

KEYWORD: Financial

DIGEST: Applicant is 57 years old and works as a software engineer for a defense contractor. During his career he has earned a high salary and contributed substantial monies into his IRA. In 1999, Applicant entered a contract to construct an expensive home. After starting construction Applicant's costs exceeded his budget, and he was unable to increase his loan. Attempting to cover those costs prior to the closing, Applicant withdrew funds from his IRA. Because the project did not close on time, he was unable to repay his IRA within the required time frame and the IRS assessed him a large fine. Unable to pay the fine and mortgage, he began accumulating debt. In 2005, the court entered an order of Discharge in Bankruptcy and the bank foreclosed on his house. Applicant mitigated the security concerns raised by his financial considerations. Clearance is granted.

CASENO: 04-02523.h1

DATE: 01/30/2006

DATE: January 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02523

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq.

FOR APPLICANT

Chester H. Morgan, II, Esq.

SYNOPSIS

Applicant is 57 years old and works as a software engineer for a defense contractor. During his career he has earned a high salary and contributed substantial monies into his IRA. In 1999, Applicant entered a contract to construct an expensive home. After starting construction Applicant's costs exceeded his budget, and he was unable to increase his loan. Attempting to cover those costs prior to the closing, Applicant withdrew funds from his IRA. Because the project did not close on time, he was unable to repay his IRA within the required time frame and the IRS assessed him a large fine. Unable to pay the fine and mortgage, he began accumulating debt. In 2005, the court entered an order of Discharge in Bankruptcy and the bank foreclosed on his house. Applicant mitigated the security concerns raised by his financial considerations. Clearance is granted.

STATEMENT OF THE CASE

On May 24, 2005, the Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline F (Financial Considerations) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On July 12, 2005, Applicant filed his Answer and requested a hearing. The case was initially assigned to another Administrative Judge on August 15, 2005, and re-assigned to me on September 13, 2005. A Notice of Hearing was issued on September 26, 2005, setting the case for hearing on October 26, 2005. At the hearing the parties stipulated to the introduction of Government Exhibits 1-8 into evidence. Applicant introduced Exhibits A-D into evidence without objection. The Government did not call any witnesses. Applicant testified and called one witness in his case-in-chief. Without objection by the Government, the record remained open until December 15, 2005, to give Applicant an opportunity to submit additional evidence. On November 8, 2005, Applicant tendered documents related to Exhibit D.

He also sent materials pertaining to the release of a federal tax lien and the foreclosure of his former residence, which I marked as Exhibit E and Exhibit F, respectively. On or about December 13, 2005, he submitted a copy of his Discharge in Bankruptcy, and eight other documents indicating recent payments of federal taxes, and current pay stubs for he and his wife that I marked as Exhibit G and Group Exhibit H, respectively. The Government did not object to these submissions. DOHA received the Transcript (Tr.) of the proceeding on November 14, 2005.

FINDINGS OF FACT

In his Answer Applicant admitted the allegations contained in ¶ 1.a. and ¶ 1.b. of the SOR, and denied the allegations contained in ¶ 1.c., ¶ 1.d., and ¶ 1.e. These admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record, I make the following additional findings of fact:

Applicant is 57 years old. Since 2002, he has been employed as a software engineer for a federal contractor, working on matters related to national security. After graduating from college in the early 1970's with a degree in electrical engineering, he began working for various federal contractors, designing software programs for national defense projects. In 1995, he took a position with a private telecommunications company and worked there until 2002 when he started his current job.⁽¹⁾ From 1969 to 1995, he held a confidential security clearance without any problems.⁽²⁾ He applied for a security clearance in July 2002.

Applicant is married and has two grown sons. His wife is a senior level executive and earns a high salary. Together, they have made a very good living over the years and contributed a substantial amount of money into their IRAs and other investments. In 1999, their IRA accounts were worth approximately \$3.5M.⁽³⁾

In 1999, Applicant and his wife decided to build their "dream" home. They obtained a \$1.2M construction loan and established a budget of \$1.5M, anticipating the \$300,000.00 difference would be covered by the sale of their residence and other savings. They contracted with a local builder to construct the frame and foundation of the house, and they undertook the job of subcontracting all other work. The builder projected a closing date in fall of 2000.⁽⁴⁾ By late summer of 2000, they had depleted their construction loan and had over-runs totaling between \$500,000-700,000. Despite some of the problems that had arisen with the job, the builder assured them that the completion date of late fall was reasonable.⁽⁵⁾ In order to cover the additional costs, they returned to their bank to seek an increase in the construction loan. Before agreeing to an increase, the bank ordered a current appraisal of the house. That appraisal established a value between \$1.5M to \$1.7M, well short of the \$2.2M construction cost of the structure.⁽⁶⁾ Although the Applicant and his architect challenged the accuracy of the appraisal, the bank refused to seek another one and limited the loan amount to \$1.5M.⁽⁷⁾

In anticipation of the fall closing date and a determination to fulfill their financial obligations to the sub-contractors, Applicant and his wife withdrew \$1.2M from their IRA to cover the additional costs upon the advice of their accountant.

