

DATE: March 19, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17288

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated his financial difficulties. Even though his debt history includes a Chapter 7 bankruptcy with continuing financial problems, a substantial number of the listed debts were discharged by operation of law. In addition, he reduced his child support arrearage by more than \$12,000.00, and joined a debt consolidation plan to resolve his current indebtedness. However, Applicant's criminal conduct and personal conduct have not been mitigated by his favorable character evidence. Clearance is denied.

STATEMENT OF THE CASE

On April 26, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On June 7, 2004, Applicant responded to the SOR and requested a hearing before an administrative judge.

The case was assigned to me on November 1, 2006. On December 18, 2006, this case was set for hearing on January 12, 2007. The Government submitted nine exhibits (GE 1-9), and Applicant submitted 19 exhibits (AE A-R) Testimony was taken from Applicant. The transcript was received on January 23, 2007. On January 29, 2007, I received a three-page exhibit that is admitted in evidence as AE S. In the first two pages of the exhibit, Applicant described certain characteristics of his demeanor at the hearing. He indicated he is not a risk to the United States. The third page of the exhibit is a contract he signed with the debt consolidation organization on September 21, 2006.

RULINGS ON PROCEDURE

At the beginning of the hearing, the government moved to amend the SOR by deleting 2.d. The reason for the motion

was that the Smith Act does not apply. Although Applicant was sentenced to imprisonment for a term exceeding a year as set forth in SOR 2.c., he was placed on probation in lieu of incarceration.

FINDINGS OF FACT

The SOR alleges financial considerations, criminal conduct, and personal conduct. Applicant denied some allegations while admitting others. In AE S, Applicant noted he did not believe he answered some questions as clearly as he should have. He believed that if an issue was resolved, then it was no longer an issue. Applicant is 47 years old and married. He seeks a secret security clearance.

Financial Considerations

In a sworn statement dated April 2002 (GE 2), Applicant was shown a criminal record and his security clearance questionnaire (SCA). He explained that his wages were garnished for child support by his employer in 1991. The garnishment was removed when the child reached age 21. Between 1984 and 1998, according to his sworn statement (GE 2), he was unable to maintain the living and medical expenses of his girlfriend and her three children. Facing mounting medical bills and living expenses, Applicant decided to file bankruptcy.

Applicant filed a petition for Chapter 7 bankruptcy in November 2000, with assets of \$2,150.00 and total liabilities of \$12,518.00 (GE 4). In February 2001, he was released from his dischargeable debts (SOR 1.i., GE 4).

AE D is an income tax amnesty application Applicant filed in response to a state tax lien (SOR 1.a.) filed against him in February 1997. Assuming that Applicant has been granted amnesty to pay his income tax for 1992, he presented no evidence to show he paid the taxes. SOR 1.a. is found against Applicant.

Applicant was notified on June 2004 that a second, state tax lien (SOR 1.b.) recorded in May 1994 had expired by operation of the cited state statute. According to the statute, when a state tax lien is recorded, the lien continues in effect for 10 years and expires 10 years from the date of recording or filing. This allegation is found for Applicant.

The debt in SOR 1.c. was included in Applicant's November 2000 bankruptcy (AE F) and discharged. I find for Applicant.

The debt in SOR 1.c. was included in Applicant's November 2000 bankruptcy (AE G) and discharged. I find for Applicant.

SOR 1.e. and 1.f. apply to the same child support action. While there are two different allegations with the same aggregate figures as those alleged in the SOR allegations, the entries are the same account that was probably modified over the years by one of the parties in the child support action. The current child support arrearage as of November 2006 is \$6,610.72 (Tr. 41; AE Q). I find for Applicant.

The SOR 1.g. debt was included in Applicant's November 2000 bankruptcy (AE I) and discharged. This allegation is found in Applicant's favor.

Applicant has no knowledge about the SOR 1.h. debt. The only evidence presented in support of the debt is AE 7 and AE 8. SOR 1.h. is found in Applicant's favor.

Applicant believes his current (unlisted) financial problems resulted when he lost his job in July 2005 after being terminated because he did not receive his security clearance. He signed a contract with a debt consolidation organization on September 21, 2006 (Tr. 100; AE S), and is paying three delinquent debts in the plan (Tr. 101). While he testified he was paying about \$400.00 a month under the plan, the contract required payments of \$167.00 a week. Applicant provided no additional information concerning whether his consolidation payments have been modified.

Criminal Conduct

In July 1998, Applicant was charged with issuing a bad check (misdemeanor) (SOR 2.a.). He paid court costs of \$31.00

under the state's first offender program. Though he denies the charge in his answer to the SOR, he admits paying the court costs and restitution (AE J). At the hearing, he stated he did not recall being charged with the bad check. Even though the disposition date in AE J appears inaccurate, I am satisfied that Applicant committed the offense. The restitution that he provided to the victim (AE J, third page) was probably a condition of his case being processed under the state's first offender plan. I find against Applicant.

In August 1996 (SOR 2.b.), Applicant was arrested for driving while under the influence of alcohol (DUI). In September 1996, he was found guilty and fined \$765.00. Applicant erroneously believed he paid the fine. He informed the investigator in April 2002 that he would make payment arrangements. AE K indicates that almost three years later, Applicant began paying the balance of the fine in \$50.00 payments beginning in February 2005. He completed the payment schedule in November 2006. I find against Applicant.

On October 26, 1994, Applicant was charged with felony bad checks. On December 22, 1994, Applicant was sentenced to serve 18 months incarceration (suspended) and placed on 18 months probation. He was fined \$1,000.00, ordered to pay restitution in an approximate amount of \$225.00, along with court costs of approximately \$184.00. In his sworn statement (GE 2), Applicant explained the bad check charges resulted from not balancing his checkbook; (U) about \$2,500.00 in checks were bounced. I find against Applicant.

In 1984, Applicant was charged with theft and failure to return a leased vehicle (GE 2). Applicant rented a car from a rental company, but contended he did not have the funds to pay for the car at the end of the contract period. He was found guilty. He was fined approximately \$1,400.00 and court costs. This offense is not listed in the SOR, but was addressed in Applicant's sworn statement (GE 2) and acknowledged by Applicant during his cross-examination (Tr. 77-78).

Personal Conduct

After taking one or two days to fill out his security clearance application (SCA), Applicant (40 years old) certified and signed his SCA on March 21, 2001. SOR 3.a. indicates he answered "No" to question 21 (Have you ever been charged or convicted of a felony offense?). SOR 3.b. points out he answered "No" to question 24 (Have you ever been charged or convicted of any offense(s) related to alcohol or drugs?). SOR 3.c. shows that Applicant answered "No" to question 26 (In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?) Applicant's explanations for his "No" answers to the three questions above are inconsistent and unclear.

SOR 3.a. (question 21 of the SCA) Applicant claimed he did not think the October 1994 check offenses constituted a felony (SOR 3.a.) because he was never incarcerated (GE 2). He repeated this claim in his sworn statement, and at the hearing (Tr. 48). On page 50 of the transcript, he contended he did not understand question 21. At a subsequent point in his testimony, however, he explained that even though he realized he pled guilty to a felony (Tr. 58), once he met all the terms of his probation in 1995 or 1996, he thought the charges were eliminated all together from his record (Tr. 59, 61). Were it not for Applicant's criminal record involving theft of a vehicle and two passing bad check offenses, his explanation for not furnishing the bad check information would be credible. However, the criminal record severely undermines his credibility, and precludes a finding that he did not deliberately omit his felony offense from question 21 of his SCA.

SOR 3.b. (question 24 of the SCA) In his sworn statement (GE 2), Applicant he found the instructions to question 24 confusing. In his answer to the SOR, he reiterated his confusion to the investigator who took the statement in April 2002. At the hearing, he was asked to explain his confusion. He responded that he probably got the question mixed up with the seven-year time frame in question 26 (Tr. 75). I find he intentionally omitted his alcohol-offense from his SCA.

SOR 3.c. (question 26 of the SCA) Beginning with his statement in April 2002 (GE 2), Applicant interpreted question 24 to mean that he did not have to list the criminal offenses because they occurred more than seven years ago. In his answer in which he denied falsifying question 26, he stated, "most of the offenses that are in question happen[ed] seven years or more ago." Question 26 is phrased to reach those criminal offenses that are not listed in questions 21, 22, 23, 24, and 25. A reasonable and straightforward interpretation of question 26 is that it applies to offenses that occurred in

the last seven years. Understanding the question to apply to offenses that occurred over seven years ago is not a credible interpretation. I find Applicant intentionally omitted information from question 26 of the SCA.

Character Evidence

Applicant's former supervisor considered Applicant an honest employee whose job performance was top notch. The branch manager found him to be technically competent in carrying out his job responsibilities. Applicant received an award for outstanding achievement in 2003. In March 2003, he received recognition and a letter of thanks for his participation in preventing an airplane accident and then removing the recovery equipment from the endangered area. In November 2006, Applicant's immediate supervisor has worked with Applicant for 16 months and considers he is a team player devoted to the accomplishment of the mission.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Financial Considerations (Guideline F)

An individual's financial practices are a private matter between him and the creditor. However, when evidence discloses he is not paying his bills on time, then his financial practices become a government concern. Accumulated debt places the individual at risk of engaging in illegal acts to generate funds.

Criminal Conduct (Guideline J)

Criminal conduct is synonymous with poor judgment because an individual who is willing to violate the law may also be willing to violate security regulations when he chooses.

Personal Conduct (Guideline E)

The security concern is poor judgment, dishonesty, or lack of candor demonstrated during the security investigation.

CONCLUSIONS

Financial Considerations (FC)

A person who cannot pay his bills is at risk of exercising poor judgment to generate funds. Applicant has accumulated a significant amount of delinquent debt. The SOR lists two state tax liens, back child support, and several other debts that have purchased by collection agencies. FC disqualifying condition (DC) E2.A6.1.2.1. (*a history of not meeting financial*

obligations) applies.

To overcome a history of debts, a person must establish that the debts have been or are being resolved in some fashion. The record shows that all but two of the debts have been resolved by operation of law. The 1994 state tax lien (SOR 1.b.) has been resolved by operation of law. The controlling statute requires the state to recover the income tax within a 10-year period. The state notified Applicant the lien had expired. The other state lien is still valid, but Applicant has a tax amnesty application pending. The debts identified in SOR 1.c. and 1.d. and 1.g. were discharged under Applicant's Chapter 7 bankruptcy in February 2001. Although his child support is still in arrears, Applicant has decreased the amount of the arrearage by more than \$12,000.00. As previously noted, there is no supporting evidence connecting Applicant to the utility debt in SOR 1.h., and he has no knowledge of the debt. Though Applicant has acquired three other delinquent debts, he is currently in a debt consolidation plan to repay the debts. FC MC E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolved debts*) applies. In sum, I find for Appellant under the FC guideline.

Criminal Conduct (CC)

A history or pattern of criminal behavior creates doubt about a person's judgment. In July 1998, Applicant issued a bad check. Before his DUI conviction in August 1996, Applicant pled guilty to felony bad check for writing \$2,500.00 worth of bad checks in October 1994. Applicant's listed criminal conduct in 1994 and 1998 constitutes a pattern of conduct that falls within the scope of CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). Even though the 1984 theft offense is not listed in the SOR, the similarity of the theft offense to the check offenses as constituting crimes of dishonesty and deception cannot be ignored.

There are three mitigating conditions that may remove the security concerns of Applicant's criminal conduct. Even though there is no evidence of subsequent criminal conduct after 1998, CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*) does not mitigate Applicant's criminal conduct due to Applicant's current position he did not falsify the SCA. CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) does not apply for the same reason. Three years after his check passing conviction, Applicant (age 40) filled out the SCA in March 2001 certifying he had no criminal record. Notwithstanding his favorable character evidence, his continuing misplaced beliefs concerning the felony offense in 1994 and his claimed confusion concerning the two other questions preclude the application of CC MC E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). The CC guideline is found against Applicant.

Personal Conduct (PC)

Applicant's omission of material information from his March 2001 SCA falls within PC DC E2.A5.1.2.2. (*the deliberate omission or falsification of relevant and material facts from any personnel security questionnaire to determine security clearance eligibility or trustworthiness*). His explanations for providing the false information are discredited (1) by the ambiguity of the explanations, and (2) by his criminal record of theft and passing and issuing bad checks, crimes of dishonesty or deception. The 1998 offense occurred only three years before Applicant certified the SCA. Applicant was 40 years old at the time he certified the truthfulness of the contents of the SCA.

Deliberately providing false information may be mitigated by PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) Applicant's criminal record was substantiated by GE 9 and AE A. A person's criminal record is always relevant to a determination of judgment. PC MC E2.A5.1.3.1. is inapplicable.

PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) would apply in this situation had Applicant told the truth about the missing information. While his omissions occurred more than five years ago, he continues to believe he did not intentionally omit any information from the SCA. PC MC E2.A5. 1.3.2. is inapplicable. PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) is also inapplicable. The record supports my finding that Applicant was shown his criminal record and/or SCA before he provided information about his criminal record. Even though the record shows he was compliant in his explanations of his entire criminal history in his April 2002 sworn statement, there is no indication he volunteered information before he was shown his criminal record and/or SCA. The disclosure of information in his sworn statement does not eliminate the legal

significance of his deliberate omissions in his March 2001 SCA. PC MC E2.A5.1.3.3. does not apply to the circumstances of this case. The PC guideline is found against Applicant. After weighing and balancing all the evidence, the CC and PC guidelines are found against Applicant.

In addition to my findings under the specific guidelines, I must consider this case in the context of the general factors of the whole person concept. *See*, E2.2.1. of the Directive. Applicant's character evidence demonstrates he has maintained good job performance ratings and is considered a team player. Though he has had no financial counseling, he appears to be on the road to regaining better control over his financial responsibilities. However, successful rehabilitation from criminal behavior and personal conduct begins with a recognition that he deliberately omitted material information from his SCA. Applicant's contributions to his past and current employers are not enough to find for him under the CC or PC guidelines, or the general factors of the whole person model.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Financial Considerations, Guideline F): FOR THE APPLICANT.

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. For the Applicant.

Subparagraph 1.c. For the Applicant.

Subparagraph 1.d. For the Applicant.

Subparagraph 1.e. For the Applicant.

Subparagraph 1.f. For the Applicant.

Subparagraph 1.g. For the Applicant.

Subparagraph 1.h. For the Applicant.

Subparagraph 1.i. For the Applicant.

Paragraph 2 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

Subparagraph 2.a. Against the Applicant.

Subparagraph 2.b. Against the Applicant.

Subparagraph 2.c. Against the Applicant.

Paragraph 3 (Personal Conduct, Guideline E): AGAINST THE APPLICANT.

Subparagraph 3.a. Against the Applicant.

Subparagraph 3.b. Against the Applicant.

Subparagraph 3.c. 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.

Paul J. Mason

Administrative Judge

1. At the hearing, he claimed his girlfriend at the time was taking money out of his checking account without his knowledge (Tr. 56).