

DATE: February 3, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06187

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

James L. Kestell, Esq.

SYNOPSIS

Applicant is unable to successfully mitigate the security concern stemming from his history of not meeting financial obligations and inability to satisfy debts. In 2003, he tried to pay off his delinquent debts, that included unpaid federal and state income taxes from several years, by a Chapter 13 bankruptcy payment plan. Applicant was unable to comply with the Chapter 13 plan, and so, he had his case converted to a Chapter 7 case wherein he received a discharge from his indebtedness in August 2004. It is too soon to tell if Applicant has changed his financial ways for the better. Clearance is denied.

STATEMENT OF THE CASE

On January 15, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline F for financial considerations. Applicant responded to the SOR on February 12, 2004, and requested a hearing. Also, he admitted to all the allegations under Guideline F except for subparagraph 1.f.

On July 15, 2004, this case was assigned to me to conduct a hearing. On August 3, 2004, a notice of hearing was issued scheduling the hearing for September 2, 2004. Applicant appeared with counsel and the hearing took place as scheduled. At the conclusion of the hearing, the record was left open for Applicant to submit additional records from his bankruptcy case. Those matters were forwarded to me from Department Counsel, who voiced no objection, on September 20, 2004. Applicant's post-hearing documents are admitted as Exhibit I. The transcript was received on September 10, 2004. Issuing a decision in this case was delayed due a heavy caseload.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated into my findings, and after a thorough review of the record, I make the following findings of fact:

Applicant is a 59-year-old married man and a native-born U.S. citizen. He is employed as a security guard for a security company. On or about May 30, 2002, Applicant submitted a security-clearance application in conjunction with his employment.

The resulting background investigation revealed Applicant has a history of delinquent indebtedness. The SOR alleges and Applicant admits having two unpaid medical bills, both placed for collection, for \$220.00 and \$232.00. In addition, the SOR alleges and Applicant admits owing unpaid federal and state income taxes for several years, the details of which will be described below. The SOR alleges and Applicant admits filing a Chapter 13 bankruptcy petition in March 2003. The SOR alleges and Applicant denies that his current monthly expenses exceed his monthly income.

In June 2002, the state comptroller's office sent a letter to Applicant concerning his unpaid state income taxes. The letter stated Applicant owed \$2,515.66, which included penalty and interest, for tax years 1988, 1990, and 1991.

In December 2002, the IRS sent a letter to Applicant concerning his unpaid federal income taxes. The letter indicated the IRS had previously notified Applicant of their intention to collect the unpaid taxes through enforced collection. The second page of the letter described the amount Applicant owed in unpaid federal income taxes, including penalty and interest, as follows:

- Tax Year 1992-amount owed, including penalty and interest, \$9,077.96.
- Tax Year 1993-amount owed, including penalty and interest, \$5,703.36.
- Tax Year 1994-amount owed, including penalty and interest, \$6,163.84.
- Tax Year 1995-amount owed, including penalty and interest, \$2,492.35.
- Tax Year 1996-amount owed, including penalty and interest, \$926.91.
- Tax Year 1999-amount owed, including penalty and interest, \$3,553.98.

In total, the IRS letter indicated Applicant owed more than \$27,000.00 in unpaid federal income taxes for six tax years spanning 1992-1999.

Also in December 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS). The interview produced a sworn statement (Exhibit 2) wherein Applicant stated he did not dispute the financial information provided in the IRS letter. Likewise, Applicant stated he agreed that he owed \$2,515.66 for unpaid state income taxes. Applicant also addressed why he got into his difficult financial situation as follows:

In response to questions regarding my finances, I'd like to explain that while working as a ceramic tile setter with [a union] I had a sporadic work schedule for the past eight years or nine years which did not keep me fully employed, causing me to at one point draw unemployment for one year [1986]. This affected my finances by not being able to make payments on my bills. I am currently playing 'catch up' on paying my old bills and am trying very hard to keep up on paying my new bills on time. By now working consistently on this job, as a security guard with [the security company], I am finally going to be able to start meeting financial obligations, but I need time because with the steady employment I know I can do it.

Applicant also stated that his spouse, a self-employed attorney, had filed for a Chapter 13 bankruptcy petition for herself, and that he was considering being included in his wife's Chapter 13 case. Applicant also stated that he had recently bought a 2003 Dodge Neon, which he financed \$18,295.00, and his first monthly payment was due the next month in January 2003. Concerning the delinquent tax debts, Applicant explained he did not report the debts on his security-clearance application because he was unaware of the debts, as his wife takes care of the bills.

