

DATE: November 30, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06249

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esquire, Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant has delinquent debts and unpaid taxes that he has done little to satisfy. He deliberately failed to file income tax returns, and pay the federal and state income taxes he owed for the 2000-03 tax years. He has failed to mitigate the financial considerations and criminal conduct security concerns that exist in this case. Clearance is denied.

STATEMENT OF THE CASE

On January 10, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 (financial considerations), and Guideline J (criminal conduct). Applicant submitted an answer to the SOR that was received by DOHA on March 8, 2005, requested a hearing, and admitted all Guideline F allegations, except subparagraphs 1.h. and 1.i., and denied all Guideline J allegations.

The case was assigned to me on July 7, 2005. A notice of hearing was issued on July 27, 2005, scheduling the hearing for August 16, 2005. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8, and admitted into the record without objection. On my motion, without objection from either party, administrative notice was taken of 26 U.S.C. § 7203 and C.R.S. § 39-22-621. Applicant testified, called one witness to testify on his behalf, and submitted a large binder containing dozens of documents that was marked as Applicant's Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on August 25, 2005.

FINDINGS OF FACT

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

Applicant is 44 years old and has been employed as a technical writer by a defense contractor since January 2004. He was employed by a temporary agency and placed with the same defense contractor from September 2003 until January 2004. Applicant has been married since December 1983, and has three sons, ages 20, 19, and 16. He received a general educational development (GED) certificate in January 1979, was awarded a bachelor of science degree in information systems in 1988, and a master of science degree in project management and information technology in March 2005.

Applicant served on active duty in the U.S. Air Force from November 1979 until he retired in November 1999, as a Technical Sergeant (paygrade E-6). He held a top secret clearance during most of his military career, and no adverse action was ever taken to remove or downgrade that clearance. Following his retirement, Applicant was employed in the telecommunications industry from September 1999⁽²⁾ until he was laid off in January 2002. He was unemployed from January 2002 until October 2002, and then worked as a substitute teacher until May 2003. He was unemployed from May 2003 until June 2003, at which time he began working at a convenience store. He quit the convenience store job in August 2003 after someone was shot in the parking lot of the store, and remained unemployed until he was placed with his present employer by the temporary agency in September 2003.

The testimony and numerous documents that Applicant submitted establish he had a very successful military career during which his performance was commendable. He has performed well in his civilian employment and is deemed to be a solid performer. He has earned a reputation for being honest, dependable, and trustworthy. Many of the letters of recommendation are from people who have known Applicant professionally for substantial periods of time, and each of them emphatically state they cannot think of any reason why Applicant should be considered a security risk.

The SOR alleges Applicant has nine accounts, totaling more than \$23,000.00, that have either been submitted for collection or charged off as bad debts. Applicant admits liability for all of the debts, except the \$1,803.38 tuition alleged as owing in subparagraph 1.h., and the \$500.00 hospital bill alleged in subparagraph 1.i. As to the tuition debt, he claims that debt had to be paid by him before he would have been allowed to depart one of his USAF active duty stations. However, he testified he is willing to pay the university the \$1,200.00 portion of the debt that is actual tuition, but not the remainder which represents accrued interest. He testified the hospital bill was for treatment provided his mother-in-law who now resides outside the country, and that he has paid most of the bill for that treatment, but the hospital will not provide him with sought after documentation about the \$500.00 unpaid balance.

Applicant claims to have made one payment on the debt alleged in subparagraph 1.a., one \$100.00 payment on the debt alleged in subparagraph 1.c., and several \$500.00 payments on the debt alleged in subparagraph 1.d. He also testified he is continuing to make \$100.00 per month payments on the debt alleged in subparagraph 1.d. However, and despite having organized and put together the impressive collection of documents contained in AE 1, he was unable to present receipts or other documentation in support of the alleged payments.

Applicant failed to file his personal federal or state income tax returns for the 2000-03 tax years in a timely fashion, and did not file them at all until March 2005, following issuance of the SOR. The SOR alleges Applicant is indebted to the Internal Revenue Service in the amount of \$15,000.00 for unpaid taxes, penalties, and interest for those years. AE 1, tab 2, discloses his actual past due tax liability for those years is over \$48,000.00. The SOR alleges Applicant is indebted for state income taxes in the amount of \$4,000.00 for unpaid taxes, penalties, and interest for those same years. Applicant estimates his actual liability is closer to \$5,000.00.

Applicant testified he failed to file the tax returns and pay the taxes alleged because he was earning twice as much money as he had earned while on active duty, failed to have adequate amounts withheld from his pay, and did not have the money to pay the taxes when they were due. He denies deliberately failing to file the returns and pay the taxes, claiming he had filed for extensions and intended to file the returns and pay the taxes when he was financially able to do so. However, he admitted at the hearing that he prepared and filed separate returns for his wife in each of those years, and neither filed his own separate return nor a joint return that included his income in order to obtain the refund they received by claiming only his wife's income.

Applicant testified and submitted the documents in AE 1, tab 2 in support of his claim that he is now working to resolve the delinquent federal tax liability. However, he also acknowledged that the IRS Form 433-F (Collection Information Statement) had not actually been submitted as of the date of the hearing. He has taken no steps to resolve the delinquent

state taxes.

