

DATE: February 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10535

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant filed for Chapter 7 bankruptcy protection in 1997 as an outgrowth of his divorce from his wife of more than 20 years. He now has several small debts that are delinquent, but will be resolved in due course. He did not intend to provide false or misleading information in a security clearance application he submitted when he incorrectly described an arrest and conviction. Applicant has mitigated the security concerns caused by his financial considerations and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On December 30, 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 January 16, 2004, admitted the SOR financial allegations, denied the personal conduct allegations, and requested a hearing.

This case was assigned to me on November 8, 2004. A notice of hearing was issued on November 30, 2004, scheduling the hearing for December 15, 2004. 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. Applicant testified at the hearing, called his wife as a witness, and submitted three documentary exhibits that were marked as Applicant's Exhibits (AE) 1-3 and admitted into the record without objection. The transcript was received December 29, 2004.

PROCEDURAL ISSUES

Applicant appeared at the hearing without an attorney or personal representative and indicated he was prepared to proceed without assistance. However, it became clear to me as we discussed preliminary matters that Applicant, a somewhat simple and unsophisticated individual, would benefit from assistance in presenting his case and fully understanding the proceedings. Accordingly, over Department Counsel's objection, I permitted Applicant's wife, who was also to be a witness, to sit with him and provide assistance during the hearing.

FINDINGS OF FACT

Applicant's admissions to 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 a 51-year-old high school graduate who has been employed by a defense contractor as a painter at a naval shipyard since August 1973. He has possessed a secret security clearance since 1974, and no complaints have ever been made against him alleging mishandling of classified information nor has any action has ever been taken to downgrade or revoke his clearance before the action herein in issue.

Applicant was first married in October 1976, and that marriage ended in divorce in October 1997. He has two children from that marriage, a daughter who is 24 years old and a son who is 21 years old. Applicant remarried in December 1997, and now resides with his wife and her daughter who is 23 years old. Applicant's net weekly pay is \$543.00. His wife works as an office assistant and is paid \$625.00 twice a month. His wife also works at a church part-time for which she is paid \$125.00 per week. The stepdaughter does not contribute significantly to the household income.

Applicant filed for protection under Chapter 7 of the bankruptcy code and received a discharge in 1997. Applicant's decision to seek bankruptcy protection resulted from his separation from his wife, her refusal to either let him have the family car or make payments on it, and his following the advice of others on how to get even with her. The bankruptcy pleadings list his 1996 income as \$40,000.00, unsecured debt as \$15,655.74, and secured debt (a car loan) as \$9,424.43.

The SOR lists five collection accounts totaling \$1,773.00. Two accounts, hospital bills totaling \$212.00, have been paid in full. Those hospital bills were incurred by Applicant's son without Applicant's knowledge. Applicant and his wife testified they thought one of the remaining accounts, a credit card bill in the amount of \$827.00, was being paid through a garnishment of her wages. The various credit reports submitted by the government corroborate this claim. Another of the accounts is for tuition owing in the amount of \$574.00⁽²⁾ on a correspondence course Applicant signed up for to learn how to run a locksmith business from his house. The last account is another hospital bill for his son in the amount of \$210.00 that again was incurred without his knowledge.

Applicant planned on making payments on all his delinquent accounts beginning in April or May of 2003. However, he became indebted to the internal revenue service, apparently because of returns filed in 2003, for unpaid income taxes amounting to \$1,800.00, including interest and penalties. Because of the accruing interest on the tax bill, Applicant decided to pay that debt first. The tax delinquency resulted from Applicant claiming his stepdaughter as an exemption on his tax returns, unaware that she had also filed a tax return and claimed herself as an exemption. Applicant sought assistance from a credit counselor but was advised that he did not appear to have any real debt problem and should just pay the debts. Applicant has now paid the delinquent taxes in full and has begun to make payments on his remaining delinquent accounts.

The SOR alleges in subparagraph 2.b. that Applicant falsified a security clearance application (SF 86) he submitted on April 5, 2000 by failing to list the accounts set forth in SOR subparagraphs 1.a. through 1.e. as currently more than 90 days delinquent. GE 7, a credit report dated April 13, 2001, provides the following information about those accounts: 1.a. was opened in December 2000 and the payment manner is *pays as agreed*; 1.b. was a collection account filed in May 2000 and reported in July 2000; 1.c. is not listed; 1.d. is not listed; and 1.e. was a collection account filed in May 2000 and reported in January 2001. Of the accounts not listed in GE 7, GE 6 discloses 1.c. was

filed June 2002 and reported in July 2002; and GE 5 discloses 1.d. was listed October 2002 and reported in February 2003. Accordingly, there is no evidence any of the accounts were more than 90 day delinquent when Applicant submitted the SF 86, and several of the accounts did not even exist when he filed the SF 86.

Applicant was arrested in November 1996 as a result of an incident with his ex-wife. He attempted to take the family car, apparently grabbed her arm in an attempt to gain possession of the keys, and she called the police. He spent 48 hours in jail until he was released on bond, following which he was convicted and required to perform community service hours and pay court costs. Applicant did not list this incident in the SF 86 in response to the question 26 asking about arrests occurring in the last seven years, although he did list it in response to the question 40 asking about civil court actions,⁽³⁾ wherein he described the nature of the action as "HARASSMENT" and the result of the action as "DISMESSED" [sic]. Applicant testified he didn't know the difference between civil and criminal courts and remembered the form he filled out was only asking about felonies. Having viewed Applicant's appearance, demeanor, and manner of testifying, considering the totality of the evidence presented, and observing Applicant to be somewhat unsophisticated about such matters, I find his explanation 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.⁽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 obtained a discharge in bankruptcy in 1997, and has allowed the five debts alleged in the SOR to become delinquent and submitted for collection. Disqualifying Conditions (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply.

Applicant's bankruptcy resulted from his divorce and following what was probably bad advice on how to rid himself of a debt on the car his wife was retaining. Three of the delinquent debts are for medical treatment for his son that were incurred without his knowledge. Applicant mistakenly believed the credit card debt was being paid through a garnishment of his wife's pay. He has now paid two of the creditors in full, along with an unlisted tax debt that caused him to delay making payments on other accounts. He also has now begun to make payments on the remaining accounts. 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* apply.

Further, Applicant sought out credit counseling but was advised he didn't need assistance because his delinquent debt situation was so minor. Accordingly, he is entitled to some consideration under MC 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* for at least realizing that it might be wise for him to seek help in resolving the security concerns.

The whole person concept is particularly pertinent to this case. Applicant is clearly a hard-working individual who has maintained steady employment in a trade with a single employer for more than 30 years. He has possessed a security clearance for more than 30 years without incident. Although Applicant does not appear to be financially astute, he is taking the appropriate steps to bring his finances under control considering his abilities and the income available.

Considering all relevant and material facts and circumstances present in this case, including the testimony provided by Applicant and his witness, the circumstances that caused him to become delinquent on various accounts, the actions he has taken 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 mitigated this security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline F is decided for Applicant.

Personal conduct under Guideline E 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. The SOR alleges Applicant failed to disclose his financial problems in the SF 86 he submitted. However, there is no evidence to indicate Applicant had delinquent accounts at the time he submitted the SF 86. His explanation for disclosing his lone criminal offense in response to the wrong question in the SF 86, and then indicating it had been "dismissed" [sic] is credible. No disqualifying condition applies, and Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

Subparagraph f: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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. The SOR lists the amount owing on this account as \$524.00. GE 4, 5 and 6 indicate the actual amount owing is \$574.00.
3. The SOR incorrectly states that Question 26 required Applicant to list "any criminal offense not otherwise listed on (sic) the SF 86. . . ." Question 26 actually specifies particular modules of the SF 86 in which such information must be listed, not including Question 40. Therefore, despite the inaccurate terminology used in the SF 86, Applicant was required to list the arrest in response to Question 26 despite having listed it in response to Question 40.
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.