

DATE: March 19, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-07149

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant has two unpaid judgments against him and several other delinquent debts. He is making payments on some of his delinquent debts. He did not disclose the unpaid judgments and other delinquent debts on his security clearance application (SF 86). He has not refuted the allegations of falsification, and he has not mitigated the security concerns arising from his financial situation and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On February 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleged security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on March 6, 2006, and requested a decision on the record in lieu of a hearing. On May 23, 2006, he changed his election and requested a hearing before an administrative judge. The case was assigned to an administrative judge on December 14, 2006, and reassigned to me on December 22, 2006. The case was heard on February 6, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on February 14, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 47-year-old quality engineer for a defense contractor. He served in the U.S. Marine Corps Reserve from

March 1984 to March 1994 and received a clearance in 1985 (Applicant's Exhibit (AX) A). He has worked for his current employer since February 2004.

Applicant had financial difficulties as early as 1983. During a security interview in October 1986, he admitted writing six dishonored checks between March and May 1983 (GX 5; GX 6).

Applicant was married in October 1989 and divorced in December 2000. He has a 15-year-old daughter from that marriage, for whom he pays child support. He remarried in March 2006 (Tr. 83). During his first marriage, his wife handled the family finances (GX 3 at 1).

In July 1999, Applicant was riding his motorcycle and was hit head-on by an automobile traveling at high speed. The automobile driver was at fault. Applicant suffered a dislocated left elbow, broken pelvis, a crushed left ankle, and a compound fracture of his right leg (Tr. 39). He now has several metal plates and numerous metal screws and pins in his lower body. He spent about six months in a hospital and nursing home, and was unable to work for about six months after the accident (GX 2 at 1; AX M, N, O). He was in severe pain and received medication for pain and depression (Tr. 40). He stopped taking prescribed pain medication some time in 2000, and now takes it occasionally as needed (Tr. 63). He incurred about \$15,000 in out-of-pocket medical expenses, which have since been paid (GX 2 at 1).

Applicant moved to a warmer climate in 2001 because the cold aggravated the pain from his injuries. He rented an apartment in anticipation of accepting a job with a county government, but he did not get the job. He moved to another location to accept a job with a defense contractor, and he incurred the debt alleged in SOR ¶ 1.c by breaking his apartment lease. He was making payments to his former landlord of \$20 per month until August 2006, when he stopped making payments because he owed federal taxes (Tr. 57).

Applicant withdrew funds from his 401(k) retirement account in 2003 to purchase a used car, but he did not report the withdrawal as income on his federal tax return. He received a bill for additional taxes from the Internal Revenue Service (IRS) in 2006 (AX C). He is now paying \$100 per month on his income tax debt (AX G; Tr. 51-52).

Applicant was paying \$20 per month on the \$5,637 credit card debt alleged in SOR ¶ 1.f until August 2006, when the creditor informed him that his payments were too small. The creditor cancelled the debt and reported it to the IRS as income for Applicant, resulting in an additional tax liability (Tr. 53; AX I).

When Applicant was divorced, he was ordered to pay \$766 per month in child support. He testified he and his ex-wife orally agreed that he would pay \$595 (Tr. 49). In November 2006, however, he was ordered to pay \$18,650 in child support arrearage or risk being jailed. He sold one of his motorcycles and borrowed from his 401(k) retirement account to pay off the arrearage (AX J, L; Tr. 49-50). He is now trying to obtain a modification of the child support order (Tr. 50).

In May 2001, Applicant and his girlfriend applied for a home loan, but were turned down because of his debt-to-income ratio. Contemplating a new loan application, he altered two bank statements to reflect a zero balance on the debts, but he decided not to submit the new application. He initially told a security investigator he did not alter any bank statements, but he then disclosed the alteration of the documents to the same security investigator in April 2003 (GX 3 at 3-4). His written statement does not indicate the temporal break, if any, between his denial and his admission. He testified he was heavily medicated at the time (Tr. 46). At the hearing, he was unable to remember the details of his conversation with the investigator (Tr. 64). The allegedly altered documents were not presented as evidence.

