

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant mitigated the personal conduct concerns about the omission of his debts from a security clearance application (SF 86); however, he failed to mitigate the concerns about his finances arising from nearly \$80,000 in delinquent debt and unpaid spousal support. Clearance is denied.

CASE NO: 03-09429.h1

DATE: 04/25/2006

DATE: April 25, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09429

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated the personal conduct concerns about the omission of his debts from a security clearance application (SF 86); however, he failed to mitigate the concerns about his finances arising from nearly \$80,000 in delinquent debt and unpaid spousal support. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On December 3, 2004, DOHA issued an SOR to Applicant regarding facts in his background that raise security concerns addressed in the Directive under Guideline F (financial considerations) and Guideline E (personal conduct).

Specifically, the SOR presented allegations Applicant had accrued more than \$80,000 in delinquent debts consisting of unpaid taxes for tax years 2000 through 2002 (SOR ¶¶ 1.a, 1.c, and 1.l), and ten delinquent credit card or other personal credit accounts (SOR ¶¶ 1.b, 1.d, 1.e, 1.g - 1.k, 1.m, and 1.n). The government also alleged he has not made a \$1,175 monthly spousal support payment to ex-wife since March 2002 resulting in an arrearage of \$51,700 (SOR ¶ 1.f). The government also alleged Applicant deliberately withheld from a November 2002 security clearance application (SF 86) facts about his delinquent debts by answering "no" to questions 38 and 39 (SOR ¶¶ 2.a, 2.b and 2.c).

Applicant timely answered the SOR, denied all of the SOR allegations, and requested a hearing. This case was assigned to me on August 15, 2005, and I convened a hearing on November 15, 2005. The parties appeared as scheduled and the government presented 12 exhibits (GE 1 through 12), which were admitted without objection. Applicant testified in his own behalf and submitted 13 exhibits admitted into the record as AE A - M. DOHA received the transcript (Tr.) on December 1, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 40 years old and employed since February 2005 by a large defense contractor as a software systems engineer. He has worked in this field since 1992, but this is his first request for clearance, which he submitted through his previous employer.

Applicant has been married to his current wife since February 2002. They have one child. Applicant also was married from 1988 until he and his first wife divorced in 2001. They had no children. As part of their divorce, Applicant agreed to pay off their debts and to pay his ex-wife \$1,175 in spousal support each month. He also bought her new furniture and appliances she would need in her new residence. Applicant and his first wife had also bought a house for \$120,000. Around the time of their separation, they refinanced their mortgage to cash out their equity. Applicant gave his ex-wife about 60% of the cash they realized from the refinance. Applicant later sold the house for about \$160,000 but realized only \$5,000 from the sale. His sale of another house resulted in a loss of about \$6,000 as he had to make significant repairs before he could put the property on the market.

For reasons discussed below, Applicant has not made the monthly support payment since about March 2002. As of the hearing, this arrearage was about \$51,700 for the intervening 44 months; however, Applicant's ex-wife has never sought to collect this debt. (2) Applicant used credit cards and withdrew funds from his 401K to meet the expenses related to his divorce. The 401K withdrawal resulted in a \$17,000 tax liability over tax years 2000 and 2001, totaling nearly \$20,000, that Applicant is still trying to pay off. He also incurred a \$130 deficiency for tax year 2002. Applicant has been making monthly payments to the IRS since October 2002, and his tax refunds 2003, 2004, and 2005 have been applied to his federal tax debts. Because of accrued interest and penalties, the balance owed to the IRS as of the hearing was still about \$16,000.

From September 2000 until August 2002, Applicant worked for a software company with federal government contracts. His performance began to suffer in late 2000 and early 2001 because the deterioration of his first marriage coincided with the deaths of his father, grandmother, and great aunt within a few months of each other. Applicant was demoted and his pay was reduced. His income was also effectively reduced by about \$30,000 when he and his wife separated, because his financial obligations increased with the divorce.

Applicant was laid off in August 2002 and remained unemployed for two months. His new wife had been working, but left her job during the lay-off in anticipation of Applicant taking a new job in another state, a prospect that fell through. Applicant has been gainfully employed as either a software engineer or a software systems analyst since October 2002. His wife also found work but with limited hours so she can care for their child.

Applicant has paid the debts listed in SOR 1.b, 1.e, 1.j, and 1.m. These debts totaled nearly \$10,000. Additionally, he negotiated a settlement on the debt listed in SOR 1.h, and has been repaying that account since July 2005. In November 2003, Applicant engaged the services of a debt management and repayment company in hopes of negotiating settlements and favorable repayment terms with his creditors. The debts listed in SOR 1.d, 1.g, 1.i, 1.k, and 1.n, totaling about \$12,855, were included in a plan for repayment. Applicant paid nearly \$5,000 up front in fees to the company over the next 12 months, but it is unclear what, if any, payments were actually made to the creditors. Applicant and his wife are now saving to pay off these debts on their own. They currently have about \$5,000 in savings to use to repay some of this debt.

Applicant submitted a SF 86 in November 2002. In response to questions 38 (debts greater than 180 days past due in the last seven years) and 39 (current delinquencies greater than 90 days), Applicant answered "no." He asserted in statements to government investigators, and at hearing that he did not believe he was more than 60 days late on any debt. He based his assertion on the fact that when he answered the questions, he had been making payments to the IRS, had paid off some of his creditors, and was in negotiation with others.