In March 2003, Applicant, with assistance of legal counsel, filed a Chapter 13 bankruptcy petition. Applicant listed a total of \$63,606.19 in liabilities and \$16,650.00 in assets. The liabilities consisted of (1) \$22,474.00 in Schedule D secured debt based on the auto loan for the 2003 Dodge Neon and state and federal tax liens for tax year 1995, and (2) \$41,132.19 in Schedule F unsecured debt based on claims from five creditors, including the IRS in the amount of \$28,095.10 for personal income taxes for tax years 1992-1999. Subsequently, in December 2003, the bankruptcy court

confirmed Applicant's Chapter 13 plan and ordered him to pay the bankruptcy trustee \$80.00 monthly for 8 months and then the sum of \$269.00 monthly for 55 months. Also, the court issued an order to Applicant's employer to deduct the required amount from Applicant's wages or salary.

In March 2004, the bankruptcy trustee moved to dismiss Applicant's Chapter 13 case due to Applicant's default on the Chapter 13 plan. The trustee indicated Applicant was more than \$900.00 in arrears on the plan at that point. In April 2004, through counsel, Applicant opposed the motion to dismiss indicating he was not in default and that his plan payments were not being forwarded promptly by his employer. The next month, April 2004, Applicant filed paperwork to convert his Chapter 13 case to a Chapter 7 case, as he was no longer able to comply with the Chapter 13 plan. In August 2004, Applicant filed an amended Schedule F listing seven creditors holding unsecured debt in the total amount of \$41,582.19, including \$28,095.19 owed to the IRS for personal income taxes. On August 24, 2004, the court granted Applicant a Chapter 7 discharge. By letter, Applicant's bankruptcy attorney indicated Applicant obtained a discharge of all debt except for \$842.00 owed to the IRS, which Applicant will try to pay off at the rate of \$50.00 per pay period. This appears to be consistent with federal law⁽²⁾ that allows state and federal income taxes to be discharged when certain conditions are met.

Applicant married his first wife in 1988, and the marriage ended in divorce in 1992. He has been married to his second wife since December 1992. They own (with a mortgage loan) their home, which is in his wife's name. They have no credit cards, and they do not have a savings account or investment accounts. In response to Department Counsel's questions, Applicant said he and his wife pay \$111.00 monthly for cable TV and have monthly bills for cell phone and internet access. He did say, however, he is current on his monthly car payment of \$439.38 for loan on the 2003 Dodge Neon, which he apparently reaffirmed in his bankruptcy case. Otherwise, he said he was delinquent on all his monthly bills (for example, gas, water, electric).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only 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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline F, a security concern typically exists for two different types of situations--significant unpaid debts and

unexplained affluence; this case involves the former. 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, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline F. The collection accounts, the unpaid state and federal income taxes for several tax years, the Chapter 13 bankruptcy case that was nearly dismissed due to defaulting on the plan, and the Chapter 7 bankruptcy case with a discharge granted in August 2004 clearly demonstrate a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts.⁽¹²⁾ Also, the same facts and circumstances demonstrate financial irresponsibility. Of particular concern here are the unpaid state and federal income tax debts. Failure to pay income taxes is a security concern because it indicates a lack of respect for one's financial obligations and a lack of respect for the government.

I have reviewed the mitigating conditions under the guideline and conclude Applicant receives some credit under MC 3⁽¹³⁾ due to his unemployment in 1986 and his lack of full-time employment for several years as a tile setter. None of the remaining MC apply. For several reasons, I am unable to conclude he has made a good-faith effort to pay or otherwise resolve his indebtedness.⁽¹⁴⁾ First, the record here suggests Applicant has been relatively uninvolved with the responsibility of managing his personal finances. Second, despite receiving a Chapter 7 bankruptcy discharge in August 2004, he is now delinquent on his monthly bills. Third, he has no savings to fall back on in the event of an unexpected expense or event. Fourth, despite a difficult financial situation, Applicant decided to buy a new 2003 car, taking on a large monthly payment, rather than buying a good used car for much less money. Fifth, despite the Chapter 7 discharge, Applicant continues to maintain at least one luxury item-cable TV at more than a hundred bucks a month. And sixth, he has not presented any information showing he has a realistic plan to become financially fit. Cumulatively, these six reasons show Applicant was hardly making intensive efforts or sacrifices to improve his situation. At bottom, Applicant's financial problems are long standing (the state income tax debt dates to 1988 and the federal income tax debt dates to 1992). Until he establishes a long-term track record of good debt management and a financially responsible lifestyle, it is simply too soon to tell if he has truly changed his financial ways for the better. Accordingly, Guideline F is decided against Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. 11 U.S.C. § 523(a)(1)(A), which refers to time periods specified in section 507(a)(2) or 507(a)(8).
 3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
 4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
 5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
 6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
 7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
 8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
 9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
 10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
 11. *Egan*, 484 U.S. at 528, 531.
12. E2.A6.1.2.1. A history of not meeting financial obligations;" and E2.A6.1.2. 3. Inability or unwillingness to satisfy debts.
13. E2.A6.1.3.3. 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).
14. E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.