

DATE: September 27, 2004

In Re:

Applicant for Security Clearance

ISCR Case No. 03-01930

ECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 42-year-old engineer's September 2001 arrest for domestic violence and conviction on a lesser charge has been extenuated by the surrounding facts and circumstances. However, he owed more than \$53,000 in delinquent debts as of the issuance of the SOR, and the amount has now increased to about \$100,000. He has only recently spoken to an attorney about filing for bankruptcy protection, but as yet no substantive steps have been taken. No mitigation or extenuations of his financial problems have been established. Clearance is denied.

HISTORY OF THE CASE

On February 4, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

In a response to the SOR, dated March 19, 2004, Applicant elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on May 20, 2004. On June 14, 2004, a Notice of Hearing was issued, setting the hearing for June 17, 2004. At the hearing, the Government did not present any witnesses but offered 11 exhibits, Government Exhibits (GX) 1 - 11. Applicant testified, called one other witness, and offered seven exhibits, which were marked as Applicant's Exhibits (AX) A - G. All exhibits were admitted into evidence. The transcript (Tr) was received at DOHA on July 6, 2004.

FINDINGS OF FACT

The SOR contains five allegations, 1.a. - 1.e., under Guideline F (Financial Considerations) and one allegation under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admitted allegations 1.a., 1.b., 1.c., and 1.e., and

denied allegations 1.d. and 2.a., all without explanation or comment. His admissions are accepted and deemed findings of fact.

After considering the totality of the evidence derived from the hearing testimony and all evidence of record, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline F Financial Considerations)

As of January 21, 2004, Applicant had delinquent debts owed to the following:

1.a. - Credit Card Company A - approximate amount of \$15,388.00 (charged off).

1.b. -Creditor B - approximate amount of \$5,097 delinquent on a total amount owed of \$14,594.00.

1.c. - Bank C - approximate amount of \$11,817.00 (charged off).

1.d. - Bank D - approximate amount of \$11,173.00 (charged off)

1.e. - Credit Union E - approximate amount of \$811.00 more than 120 days delinquent on a total amount owed of \$10,045.00.

The delinquent debts cited above have never been resolved. In fact, these older debts now total about only about \$45,000 of Applicant's current debt of \$100,000. An attorney retained by Applicant is developing the bankruptcy paperwork to be filed at an appropriate time (Tr at 66 - 80), but no action has been taken as of the closing of the record.

Guideline J (Criminal Conduct)

2.a. - On September 13, 2001, a complaint was filed charging this 42-year-old Applicant with "Inflict Corporal Injury on Spouse." On January 17, 2002, one count of Causing Loud Noise was added to the complaint. Applicant pleaded no contest to the added charge and the corporal injury charge was dismissed. Applicant was found guilty of Causing Loud Noise and sentenced to serve 180 days jail or 15 days of "Cal Trans" and fined \$340.00. He was also ordered to complete domestic violence counseling sessions.

Based on the surrounding facts and circumstances, particularly those shown in the court records, I find that the charge arose during a difficult divorce process, that Applicant pleaded to the lesser offense as a way to resolve the matter with minimal stress and cost and to avoid getting his children involved (GX 2, GX 11, and Tr 34 - 38). I further find that it is more likely than not that the situation occurred as claimed by Applicant and that there was no domestic violence on his part.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding

the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

1.a. - 1.e. At the hearing, Applicant admitted that the delinquent debts cited in the SOR as owing to Creditors A (\$15,388.00), B (\$5,097.00), C (\$11,817.00), and E (\$811.00) were still owing and that he had not made any payments on them "in over a year" (Tr at 40 - 43). He denied the debt alleged at SOR 1.d. because he believed, under the terms of the divorce settlement, that his ex-wife was legally responsible for that debt, but he acknowledged that no court had ever legally excused him from responsibility for that \$11,817.00 debt (Tr at 43). He presently earns about \$90,000 per year (Tr at 62), but it is his intent to file for bankruptcy once his divorce becomes final (Tr at 44, 59). Applicant's bankruptcy attorney testified that he is beginning to draw up such papers but needs to wait until the financial situation becomes clear (Tr at 66-78).