(8) The house did not close as scheduled, but took another year to complete and closed in January 2001. Due to the closing delay, they were unable to repay the funds withdrawn from their IRA within the 90 day deadline, and the Internal Revenue Service (IRS) assessed a 40% income tax on the withdrawn monies and a 10% penalty for the early withdrawal, for a total amount of \$557,460.68.

After the closing in 2001, Applicant sought another appraisal, expecting it would reflect a value closer to \$2.7M, in order to increase the mortgage loan amount and provide funds to cover the IRS debt. They were unable to secure one. (9) They then sought help from a company that advertised services to assist in the resolution of tax debts. The company contacted the IRS and proposed two offers in compromise. Over the course of the next year neither offer was accepted by the IRS. (10) In the interim they placed the house on the market, hoping to recoup some of their monies, pay the tax debts and avoid bankruptcy. (11)

The following year they were able to secure another appraisal that valued the house at \$2.7M. The bank then offered to increase the mortgage loan to \$1.9M, which would provide \$400,000.00 to cover a large portion of the IRS debt. In March 2002, within weeks of closing the loan, the IRS filed a Notice of Federal Tax Lien for \$557,460.68, as alleged in ¶ 1.a. After the lien was filed, the bank reneged on its offer and they were no longer in a position to resolve the tax debt as planned. (12) This debt was discharged through bankruptcy in November 2005. (13)

In June 2002, the IRS filed another Notice of Federal Tax Lien for \$42,810.19 for taxes, penalties and interest for 2001, as alleged in ¶ 1.b. This debt included unpaid income taxes for 2001, and penalties for additional monies Applicant withdrew from his IRA to cover the mortgage payments after the bank withdrew its offer. (14) These taxes were not discharged in bankruptcy and are being repaid in accordance with a repayment plan established by the IRS. (15)

In late 2003, Applicant hired a tax attorney, who was unsuccessful in his attempt to work out an offer of compromise with the IRS. In February 2004, the IRS filed a tax lien for \$8,852.00 for 1999 and 2002 taxes. About the same time, the state garnished his wife's income. In late 2004, the IRS garnished both of their wages. By the end of 2004, they were unable to pay the mortgages, and their house went into foreclosure. (16) They owed \$198,000 to one bank and \$999,000 to another bank, as alleged in ¶ 1.d. and ¶ 1.f. The foreclosure was completed in May 2005. (17) The mortgage debt at the time of the foreclosure was \$1.2M, and the house is presently on the market for \$1.7M. (18)

Up to the time of the foreclosure, Applicant struggled to make mortgage payments, pay taxes and meet living expenses. He depleted his IRA (the value of which had fallen in late 1999) and accumulated credit card debt, including, \$41,225.00 that is alleged in ¶ 1.e. This debt was discharged in the November 2005 bankruptcy.

In May 2005, Applicant and his wife moved out of their house and rented one for \$1,300.00 a month. Since then they

have significantly reduced their living costs and no longer use credit cards. They owe the IRS and state approximately \$100-115,000.00, which includes the \$42,810.19 debt, referenced in ¶ 1.b. (20) In August 2005, Applicant filed a Chapter 7 Bankruptcy. Under an agreement reached by his bankruptcy attorney with the IRS to resolve the debt, he will pay \$6,000.00 a month for about two and a half year, In addition, he will pay the state \$500.00 a month for the same amount of time. (21) Given a monthly income of approximately \$17,000.00, and limited expenses, he and his wife are in a financial position to resolve that delinquent tax debt within the set time frame. (22) Applicant made those payments in October, November and December 2005. (23) Prior to the above arrangement, Applicant and his wife repaid the IRS between \$300,000-400,000.00. (24) Around the time of the foreclosure, Applicant paid the \$8,852.00 federal tax lien (¶ 1.e.). (25)

Applicant and his wife lost approximately \$1.2 to \$2M of their money in this project. (26) They have about \$6,500.00 left in their IRA's. (27) This is the first time in his life that he has ever encountered financial difficulties. (28) Applicant informed his employer about this proceeding and the underlying financial issues. (29)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of

disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽³⁰⁾ The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty.⁽³¹⁾ Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.⁽³²⁾ The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability.⁽³³⁾

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government.⁽³⁴⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."⁽³⁵⁾

Based upon a consideration of the evidence, I find the following adjudicative guideline is pertinent to an evaluation of the facts of this case:

Guideline F - Financial Considerations: A security concern may exist when an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

The applicable qualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate adjudicative factors and legal standards, including the "whole person" concept, I conclude the following with respect to

the allegations set forth in the SOR:

Guideline F: Financial Considerations

Based on the evidence and Applicant's admissions, the Government established its case under Guideline F, specifically, Financial Consideration Disqualifying Condition (FC DC) E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*). From approximately fall of 2000 to November 2005, Applicant was financially unable to resolve some of his debts with governmental taxing bodies, mortgage lenders, and credit card companies.

