

DATE: February 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02924

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has experienced financial problems since approximately 1992. He has twice filed for protection under Chapter 13 of the bankruptcy code, and has had both state and federal tax liens filed against him. His explanations for not fully disclosing his financial problems in a security clearance application he submitted in August 2002 are credible. Applicant has failed to mitigate the financial considerations security concern. Clearance is denied.

STATEMENT OF THE CASE

On October 22, 2003, 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, and Guideline E, for personal conduct.

Applicant submitted a sworn answer to the SOR, dated February 4, 2003, and requested a hearing. Applicant admitted all Guideline F allegations, and admitted answering questions about his financial delinquencies incorrectly in the security clearance application (SF 86) he submitted in August 2002, but denied he intended to intentionally falsify the application.

This case was assigned to me on November 8, 2004. A notice of hearing was issued on December 2, 2004, scheduling the hearing for December 16, 2004. ⁽²⁾ The hearing was conducted as scheduled. The government submitted twelve documentary exhibits that were marked as Government Exhibits (GE) 1-12, and admitted into the record without objection. Applicant testified and submitted four documentary exhibits that were marked as Applicant's Exhibits (AE) 1-4, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documents in support of his case. Seven additional documents were timely received, marked as AE 5-

11, and admitted into the record without objection. The transcript was received December 29, 2004.

FINDINGS OF FACT

Applicant's partial admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 47 years old, married, and was employed by a defense contractor as a communications installer from August 2000 until he was laid off pending resolution of his eligibility for a security clearance. He quit high school in 1975, after completion of the 11th grade, and obtained a general educational development (GED) diploma in 1979. Applicant enlisted in the U.S. Navy in February 1976, and served continuously until he retired in August 2000, as a Master Chief Petty Officer (paygrade E-9). He was married in August 1981, and has two sons, ages 19 and 17, who reside with him and his wife.

Applicant first filed for protection under Chapter 13 of the bankruptcy code in October 1992. He attributes his need for filing for bankruptcy protection at that time to his wife mishandling the family finances while he was on extended deployment. He successfully made all payments under the approved plan and the bankruptcy was dismissed as satisfied in November 1996.

While making payments under the 1992 bankruptcy plan, Applicant failed to pay federal income taxes as they came due. As a result, a tax lien in the amount of \$1,582.29 was filed against him in October 2000, for the tax years 1994, 1995, and 1998. A separate tax lien was also filed in October 2000, in the amount of \$4,492.89, for the tax year 1996. A state notice of tax lien was issued in October 2002, in the amount of \$1,490.00, for an unspecified tax year. Applicant testified he did not have the money to pay the taxes as they came due because of the payments he was making under the bankruptcy plan.

In addition to the tax liens, Applicant became severely delinquent on his home mortgage payments in 2000, and was notified the mortgage company was going to begin foreclosure proceedings by the end of that year if the payments were not brought current. Applicant also had a hospital bill in the amount of \$368.00 that was submitted for collection because of an insurance claim that was apparently not properly processed. That account had now been satisfied. Applicant attributes the financial problems he was experiencing in 2000 to his wife being unemployed, and legal expenses he incurred of about \$6,000.00 to pay attorneys and make restitution arising from his sons' criminal activities.

Applicant filed for Chapter 13 bankruptcy protection in January 2001. (3) That petition was dismissed in November 2001 for failure to take court ordered action in accordance with a local court rule. Applicant filed again in December 2001, and this time a plan was approved. Applicant listed assets totaling \$156,777.00, and liabilities totaling \$183,644.03 in the petition. Under the approved plan, Applicant was to make payments of \$767.00 for three months, then \$987.00 for 22 months, and then \$1,499.00 for 23 months. He made the required payments under the plan through payroll withholdings until May 2003, when he sold his house, paid the tax liens from the proceeds of the sale, and voluntarily closed the bankruptcy case.

Applicant submitted a personal financial statement on November 25, 2002 in which he indicated his monthly expenses exceeded his monthly income by \$528.00. He explains that was incorrect because he did not include his wife's income in the statement. The declarations Applicant filed as part of the 2001 bankruptcy disclose his wife's monthly income as of December 13, 2001 was \$1,000.00, and their combined net monthly income exceeded their monthly expenditures by \$767.00.

Applicant filed an SF 86 in August 2002 in which he stated he had filed for bankruptcy in January 2002. (4) Applicant testified he did not reveal the multiple filings between November 2000 and December 2001 because he considered them all a single bankruptcy. He did not reveal the tax liens that had been filed against him in the SF 86 because, while he was aware of the tax deficiencies, he was unaware liens had been filed. Considering his appearance and demeanor while testifying, the status of the bankruptcy filings, and the totality of information he did disclose in the SF 86, his explanations are credible.

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, 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.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁷⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ 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.⁽¹⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

No one has a right to a security clearance⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁴⁾

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 continuing financial problems from 1992, when he first filed for bankruptcy protection, until at least April 2003, when he sold his home. More recently, he has had several tax liens filed against him and allowed his mortgage to become severely delinquent, once again causing him to seek bankruptcy protection in 2001. Disqualifying Conditions (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply.

Applicant blames his original financial problems on his wife mishandling the family finances. He blames his tax troubles on an inability to maintain payments under his bankruptcy plan and pay his income taxes too. His more recent problems he attributes to his wife's unemployment and his sons' troubles with the law. Applicant has resolved his most pressing financial problems, the tax liability and mortgage delinquency, by selling his house. Applicant is entitled to some credit under 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)*; and MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*.

However, it must be noted that while experiencing over ten years of financial distress, Applicant has himself been at all times fully employed and earning an acceptable income. Further, while he satisfied his delinquent taxes with the sale of his house in 2003, those taxes had remained delinquent for many years. Additionally, Applicant testified he has other accounts that remained delinquent as of the hearing date.

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 failed to mitigate this security concern. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. Guideline F is decided against 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. Applicant's explanations for providing incorrect and/or inaccurate information in the SF 86 he submitted are credible. No disqualifying condition applies. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: For the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: 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. Clearance is denied.

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. Although Applicant did not receive the official notice of hearing more than 15 days prior to the hearing, he received actual notice of the hearing from Department Counsel more than 15 days prior to the hearing.
3. Applicant had filed a petition in November 2000, that was apparently dismissed because of some procedural irregularity.

4. This was obviously referencing the petition that was actually filed in December 2001.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
12. *Egan*, 484 U.S. at 528, 531.
13. *Id* at 531.
14. *Egan*, Executive Order 10865, and the Directive.