The evidence indicates that Applicant was involved in a long and difficult separation and divorce process that became final in November 2001 (GX 2). As part of the divorce settlement agreement, his ex-wife retained the family business, part of his 401k investment, and full equity ownership in the family home, along with the obligation to make house payment. Applicant has been paying monthly child support of \$2,500.00, but no alimony. He currently "makes about \$1,717.00 per week" and his new wife also works and has additional income. Under state law, according to Applicant, he has been able to legally remarry, even though the divorce from his first wife is not "final" (Tr at 45-48).

When it is "final," he believes, he will receive about \$60,000.00 - \$65,000.00 from the proceeds of his former family home under court order. He expected the sale would occur in June 2004. As of the closing of the record, however, there is no evidence that anything has occurred to improve his financial situation. Instead, as he admits, he owes even more money than the debtors and figures cited in the SOR shows. He has recently had a 2003 automobile worth \$30,000 repossessed three months before the hearing because he couldn't make the payments (Tr at 56, 57).

Including attorney's fees, he currently has a "total indebtedness of \$100,000.00" (Tr at 59). I note his statement in October 2003 that he is "about to file for bankruptcy" and that his financial stability will be improving dramatically in the next few months. Neither event has been shown to have occurred and continue to be only promises or expectations. Nothing Applicant has done to date qualifies as financial rehabilitation.

Guideline F (Financial Considerations)

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying:

1. a history of not meeting financial obligations.
3. inability or unwillingness to satisfy debts.

Conditions that mitigate security concerns include:

3. the conditions that resulted in the behavior [delinquent debts] were largely beyond the person's control. (Accepted as applicable to the incurring of the delinquent debts but not to his efforts to resolve the same debts).

Note: MC 6 is not applicable since there is no evidence that Applicant has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Guideline J (Criminal Conduct)

The 2001 criminal matter arose out of the emotional heat generated by the failure of his first marriage. Court and official documents establish the facts and circumstance surrounding his legal problem as arising from the same marital difficulties that caused much of his delinquent debt. The plea accepted from Applicant and the nature of the sentencing tend to support his contention that he was more the victim of an angry wife than an intentional wrongdoer. He was offered a lesser plea, akin to disturbing the peace, which he accepted as a way to avoid getting his children involved in court proceedings and having to pay large attorney's fees. I am also impressed that he has regained at least partial custody of his children. Based on the totality of the record, I conclude that there is no current adverse security significance to be derived from this incident.

The Concern: A history of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying:

1. None.

I conclude that no criminal conduct occurred. Assuming for the sake of argument that the conviction by plea of no contest to a lesser offense is considered proof of criminal conduct, *per se*, then Disqualifying Condition 1 may be deemed applicable. Disqualifying Condition 2 is not applicable since the evidence does not show a serious crime or multiple lesser offenses).

If DC 1 is deemed applicable, then:

Conditions that could mitigate security concerns include:

1. the criminal behavior was not recent.
2. the crime was an isolated incident.
4. the factors leading to the violation are not likely to recur.
5. there is clear evidence of rehabilitation.

While I conclude that the alleged criminal conduct, even if true, was an aberration, and not a part of Applicant's basic character, I cannot reach the same conclusion as to his financial judgment. While Applicant's explanations as to the incurring of so much debt may be at least in part attributable to the actions of his ex-wife, I cannot find that to be equally true as to the newer debts, nor to his failure to take substantive steps to resolve the old and new delinquent debts despite the passage of years, and his continuing gainful employment. His financial conduct raises more questions than it answers, and it is basic to the security clearance process that doubts are to be construed against the granting of a clearance. In the year that must pass before Applicant can reapply for a security clearance, he can take the opportunity to clear up the remaining debts and issues. But as for now, he failed to show that he has the judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline F (Financial Considerations) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Guideline J (Criminal Conduct) For the Applicant

Subparagraph 2.a. For the 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 a security clearance for Applicant.

Barry M. Sax

Administrative Judge