Applicant's financial problems arose after he and his wife began construction of their "dream" home. Unfortunately, that dream turned into an expensive nightmare through a series of events, some of which were unforeseeable. The first difficulty occurred when the 2000 appraisal appeared to be inadequate and the bank refused to order another one, despite requests by the architect. Then, the completion of the house was delayed for a year, which exacerbated his financial situation. He withdrew IRA monies to pay subcontractors based on the advice of his accountant. In retrospect that advice may have been inaccurate and imprudent. He hired a professional tax company and a tax attorney to resolve the problems. Both of their efforts were ineffective and resulted in delaying a final resolution with the IRS. After 1999, the stock market fell, further reducing the value of his savings and ability to pay his debts. All of these factors sufficiently mitigate the disqualifying condition under Financial Consideration Mitigating Condition (FC MC) E2.A6.1.3.3. (*The conditions that resulted in the behavior were largely beyond the person's control*).

After Applicant realized he was running into financial problems during the construction phase, he returned to his bank in an attempt to cover the growing expenses. When he was unsuccessful, he sought advice from his accountant. After the house failed to close as scheduled and the IRS assessed a large tax bill, he engaged a company he thought capable of resolving the matter. He placed his home on the market. Later, he hired a tax lawyer and eventually a bankruptcy attorney. He obtained a larger mortgage, intending to pay some of the taxes after the loan closed. He exhausted his entire savings in the process of paying some of his debts. Presently, he is on a realistic payment plan for the remaining unpaid taxes and has made payments for the past three months. He reticently filed bankruptcy to resolve other debts. The combination of these efforts also mitigates the allegations under FC MC E2.A6.1.3.6. (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

I considered the totality of the evidence in this case, including Applicant's credibility and humility about these events, a 30-year history unblemished by security concerns or other financial problems, numerous attempts to responsibly resolve his problems, and his present ability and commitment to pay the remaining debt. I also reviewed the circumstances underlying the security concerns and concluded that they are unlikely to recur, and thus, do not cast doubt on his current reliability, trustworthiness or good judgment. Therefore, I am persuaded that Applicant sufficiently mitigated the financial security concerns. Accordingly, Guideline F is decided for Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1: Guideline F (Financial Considerations) 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

DECISION

In light of all of 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.

Shari Dam

Administrative Judge

1. Government Exhibit 1 (Security Clearance Application (SCA), dated July 25, 2002) at 2.
2. Tr. 41.
3. Tr. 82.
4. Tr. 47.
5. Tr. 49.
6. Tr. 81.
7. Tr. 52.
8. Tr. 50.
9. Tr. 54.
10. Tr. 55.
11. Tr. 71.
12. Tr. 57.
13. Applicant Exhibit A (Notice of Chapter 7 Bankruptcy Case) at 2; Exhibit G (Discharge of Debtors) at 1; Tr. 27.
14. Tr. 61.
15. Tr. 62.
16. Tr. 60.
17. Applicant Exhibit F (Documents related to the foreclosure sale).
18. Tr. 64. Under applicable state law, any profit realized after the sale of foreclosed property inures to the bank and not the original title holder. [\(19\)](#)
19. Tr. 64.
20. Tr. 31-32.
21. Tr. 28.
22. Tr. 31.
23. Applicant Group Exhibit H (Copies of checks to the IRS and state) at 1-4; and Exhibit C (Copies of checks to IRS and state) at 1 and 2.
24. Tr. 33.

25. Applicant Exhibit D (Certificate of Release of Federal Tax Lien, dated May 18, 2005).
26. Tr. 87.
27. Tr. 82.
28. Tr. 66.
29. Tr. 77.
30. Directive, Enclosure 2, ¶ E2.2.2.
31. Executive Order 10865, § 7.
32. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
33. ISCR Case No. 95-0611 at 3 (App. Bd., May 2, 1996).
34. ISCR Case No. 01-20700 at 3 (App. Bd., Dec. 19, 2002); *See* Directive ¶ E3.1.15.
35. *Id.*