Applicant executed a SF 86 on July 27, 2004, to continue his clearance. He answered "no" to question 37, asking if he had any unpaid judgments entered against him during the last seven years; question 38, asking if he had ever been more than 180 days delinquent on any debt during the last seven years, and question 39, asking if he was currently more than 90 days delinquent on any debt (GX 1 at 6). His credit reports dated September 8, 2004, and December 30, 2005 reflected two unpaid judgments against him, entered in January and May 2002 (SOR ¶¶ 1.a and 1.b), and five delinquent debts (SOR ¶¶ 1.c, 1.e, 1.f, 1.g, and 1.h) charged off or placed for collection between June 2000 and May 2002. One delinquent debt (SOR ¶ 1.d) was placed for collection in April 2005, after he executed his SF 86.

When questioned by a security investigator about his negative answer to question 37, he told the investigator he was

unaware of the unpaid judgments until he saw his credit report (GX 2 at 2). However, at the hearing, Applicant admitted he was aware of the unpaid judgments and the delinquent debts when he executed his SF 86 (Tr. 72). He testified he executed the form at work and was under pressure to complete some projects. He admitted being careless but denied intentionally falsifying his answers (Tr. 37-38).

The evidence pertaining to the debts alleged in the SOR is summarized in the table below.

SOR	Debt	Amount	Status	Record
1.a	Judgment	\$782	Judgment entered May 02; paying \$20 per month since Dec 05.	GX 8 at 2; GX 11 at 1; AX F; Tr. 74-75
1.b	Judgment	\$1,488	Judgment entered Jan 02; paying \$20 per month since Dec 05.	GX 8 at 2; GX 11 at 1; Tr. 75
1.c	Penalty for breaking lease	\$1,940	Placed for collection Nov 01; paid \$20 per month Oct 05 to Aug 06; balance of \$1,820 unpaid.	GX 8 at 6; AX H; Tr. 56-57
1.d	Telephone	\$570	Placed for collection Apr 05; paid \$20 per month since Oct 05; settled Jan 06.	GX 8 at 6; AX B at 2; Tr. 76
1.e	Credit card	\$14,240	Charged off Nov 00; amount disputed; Applicant admits owing \$5,600, which is unpaid.	GX 8 at 2; GX 11 at 2
1.f	Credit card	\$5,637	Placed for collection June 00; paid \$20 per month from Oct 05 to Aug 06; debt cancelled and reported to IRS as income.	GX 8 at 2; AX C at 2; AX I
1.g	Car repossession	\$839	Charged off March 02; included in judgments alleged in SOR ¶¶ 1.a-1.b.	GX 8 at 2; GX 11 at 2; Tr. 80-81
1.h	Bank fees	\$86	Charged off May 02; Applicant says he paid it but has no evidence; credit reports show it unpaid.	GX 8 at 2; GX 11 at 2; Tr. 79-80

In November 2004, Applicant was questioned by a security investigator about his debts, and he submitted a personal financial statement reflecting net monthly income of \$2,970, expenses of \$2,235, debt payments of \$427, and a net remainder of \$308 (GX 2 at 6). At the hearing, he estimated his net monthly remainder to be about \$150 (Tr. 69).

Applicant's wife owns the house they live in, and he shares the expenses (Tr. 67). His car payment is \$326 per month (Tr. 68), and it is his primary transportation. He owns a second car that is paid for (Tr. 68). He sold his 1998 Harley Davidson motorcycle, purchased in 2001 for \$16,500, to pay his child support arrearage (Tr. 70-71), but he still owns the 2000 Harley Davidson that he purchased new for about \$14,000 (Tr. 70).

Applicant tried some form of credit counseling in the early 1980's, but he has not sought credit counseling recently (Tr. 71). He admits his finances have been "in disarray for 23 years," (Tr. 54) and characterizes his financial situation as "mayhem," but he does not believe it is a security problem (Tr. 72).

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 with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must

be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[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. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history and current situation establish DC 1 and DC 3. He is financially overextended.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or was an isolated incident (MC 2). Directive ¶¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant has multiple delinquent debts that are not resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially arose due to circumstances beyond his control, it is appropriate to consider whether he acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003).

