

DATE: July 27, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08452

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Robert F. Burkey, Esq.

SYNOPSIS

Applicant is 68 years old, a retired businessman, who now drives his trucks for a defense contractor hauling classified and secure loads. Applicant failed to disclose a \$256,000 judgment on his security clearance application, nor did he disclose his 1998 lawsuit with his wife against another businessman. Applicant has not paid the judgment, and refuses to do so. He is making payments on an Internal Revenue Service debt. Applicant has not successfully mitigated the financial considerations and personal conduct security clearance concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 21, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on November 20, 2004, and elected to have a hearing before an administrative judge. The case was assigned to me on January 3, 2005. On May 19, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. The Government moved to amend the SOR to add an allegation Paragraph 1.b. concerning a Federal tax lien filed February 15, 2005, against Applicant. Applicant had no objection to the amendment and the motion was granted. DOHA received the hearing transcript (Tr.) on May 27, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 68 years old, a retired rental property manager and condominium yacht club consultant, who now owns two

tractor trailer trucks he and his wife lease to a defense contractor in which classified and critical loads are shipped. Applicant and his wife gross \$180,000 annually for ten months of driving. His wife is a retired bank assistant vice president. Applicant owned his rental property management company from about 1978 to 1997. He operated at one time 5,000 apartments for their owners, employed up to 107 staff, and collected at one time \$1 million monthly in rent. (Tr. 18, 20, 25, 26, 30, 41, 49-52, 56; Exhibits 1 and 2)

Applicant's agreement with a condominium yacht club development owner and a bank occurred sometime in 1991 to 1992. With the savings and loan crises then in the U.S., the bank was no longer able to make loans, and closed, causing the development to fail. Applicant and his partner were sued personally by the owner on an agreement they all signed, and a jury trial held in September 1996. Applicant and his partner, who later declared bankruptcy, were ordered to pay \$256,679 plus about \$75,000 in attorney's fees. Applicant attended the trial and was represented by legal counsel. That judgment was the subject of a foreign judgment filing in Applicant's home state and county on June 20, 1997. Applicant has not paid this judgment, and does not intend to ever pay it. He regards himself as cheated and a victim of the savings and loan debacle. Applicant did not list this judgment in answer to Question 27.d. of his August 20, 2002, security clearance application (SCA) (*In the past 7 years, have you had any judgments against you that have not been paid?*), but answered this question with a "no". Applicant thought the judgment was in 1991 or 1992. Applicant also did not list the unpaid judgment debt in answer to SCA Questions 28.a. (*In the last 7 years, have you been over 180 days delinquent on any debt(s)?*) and Question 28.b. (*Are you currently over 90 days delinquent on any debt(s)?*). No where on his SCA did Applicant disclose any information about the 1996 judgment. (Tr. 24-28, 40-46, 61, 65; Exhibits 2-4, D)

Applicant had a lien filed against him by the Internal Revenue Service (IRS) on February 15, 2005, in the amount of \$40,061, relating to payroll taxes owed from 1992 to 1994. The trust fund part of the tax debt was paid on time, but Applicant is obligated for penalty and interest because his name was on the IRS documents as the responsible party. Applicant has an agreement with the IRS to pay \$150 monthly by deduction from his social security payments. Applicant has been paying on that agreement for about four years. Applicant did not list this IRS debt on his SCA in answer to Questions 27.b. (*In the last 7 years, have you had your wages garnished or has any property repossessed for any reason?*). (Tr. 30-32, 35, 49-54; Exhibits 1 and 5)

Applicant and his wife filed a lawsuit against a person who Applicant's wife claimed violated certain of her rights, with Applicant filing as a plaintiff for loss of consortium. The lawsuit was filed in October 1998, and settled in May 2000. Applicant did not disclose this lawsuit on his SCA in answer to Question 29 (*In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?*). Applicant claims he forgot about it because his wife was the lead plaintiff. However, Applicant's statement to the government investigator on December 6, 2002, states he filed the lawsuit and dismissed it because he was paid in a settlement. Applicant and his wife worked on completing their respective SCA forms in 2002 at the same time and over a two day period. Her lawsuit was listed on her SCA. (Tr. 33-38, 60; Exhibits 1 and 2)

Applicant submitted three character reference letters. His references have known him many years and regard him as honest. (Exhibits A-C)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

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.* E2.A6.1.1

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. The essence of the SOR allegations is that Applicant has a large judgment against him personally from a failed business transaction in the early 1990's, and was a party plaintiff in a lawsuit he and his wife filed against another businessman in 1998, yet he did not disclose either lawsuit, and judgment debt, on his SCA. Also, he has a substantial IRS tax debt that has not been paid, but is being paid by an installment payment method.

Regarding Guideline F, Financial Considerations, Disqualifying Conditions (DC) 1 (A history of not meeting financial obligations E2.A6.1.2.1) and DC 3 (Inability or unwillingness to satisfy debts E2.A6.1.2.3) apply. Applicant refuses to

pay the 1996 judgment. He is paying \$150 monthly through a social security deduction. His current income is high enough that he could make periodic payments on the judgment to pay it off, or could have tried to settle for a lesser amount. Instead, he ignored it. The debt exists for the purpose of evaluating security clearance eligibility even though Applicant's state law would not allow plaintiff to execute on the judgment after five years of non-execution (Exhibit D). The issue here is Applicant's failure to pay a debt, not the effect of the state law, that cannot override the Directive for security clearance purposes.

The Mitigating Condition applicable to the IRS debt is MC 6 (Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts E2.A6.1.3.6). Applicant is paying that debt. While I conclude that specific allegation for Applicant, allegation Paragraph 1.a. and Guideline F I conclude against Applicant.

The deliberate falsification allegations under Guideline E, Personal Conduct, I consider the DC applicable are DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2) applies. Applicant deliberately failed to disclose significant financial obligations and legal actions involving him on his SCA. I do not find his explanations credible, in large part because he is a successful businessman whose former business collected \$12 million annually in rents for apartment owners, paid a 107 person staff monthly, and was a consultant who traveled out of his home state to work on condominium yacht club projects. His current trucking operation grosses \$180,000 annually for ten months driving. He is not an unsophisticated person, but an experienced businessman. When completing his SCA over two days of work it is not reasonable for me to believe, in simultaneous discussions with his wife about her SCA, that Applicant could not research or remember the time he spent in court in 1996 regarding a \$256,000 lawsuit. This same debt was over 180 days delinquent, and he failed to disclose it in Question 28. Applicant failed a third time to disclose this lawsuit or his lawsuit against a former business associate in which his wife was a party, even though they included it in his wife's SCA. Applicant further failed disclosure a fourth time when he failed to use the "continuation space" on page 9 of the SCA to explain these lawsuits. According to Applicant, he forgot anything adverse that happened to him financially between August 1995 and August 2002, the time period for disclosure sought by the SCA. That lack of recollection is not believable.

I conclude no MC apply here because my analysis of the facts show that none could apply. Applicant deliberately falsified his SCA for the reasons stated. Therefore, I conclude this Guideline against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.c.1: Against Applicant

Subparagraph 2.c.2: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).