Applicant attributes the beginning of his financial problems to a serious automobile accident he was involved in back in 1993 that left him in a coma for a couple of weeks and physically disabled for several months. While he was on active duty in the Air Force with all medical expenses paid by the government and his pay continuing during his convalescence, he claims his wife did not properly handle the family finances during that time causing him to get behind with some debts.

He blames his reassignment to the United States in 1997, following several overseas tours of duty, for his continuing financial difficulties. Although all moving expenses and relocation allowances for he and his family were paid for by the government, Applicant testified he had to spend about \$15,000.00 to rent a house, acquire furniture and an auto, and on other miscellaneous expenses. He claims his finances took another serious hit when he had to spend about \$3,000 when his mother died in 1998, and an additional \$7,000.00 when he became the conservator for a mentally handicapped niece at about the same time.

While Applicant blames some of his financial problems to the problems and expenses he encountered during the mid-1990s, he also attributes his failure to pay income taxes in the early-2000s to the fact that his annual family income increased from approximately \$40,000.00 in 1998, his last full year of active duty, to over \$80,000.00 in 2001, the first year he failed to submit a tax return.

The IRS Form 433-F Applicant submitted in AE 1, tab 2, discloses his combined family monthly net income is \$4,643.00, and the family monthly living expenses, including payments on two of the debts alleged in the SOR, are about \$4,200.00.⁽³⁾ Also included in AE 1, tab 2, is a document Applicant prepared listing his family debt. Including the debts listed in the SOR, Applicant reports his total outstanding debt to be \$86,145.00. His *Action Plan to Address Debt*, also contained in AE 1, tab 2, is to establish repayment plans for past due federal and state taxes, order credit reports, contact creditors and either clear erroneous entries or establish repayment planes, and apply for part-time teaching positions to generate a bit more income.

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, financial considerations, and Guideline J, 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.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁶⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

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 has numerous accounts, totaling tens of thousands of dollars, including federal and state income taxes, that have been seriously delinquent for a number of years. DC 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

Applicant's financial troubles are at least partially attributable to his unanticipated loss of employment in January 2002, and unemployment or underemployment from that time until he returned to steady full-time employment in September 2003. However, considering the number of years that passed between the incidents in the 1990s he attributed to some of his financial problems, and the substantial increase in pay he experienced between the last incident and his January 2002 unemployment, I do not find they are at all responsible for his present financial condition. Accordingly, Applicant is entitled to application of Mitigating Condition (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)* to his case only for those events occurring after January 2002.

While Applicant's failure to properly plan for his increased tax liability for the 2000 tax year is somewhat understandable; his failure to take immediate steps to resolve the problem by increasing his withholdings or otherwise setting aside funds to pay his taxes for future years is not. Instead, Applicant continued to allow his tax withholdings to be insufficient through at least the 2003 tax year, and did nothing to resolve any of his delinquent taxes until after the SOR was issued.

Further, while Applicant claims to have made some payments on some debts alleged in the SOR, he has not submitted documentation in support of those claims. Finally, the only information Applicant has presented of any plan to deal with his financial condition, is assertions of what he intends to do in the future to either arrange repayment plans or challenge his liability on certain debts, and seek additional sources of income. Applicant is not entitled to application of any other mitigating condition to his case.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant violated 26 U.S.C. § 7203, thereby committing a misdemeanor criminal offense, by willfully failing to file federal tax returns for the 2000-03 tax years. His actions in filing separate returns for his wife to obtain refunds, while neither filing his own separate returns nor filing a joint return that included his income, clearly demonstrates that his failure to file returns for those years was willful. DC 2: *A single serious crime or multiple lesser offenses* applies. The statute alleged in SOR subparagraphs 1.e. through 1.h., C.R.S. § 39-22-621, is not a criminal statute, and therefore Applicant's conduct as alleged under those subparagraphs does not create any additional Guideline J concerns. (14) I have considered all potentially mitigating conditions and conclude that none apply.

Considering all relevant and material facts and circumstances present in this case, 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, Applicant has failed to mitigate the financial considerations and criminal conduct security concerns that exist in this case. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guidelines F and J are decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against Applicant

Subparagraphs a-k: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraphs a-d: Against Applicant

Subparagraphs a-d: 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 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. Applicant actually began working at this job while on terminal leave from the Air Force.
3. It is impossible to decipher what he wrote as the payment on one of the debts listed under monthly expenses, so a more accurate figure cannot be ascertained. However, he testified he had disposable income of about \$400.00 per month that could be applied to payment of his unlisted debts.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the 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. *Id.* at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. C.R.S. § 39-22-621 establishes interest and penalties that are to be assessed for failure to file tax returns as required. C.R.S. § 39-21-118 establishes a misdemeanor criminal offense for the failure to file tax returns as required. I find the citation to the wrong statute could mislead a reasonable Applicant in preparing to respond to the government's case, and therefore conclude Applicant has mitigated SOR subparagraphs 1.e. through 1.h.