The breakup of Applicant's first marriage and his motorcycle accident were circumstances beyond his control. He acted reasonably by paying off his out-of-pocket medical expenses. However, in 2000, about the same time when he was trying to negotiate his child support payments downward, he purchased an expensive motorcycle. In 2001, he purchased a second expensive motorcycle. I conclude MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and

there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is not established because Applicant has not sought financial counseling.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). When Applicant was facing imprisonment for his child support arrearage, he reacted quickly by selling his motorcycle and borrowing from his retirement account. He has not acted with the same decisiveness regarding the debts alleged in the SOR. He has kept an expensive motorcycle that he does not need for transportation, even though selling it would allow him to substantially increase his monthly debt payments or pay off many of his delinquent debts. He is making only small payments on the debts alleged in SOR ¶¶ 1.a, 1.b, and 1.g. He suspended payments on the debt in SOR ¶ 1.c. He has not settled the debt alleged in SOR ¶ 1.e, or tendered any payments, even though he admits he owes about \$5,600. He claimed to have paid the debt in SOR ¶ 1.h but offered no documentation that it was paid. I conclude MC 6 is not established.

Applicant made payments on the debt in SOR ¶ 1.d from October 2005 to January 2006 and then settled the debt. I conclude he has mitigated the security concern raised by this debt, and I resolve SOR ¶ 1.d in his favor.

Applicant made payments on the debt alleged in SOR ¶ 1.f until the creditor cancelled the debt and reported the unpaid balance to the IRS as income attributable to Applicant. He is no longer under any obligation to pay this debt, and it would be unreasonable to expect him to continue paying it while it is being taxed as income. I conclude the security concern raised by this debt is mitigated, and I resolve SOR ¶ 1.f in his favor.

The debt alleged in SOR ¶ 1.g appears to be included in one of the unpaid judgments alleged in SOR ¶¶ 1.a and 1.b. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicate allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 1.g in Applicant's favor.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be raised by "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." Directive ¶ E2.A5.1.2.2.

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant has held a clearance for many years and is familiar with the clearance process. He applied to continue his security clearance several times. He gave inconsistent explanations for his negative answers to questions 37, 38, and 39 on the SF 86. In November 2004, he told a security investigator he was unaware of the judgments and delinquent debts until he saw his credit report. At the hearing he admitted he was aware of the unpaid judgments and delinquent debts but inadvertently answered the questions in the negative because he was under pressure to complete work projects. Starting in 1983, he has been questioned repeatedly by security investigators about his delinquent debts. In light of his familiarity with the process and his contradictory explanations, I find his claim of an inadvertent mistake to be implausible and not credible. I conclude DC 2 is raised by Applicant's false answers to questions 37, 38, and 39 (SOR ¶¶ 2.a, 2.b, and 2.c).

A disqualifying condition (DC 3) also applies when an applicant deliberately provides false or misleading information

concerning relevant and material matters to an investigator or security official in connection with a personnel security or trustworthiness determination. Directive ¶ E2.A5.11.2.3. SOR ¶ 2.d alleges Applicant falsely denied altering the bank statement and then admitted it. The falsification alleged in the SOR is the denial, not the alteration of the bank statements. The only evidence is Applicant's written statement. It is impossible to determine from the statement what question, if any, Applicant was asked when he denied altering any records. The statement does not indicate whether Applicant forgot about altering the bank statements until his memory was triggered by the investigator's questions. It also does not indicate the time lapse between Applicant's denial and subsequent admission. I conclude the evidence is too vague and uncertain to support the allegation that Applicant falsely denied altering the documents. I conclude DC 3 is not raised by substantial evidence, and I resolve SOR ¶ 2.d in Applicant's favor.

Since the government produced substantial evidence to establish DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶ E2.A5.1.3.2. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3. Neither condition is established, because Applicant's falsification was recent, pertaining to his current application, and he took no steps to correct the falsification until he was confronted with the facts.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant is a mature adult who has held a security clearance for many years without incident. He takes great pride in his work. He is not motivated to change his lifestyle because he does not regard his financial "mayhem" as a security problem. He has chosen to indulge in an expensive hobby-his love of Harley Davidson motorcycles-instead of paying off his delinquent debts. While he steadfastly maintains he would never compromise classified information, he is vulnerable to pressure, coercion, exploitation, or duress because he is financially overextended. He is likely to continue his financial "mayhem" because he is not motivated to change.

Applicant's falsification of his SF 86 is a serious security concern. Candor is important, and Applicant was unable or unwilling to be candid about his financial situation. Because of this serious misconduct, compelling reasons to grant a clearance are required.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his security clearance.

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: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: For Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge