

DATE: June 30, 2006

In Re:

Applicant for Security Clearance

CR Case No. 05-05555

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 50-year-old employee of a defense contractor has a history of financial problems that have only partially been resolved, a history of alcohol-related arrests and convictions, and four significant falsifications on his security clearance application, each of which is a violation of 18 U.S.C. 1001. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On November 25, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On December 19, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The case was assigned to me on February 2, 2006. A Notice of Hearing was issued on February 14, 2006, setting the hearing for March 21, 2006. At the hearing, the Government offered six (6) exhibits (Government's Exhibits (GX) 1-6. Applicant testified and offered five (5) exhibits (Applicant's Exhibits (AX) A-E. He also submitted a timely post hearing collection of documents, which was marked as AX F.. All exhibits were admitted without objection. The transcript was received at DOHA on March 30, 2006.

FINDINGS OF FACT

Applicant is a 50-year-old employee of a defense contractor. The June 30, 2005 SOR contains eight (8) allegations under Guideline F (Financial), 1.a.-1.h.; eight (8) allegations under Guideline J (Criminal Conduct); and one (1) allegation under Guideline E (Personal Conduct).

Applicant admits Guideline F allegations 1.a.-1.d, but denies 1.e. and 1.h.; he admits all eight Guideline J factual allegations; and he denies intentionally failing to mention the arrests alleged at 2.f and 2.g., above. All admissions are

accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to the status of each SOR allegation.

Guideline F (Financial)

As of the issuance of the SOR, and unless otherwise noted, Applicant had a history of 26 past due debts (delinquent, charged off, referred for collection, lien filed, or reduced to judgment) to the following creditors in the approximate amounts cited:

1.a. Data Information Service A (civil judgment)----- \$2,121.00.

1.b. State Tax Lien, filed September 1996 -----\$5,344.93. The garnishment has ended and the State Tax Authority has issued a "Termination of Order to Withhold Taxes," dated September 12, 2005 (AX F2).

1.c. - Internal Revenue Service Tax Lien for tax years 1993, 1995, and 1998 --\$7720.21The IRS issues a acceptance of Applicant's offer of an Installment Agreement, wherein Applicant agreed to make payments of \$200.00 per month, beginning in December 2000. (AX F3). Applicant submitted a part of a single receipt, undated, showing a payment of \$200.00, and a part of a monthly statement, also undated, showing that at least one payment had been made, but it is not shown when it was made. I note that the first column, for tax period 12-31-1993 shows a balance of \$8,498.68, which is about twice the amount alleged in the SOR at 1.b. In essence, Applicant's exhibit suggests he has gone substantially backward (AX F4)..

1.d. - Superior Court D (fine cited in 2.f., below, referred for collection) -----\$3,069.00

1.e. - County E - unpaid child support, referred for collection -----\$183,000.00

A document submitted by Applicant's Family Law attorney indicates that the amount of child support arrearage is now about \$100,000 (AX F1).

1.f. - Creditor F -----\$10.00

1.g. - State G - (judgment for benefit overpayment) -----\$4,344.00

1.h. - Credit Card Company H -----\$1,614.00.

In an undated letter (last date shown is in May 2001), Applicant outlined his efforts to contact the creditor and resolve the debt, without apparent success (AX F6). In the subsequent six years, nothing appears to have changed.

Guideline J (Criminal Conduct)

As alleged in the SOR, Applicant was:

2.a. - arrested on March 8, 1995 and charged with (1) Driving Under the Influence of Alcohol. He pleaded guilty and was sentenced to three years' probation, 90 days in jail; and a fine of \$1,675.00.

2.b. - arrested on March 25, 1995 and charged with Reckless Driving. He pleaded guilty and was sentenced to three years' probation, 80 days in jail, and a fine of \$1,000.00

2.c. - arrested on October 18, 1995 and charged with (1) Driving Under the Influence of Alcohol; and (2) Chemical Test Refusal. He pleaded guilty to Count (1), and was sentenced to five

years probation, with 24 months formal probation, and 36 years summary probation, 90 days in jail, fined \$1,100.00, and had his driver's license restricted for three years.

2.d. - arrested on September , 1996, and charged with (1) Driving Under the Influence of Alcohol, with Injury, (2) Driving While License Suspended or Revoked; and (3) Unlicensed Driver. He pleaded guilty to Amended Count (1), Driving Under the Influence of Alcohol, and was sentenced to three years' probation, with 24 months formal probation, 340 days in jail, and ordered to attend an alcohol drinking driver program, and fined \$1,000.00

2.e. - arrested on November 2, 1996, and charged with (1) Driving Under the Influence of Alcohol; and (2) Driving on a Suspended or Revoked License. He pleaded guilty and was sentenced to five years probation, 340 days in jail, ordered to attend and complete an alcohol drinking driver program; and fined \$1,500.00.

