement with a credit counseling service whereby he provided the service approximately \$800.00 per month to satisfy all his known debts. He continued making payments to the service for about a year at which time he decided to refinance his house and apply the proceeds to satisfy his creditors. The refinancing was completed in September 2000, and the debts listed in SOR subparagraphs 1.a. through 1.d. ,⁽²⁾ totaling \$18,286.00, were paid from the proceeds. Additional debt of \$22,722.00 not listed in the SOR was also paid from the refinancing proceeds,⁽³⁾ and the refinancing balance of \$21,811.63 was paid to Applicant and his wife.⁽⁴⁾

Applicant believed all his delinquent accounts were satisfied from the refinancing funds. It is his understanding that the mortgage company conducted a credit search and applied funds to fully pay all creditors before releasing anything to him and his wife. Department Counsel entered into a stipulation with Applicant that the debt alleged in SOR subparagraph 1.e. has been paid.⁽⁵⁾ The debts listed in SOR subparagraphs 1.f. and 1.g. had both been referred to collection prior to the refinancing of Applicant's home and should have been paid at that time. Although Applicant is uncertain of the status of those accounts, and has expended minimal effort to determine the current status of the accounts, it is clear that he intended to fully satisfy all delinquent debt, including these accounts, in 2000 with the refinancing.

Applicant satisfied the judgment in the amount of \$3,687.00 alleged in SOR subparagraph 1.i. in February 2001.⁽⁶⁾ The \$6,168.00 judgment alleged in SOR subparagraph 1.j. was satisfied through a wage garnishment that appears to have begun sometime around August 2000.⁽⁷⁾ Applicant still owes the debts listed in SOR subparagraphs 1.h. (his school tuition) and 1.k. The total owing on those accounts is \$7,728.00.⁽⁸⁾

Applicant's present gross income is \$8,762.00 per month, and his net income is about \$6,562.00. He pays his ex-wife

\$2,500.00 per month in permanent alimony, and an additional \$900.00 per month towards an arrearage. He estimates he has approximately \$1,200.00 in disposal income each month after payment of his living expenses and debts. Applicant also had about \$1,400.00 in a savings account and \$900.00 in a checking account at the time of the hearing. Although he listed a deficit in a personal financial statement he prepared in February 2002, it appears that was largely due to some inflated monthly expense estimates.

The SOR alleges Applicant falsified a security clearance application (SF 86) he submitted in February 2001 by failing to list unpaid judgments and delinquent accounts. However, review of the SF 86⁽⁹⁾ discloses that in addition to listing some delinquent accounts in response to specific questions, Applicant provided a lengthy description of his financial problems with explanations as to how they arose and the efforts he had made to resolve them in response to question 43, which inquired if there were additional remarks he wanted to make.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline F, pertaining to financial considerations and Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁰⁾ The government has the burden of proving controverted facts.⁽¹¹⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽¹²⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽¹³⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁶⁾

No one has a right to a security clearance⁽¹⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁹⁾

CONCLUSIONS

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant experienced financial problems that began when his work required him to live apart from his family. Two judgments were entered against Applicant, and other accounts were either charged off or submitted for collection. Disqualifying Condition (DC) 1: *A history of not meeting financial obligations* applies.

Applicant's financial problems arose from his employment reassignment in 1996, his wife's failure to properly manage the family finances in his absence, and an obviously disintegrating marriage. He quickly took action to resolve the delinquencies by entering into a repayment plan with a credit counseling service and thereafter by refinancing his home

and applying the proceeds to pay off what he believed was every creditor. In September 2000, Applicant satisfied more than \$41,000.00 in debt and had more than \$21,000.00 in additional funds to repay any other creditors had he known of them. Mitigating Conditions (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 4: *The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*; and MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply.

Applicant's divorce, high alimony and support payments, and the costs of establishing a separate residence have impeded his ability to completely resolve all past due accounts. However, his actions to date conclusively establish he is a financially responsible, stable, and secure individual. Considering all relevant and material facts and circumstances present in this case, including the testimony provided by Applicant, the circumstances that caused him to become delinquent on various accounts, the actions he took to return his finances to order, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated this security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline F is decided for Applicant.

Under Guideline E personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Applicant's detailed description of his financial problems in the SF 86 clearly demonstrates he did not intend to submit false or misleading information. No disqualifying condition applies. Guideline E and Guideline J are decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: For Applicant

Subparagraphs a - l: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraphs a & b: For Applicant

SOR ¶ 3-Guideline J: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. See: AE 3, AE 5, AE 6, and AE 8
3. See: AE 2, AE 7, AE 9, AE 10, and AE 12
4. See: AE 13

5. See: Tr. p. 54

6. See: AE 21

7. See: AE 22. Although some of the documents are unsigned and there is no actual garnishment order, it appears that all steps were taken by the judgment creditor to garnish Applicant's wages in 2000. Applicant's current wage statement does not reflect any continuing deduction for a garnishment (AE 18) and he testified there was a garnishment that has been paid.

8. Although subparagraph 1.h. alleges the amount owing is \$4,200.00, Applicant testified the creditor has actually demanded payment in the amount of \$6,500.00. (Tr. p. 70)

9. See: GE 1

10. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

11. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

12. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

13. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

14. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

17. *Egan*, 484 U.S. at 528, 531.

18. *Id* at 531.

19. *Egan*, Executive Order 10865, and the Directive.