POLICIES AND BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽³⁾ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the applicant bears a heavy burden of persuasion.⁽⁴⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁽⁵⁾

To that end, the Directive sets forth adjudicative guidelines⁽⁶⁾ for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline F (financial considerations).

CONCLUSIONS

The security concern stated under Guideline E is that 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.⁽⁷⁾ Here, the government alleged in SOR ¶ 2 that Applicant deliberately falsified answers to two financial questions in his SF 86. Available information establishes the underlying debts and that they were not disclosed in Applicant's SF 86. Accordingly, the government is reasonably concerned, in light of the results of Applicant's background investigation, about whether he can be relied on to tell the truth even under adverse circumstances. An applicant's completion of a security questionnaire is the initial step in requesting a security clearance. Because false or incomplete information given in the questionnaire is capable of affecting the way in which the government assesses a person's suitability to hold a clearance, it is material. Moreover, a false answer is material even if there is no proof that it actually influenced an agency's investigatory functions.

However, to be disqualifying such omissions must have been made deliberately.⁽⁸⁾ Simple mistakes through forgetfulness, confusion about the question, or lack of available information do not indicate a defect in a person's reliability or integrity. Further, it is important to note that I found Applicant's testimony at hearing to be forthright, credible, and fully appreciative of the gravity of the government's concerns. He also made a full disclosure of the omitted debts and other financial obligations when he was first interviewed by a government investigator in March 2003. In a second investigative interview in March 2004, Applicant again was completely forthcoming and provided accurate updated information about the corrective actions he had taken in the intervening year. On balance, absent intent to falsify his SF 86 or otherwise mislead the government about his finances, I conclude none of the Guideline E disqualifying conditions (DC) apply, and this guideline is resolved in favor of the Applicant.

The facts presented through the government's information offered in support of the SOR ¶1 allegations also raise security concerns addressed in the Directive under Guideline F. The government has established Applicant still owes about \$80,000 in delinquent debts. While Applicant asserted at hearing that the spousal support agreement with his first wife should not be held against him as it is a private matter that has not been paid or enforced for nearly four years, other information suggests it is, in fact, a court decree. Either way, it is an obligation Applicant must bear and which may operate at any time to set back his efforts to resolve his overall indebtedness. An applicant who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts

to generate funds to resolve their fiscal difficulties. Failure to reasonably attend to personal finances may also indicate poor judgment and reliability in other facets of one's conduct.⁽⁹⁾ The facts here support application of Guideline F disqualifying condition (DC) 1⁽¹⁰⁾ and DC 3.⁽¹¹⁾ DC 1 applies based on the fact there is a record of delinquencies attributable to the Applicant. As to DC 3, this case is more about Applicant's inability to pay than any unwillingness to pay his debts.

By contrast, the facts also require consideration of Guideline F mitigating condition (MC) 3,⁽¹²⁾ MC 4,⁽¹³⁾ and MC 6.⁽¹⁴⁾ Much of Applicant's debt - the tax liability, spousal support, and several high balance credit cards - is directly attributable to his divorce in 2001. Further, his pay reduction and layoff in 2002 hindered his ability to repay those debts. Applicant has been making what payments he could to the IRS since late 2002 and he has pursued various credit counseling, debt negotiation, and legal avenues to resolve his debts. However, the fact that he still owes a significant amount of money to the IRS, his ex-spouse, and various other creditors sustains the government's concerns that he may be at risk of engaging in illegal acts to generate funds. Accordingly, I conclude Guideline F against the Applicant.

A fair and commonsense assessment⁽¹⁵⁾ of the entire record before me shows the government properly expressed reasonable doubts about Applicant's suitability to have access to classified information. The SOR was based on sufficient, reliable information about Applicant's financial problems and his omission of information about his finances. Such issues bear directly on an applicant's ability to protect classified information, and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I am not unmindful of Applicant's efforts thus far to pay or otherwise resolve his debts; however, the amount of his still outstanding debts in comparison to his current circumstances leads me to conclude he is not, at this time, able to overcome the government's doubts about his suitability to hold a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline F (Financial): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: For the Applicant

Subparagraph 1.k: Against the Applicant

Subparagraph 1.l: Against the Applicant

Subparagraph 1.m: For the Applicant

Subparagraph 1.n: Against the Applicant

Paragraph 2, Guideline E (Personal 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. Applicant testified this was not a court decree, but in a statement given to a government investigator he had hired an attorney to try to have this agreement modified in his favor. Applicant was advised "it is hard to have [the spousal support agreement] reduced once it becomes a court order." (GE 2) Applicant recently hired a different attorney who has advised him the agreement can be modified, but there has yet been no action taken to do so.

3. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

4. See *Egan*, 484 U.S. at 528, 531.

5. See *Egan*; Directive E2.2.2.

6. Directive, Enclosure 2.

7. Directive, E2.A5.1.1.

8. Directive, E2.A5.1.2.2. The *deliberate* omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; (emphasis added)

9. Directive, E2.A6.1.1.

10. Directive, E2.A6.1.2.1. A history of not meeting financial obligations;

11. Directive, E2.A6.1.2.3. *Inability* or unwillingness to satisfy debts; (emphasis added)

12. Directive, 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).

13. Directive, E2.A6.1.3.4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.

14. Directive, E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

15. Directive, E2.2.3.