2.f - arrested on May 30, and charged with (1) No Proof of Insurance; (2) Driving on a Suspended or Revoked License for DUI. He pleaded guilty to a Lesser Included Offense of Count (2) and was sentenced to three years' probation, participate in 15 days community service; and pay a fine of \$\$3,012.00, with \$2,001.00, of the fine suspended upon proof of insurance. He failed to pay the fine and owes the Superior Court \$3,069.00.

2.g. - arrested on June 25, 2003, and charged with Unlicensed Driver. He pleaded guilty to a lesser included offense, and was sentenced to three years' probation, to pay a fine of \$440.00, and had his driver's license suspended.

2.h. - The allegations in SOR 3.a, below, constitute a violation of 18 U.S.C. 1001, a felony.

Guideline E (Personal Conduct)

3.a- In a signed sworn statement, dated October 15, 2004, and presented to an authorized investigator for the Department of Defense, Applicant falsified material facts in that he stated, "I have had no other unfavorable police involvement prior to 1994 and since 1997, whereas in truth

he deliberately omitted any mention of the arrests in 2.f. and 2.g.

Applicant is viewed positively by a variety of friends and co-workers (AX A, AX B, and AX C).

POLICIES

Each adjudicative assessment and decision must view the Applicant under the Directive's "whole person" and also under nine generic factors relevant to the Applicant's conduct, including (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, including knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, page 2-1 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to

classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Guideline F (Financial Considerations)

Applicant has had financial problems going back to the early 1990s.

1.a. - IRS tax lien - Applicant has paid \$150 per month from September 2001 to January 2006 (AX E). The lien for tax years 1992 and 1993 was released on February 8, 2006 (AX F), but an offer in compromise for 1994 was submitted (Tr at 38-40) and has been agreed to by the IRS (\$7,968.00) for tax years 1992, 1993, and 1994 (AX H5). A final payment in resolution was acknowledged by the IRS (AX H6).

1.b. and 1.c. -- The State tax liens "were for unpaid taxes for tax years 1993 and 1994" (GX 3) or 1992 and 1993 (GX 12). The lien for 1992 and 1993 was released on July 30, 2002 (GX 6) and the State has stopped garnishing his wages. Applicant has now provided a document from the State tax agency dated May 10, 2006, showing a "\$.00" balance due for tax years 1992, 1993, and 1994 (AX H4 at 2/2). I conclude from all of this that his State tax liability has been resolved.

1.d. - This debt is owed to his divorce attorney. Applicant stopped paying when his income decreased. In his April 2004 sworn statement, he stated that he would pay this debt by February 2005, but he has not done so, despite his having the funds available to do so (Tr at 46 and GX 2).

1.e.-1.m. - The evidence supports all of the specified allegations. At several places in his testimony, Applicant states that if a certain debt is "mine," then I will pay it (Tr at 48). He also stated that he was not sure if some debts were duplicates or not (Tr at 49), or even if the debts were actually his (Tr at 50), but he admits having done little or nothing to contact the creditors or otherwise ascertain the status of most of the consumer debts (Tr at 48-52), some of which have remained unpaid since 2000 or earlier (Tr at 52).

I have carefully considered Applicant's post hearing submissions. An attorney recently consulted by Applicant writes (April 14, 2006) that "most if not all of the debt is quite old and can be 'fixed' through administrative action" (AX H1). The problem is that any actual results are still in the indefinite future and, in any case, would not establish Applicant's current eligibility, which depends on current evidence of rehabilitation. A current credit report (AX H2, page 3/4) contains some of the debts, but others no longer appear, apparently because of age rather than by any resolution by Applicant. These facts do not suggest any substantial movement efforts by Applicant toward financial rehabilitation on his numerous consumer debts.

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. *Disqualifying Conditions:* (1). A history of not meeting financial obligations; and (3). Inability or unwillingness to satisfy debts; *Mitigating Conditions:* None that are established by the record; e.g., (1). the behavior remains recent; and (2). was not an isolated incident. Applicant's failure to resolve the longstanding debts cited in 1.d-1.m. raises doubts about his judgment , reliability, and trustworthiness.

Guideline G (Alcohol)

Applicant's three (1991, 1995, and 1998) DUI arrests and convictions are undisputed. His drinking began in around 1979, when he was 22 years old (Tr at 54). His 1991 arrest was not the first time he had consumed alcohol and driven a car, only the first time he had been caught (Tr at 55). In 1995, he was arrested for DUI again, at a time when his driver's license had been suspended. At the time of his 1998 arrest, he again drove while his license was suspended, this time to a club (Tr at 61). He still consumes "beer now and then , but I've been sober" (Tr at 56). At the hearing, he produced a current and valid driver's license (Tr at 63, 54). The last alcohol he consumed was about a month prior to the hearing, but he didn't drive (Tr at 65). Despite his past difficulties, and his treatment program, he continues to drink about once or twice a month, usually on the weekend (Tr at 66-68). He does not think he has a drinking problem (Tr at 69).

The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness

Disqualifying Conditions: (1). Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use; and (5) Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions: None that are established by the record; e.g., (1) The alcohol-related incidents *do* indicate a pattern; (2). Although the problem occurred a number of years ago, Applicant continues to consume alcohol, so the mitigating effect of this factor is minimized; (3). There are positive changes in behavior supportive of sobriety, but Applicant denies any problems with alcohol while still drinking, a combination I conclude suggests a degree of denial on his part; and (4). Following diagnosis of alcohol abuse or alcohol dependence, Applicant has completed inpatient or outpatient rehabilitation along with aftercare requirements, but he does not participate frequently in meetings of Alcoholics Anonymous or a similar organization, and has not abstained from alcohol for a period of at least 12 months, and has not received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member.

Guideline E (Personal Conduct)

3.a., 3.b., 3.c., and 3.d - Applicant acknowledges that he read Questions 24, 36, 37, and 38 before answering them and signing the security clearance application (Tr at 70-72).

3.a. - He did cite the last two DUIs, in 1995 and 1998, but omitted the first one, in 1991. He states it was an accident and not intentional, but he admitted he understood the question and should have listed the 1991 arrest and conviction (Tr at 72). He just "doesn't know why" he didn't do so (*Id.*).

3.b. - He knew the "importance of the application" and he reviewed it before signing (Tr at 73). He understood the question and knew that he had a tax lien he should have reported. He knows he did not report it correctly, but he doesn't know why (Tr at 74).

3.c. - He read the question and understood it (Tr at 74). He knew he had a judgment against him. He admits he answered the question incorrectly, but he doesn't know why (*Id.*).

3.d. - Again, he read and understood the question about delinquent debts, and knew he should have answered "yes," and reported the delinquent debts cited in the SOR. He was warned by his boss that DoD "was gonna know everything anyway," so he wasn't "trying to hide anything" (Tr at 75) Nonetheless, he did answer falsely and he still can't explain why. (Tr at 75, 76).

The Concern: A history or pattern of criminal conduct creates doubt about a person's judgment, reliability; and trustworthiness.

Disqualifying Conditions (1) any criminal conduct; regardless of whether the person was formally charged; and (2) a single serious crime or multiple lesser offenses. Mitigating Conditions: (1) the criminal behavior was not recent, since the seven-year period of three arrests and convictions ended in 1998, but (2) the crimes were not an isolated incident and (5) the overall record does not suggest "clear evidence of successful rehabilitation.

I have gone over the evidence from different perspectives. There is compelling evidence that Applicant knowingly answered falsely as to Questions 24, 36, 37, and 38. I have carefully considered his explanations and conclude that they do not constitute mitigation of his false answers. I conclude that any reasonable man would have understood what the questions were asking about and the uniform denials present too much of a one-sided coincidence to be credible, or to encourage confidence in his judgment, reliability, and trustworthiness.

I also note that other than the four cited questions, all of which might logically cause problems for Applicant if answered truthfully, there is no evidence of false answers as to any other questions on the security clearance application. Considering the totality of the evidence, I conclude that Applicant intended to deceive, or at the very least, hoped he

would deceive the Government as to his arrest and financial situations. In either case, the Guideline E allegations would still be found against Applicant.

Disqualifying Conditions: (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; *Mitigating Conditions:* None that are established by the record; e.g., (2) The falsification, although not recent, was not an isolated incident, and the individual did not subsequently provide correct information voluntarily. ***Guideline J (Criminal Conduct)***

4.a. - Based on my conclusion that Applicant deliberately answered falsely as to all four SOR questions, as cited under 3.a., 3.b., 3.c., and 3.d., above, I further conclude that all four falsifications violate 18 U.S.C. 1001, a felony.

Disqualifying Conditions (1) - allegations or admissions of criminal conduct; and (2) a single serious crime or multiple lesser offenses, have been established. None of the parallel mitigating conditions (MC), have been established.

As to all four Guidelines, individually and collectively, Applicant has not come close to overcoming the evidence supporting the Government's concerns, as stated in the SOR. It is not necessary to question Applicant's sincerity to conclude that he has simply not demonstrated that he currently possesses the good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets. In the year that must pass after this decision becomes final, at which time Applicant can reapply for a DoD security clearance, he will have the opportunity to further address the Government's concerns.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline F (Financial Considerations) Against the Applicant

Subparagraph 1.a., 1.b., 1.c. For the Applicant

Subparagraph 1.d. - 1.m. Against the Applicant

Guideline G (Alcohol) Against the Applicant

Subparagraphs 2.a- 2.c. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 3.a.- 3.d.. Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 4.a. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE