KEYWORD: Financial; Personal Conduct

DIGEST: Applicant is a 61-year-old truck driver working for a defense contractor. Through the 1990s, Applicant accrued a number of debts that lead him to a Chapter 13 bankruptcy in 2000. In an electronically completed security clearance application in 2002, there is a negative answer to a question inquiring whether he had filed bankruptcy. Applicant has substantially paid off his Chapter 13 bankruptcy, and he successfully established that the bankruptcy information was administratively transcribed from a 1999 application without his knowledge. Applicant has mitigated the financial and personal concerns raised. Clearance is granted.

CASENO: 04-02624.h1

DATE: 05/31/2006

DATE: May 31, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-02624

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 61-year-old truck driver working for a defense contractor. Through the 1990s, Applicant accrued a number of debts that lead him to a Chapter 13 bankruptcy in 2000. In an electronically completed security clearance application in 2002, there is a negative answer to a question inquiring whether he had filed bankruptcy. Applicant has substantially paid off his Chapter 13 bankruptcy, and he successfully established that the bankruptcy information was administratively transcribed from a 1999 application without his knowledge. Applicant has mitigated the financial and personal concerns raised. Clearance is granted.

STATEMENT OF THE CASE

On December 15, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) concluding it was unable to find that it is clearly consistent with the national interest to grant him a security clearance.[(1)] The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). In a notarized statement, dated December 30, 2004, Applicant responded to the SOR allegations. He denied six of the seven allegations raised under Guideline F and denied the sole allegation raised under Guideline E. Additionally, he waived his right to an administrative hearing in favor of a decision based on the written record.

Department Counsel prepared a File of Relevant Material (FORM),[(2)] dated February 15, 2005. Applicant was provided a complete copy of the FORM, which was apparently mailed on February 21, 2005.[(3)] Applicant received the complete copy of the FORM on March 25, 2005,[(4)] and timely responded with additional material,[(5)] dated March 25, 2005. The case was assigned to me on April 7, 2005.

FINDINGS OF FACT

Applicant's answers to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 61-year-old truck driver for a defense contractor. He has been with his current employer since 1999. He is divorced and has two children.

Starting around 1994, when he divorced, Applicant began experiencing financial difficulties that increased throughout the 1990s. In May 1999, he changed employers. That June, he personally completed a written Security Clearance Application (SF-86) and gave it to his employer. The application, however, was not forwarded for processing at that time.

Due to unexplained conditions in the 1990s,[(6)] Applicant's finances became unwieldy. He found it difficult to pay his bills on an income of approximately $34,000, and, at some point, feared he might lose his home. Eventually, Applicant decided to file for Chapter 13 Bankruptcy protection. The petition was filed on July 6, 2000. Included in the bankruptcy were debts in the amount of $5,076 to the Internal Revenue Service (IRS) for tax year 1998, $5,021 to the IRS for tax year 1999, $1,712 to his state for tax year 1999, $1,800 for a returned check to one casino, and $6,925 for returned checks to another.[(7)]

Applicant states that the returned checks are ones he cashed at the casinos in order to loan a friend cash. The checks, he maintains, were returned for non-sufficient funds and the friend never paid the loans back. He included them in the bankruptcy on the advice of his lawyer after the debts had increased by close to 50% owing to fines and penalties.[(8)] Additionally, in the court's accounting of Applicant's financial condition, there is a notation for $24,586 in gambling losses[(9)] which is counterbalanced with $24,586 in gambling winnings,[(10)] thus yielding a zero sum gambling loss.

In total, the bankruptcy encompasses $62,604 in liabilities against a court-appraised $11,798 in assets. Under the bankruptcy plan, Applicant was to pay the bankruptcy trustee in monthly installments over 60 months through a plan that expired in July 2005. Applicant regularly paid on the plan and, as of March 10, 2005, he had a remaining balance of $1,056, with no delinquent payments due.[(11)] That balance should have been satisfied by four payments of $264 each over the remaining four months in 2005.

In the interim, on March 26, 2002, Applicant signed and dated a United States of America Authorization for Release of Information (Release) form. On May 1, 2002, at least a portion of a written SF-86 was completed by or for Applicant. (12) Then, an electronic version of the SF-86 was prepared and submitted for processing by Applicant's company on May 23, 2002. The electronic form noted that the subject had signed the form on March 20, 2002, but there is no actual signature in the electronic format.

The May 2002 electronic SF-86 includes a question regarding bankruptcy. To Question 33 ("**Your Financial Record - Bankruptcy** In the last 7 years have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?"), the answer "No" is designated. Applicant specifically denies any knowledge of the electronically submitted SF-86, (13) claiming the information contained must have been copied by someone in the company from his 1999 written version. He also states that he was recently told the company submitted the 2002 SF-86 for him after his original 1999 application was rejected. (14)

As of the Spring of 2005, Applicant was financially stable. He is approximately one year away from retirement and has both his union pension and Social Security for future income. He states his current assets are about $40,000 and include multiple vehicles. As of January 2005, he had less than $7,000 in debts, including what remained of his bankruptcy balance. He had approximately $7,000 in the bank as of March 2005. (15) With his bankruptcy paid off by now, his net income should be increased. For entertainment, he goes to local casinos once or twice a month. There, he spends approximately $50 to $100 per visit.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to

grant or continue a security clearance for an applicant.[16] The government has the burden of proving controverted facts.[17] The burden of proof is something less than a preponderance of evidence.[18] 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.[19] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[20]

No one has a right to a security clearance[21] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[22] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[23] The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.[24] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline F - Financial Considerations. ***The Concern*:** 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.[25]

Guideline E - Personal Conduct. ***The Concern*:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.[26]

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). For clarity, I will discuss each separately.

Financial Considerations

The Regulation sets out several potentially disqualifying and mitigating conditions under Guideline F:

For various reasons, Appellant accrued a number of debts in the 1990s, leading him to declare Chapter 13 bankruptcy. Consequently, Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.2 (*a history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*) apply.

I considered all the Financial Considerations Mitigating Conditions (FC MC). Applicant filed for Chapter 13 bankruptcy protection in 2000. By 2005, he should have repaid the balance owed his bankruptcy trustee.[(27)] Inasmuch as the debts at issue were multiple and the bankruptcy discharge was not expected to occur earlier than July 2005, neither FC MC E2.A6.1.3.1 (*the behavior was not recent*) nor FC MC E2.A6.1.3.2 (*it was an isolated incident*) applies.

Applicant makes vague references to conditions mitigating his financial situation.[(28)] Such references, left undefined, however, lack the specificity needed to demonstrate that they helped give rise to his financial problems. He does, however, point to his divorce as contributing to his financial problems, although without much specificity as to how. Inasmuch as he is a layman proceeding *pro se*, and since divorce rarely occurs without some financial repercussions, I find that FC MC E2.A6.1.3.3 (*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*)) applies to a limited extent.

At no point in the case file is there any evidence that Applicant received financial counseling, either before or after the filing of his bankruptcy. Therefore, I cannot find that FC MC E2.A6.1.3.4 (*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*) applies.

Other than references to a struggle to handle debt and to keep his home in the 1990s, the record does not indicate what efforts Applicant made to pay off his debts prior to 2000. In 2000, however, he chose to file bankruptcy. Although

bankruptcy is not the preferred method for eliminating debt, it is a legally available option and is not prohibited by the guidelines. To his credit, he chose to contribute toward the satisfaction of his debt through Chapter 13 bankruptcy, rather than seek a clean sweep of his debts under Chapter 7 proceedings. Further, he apparently made it through 56, if not all, of the 60 months of payment to the bankruptcy trustee on schedule and without incurring any delinquencies. Taken together, I find that Appellant's choice of Chapter 13 bankruptcy and his record for completing his repayment plan demonstrate that FC MC E2.A6.1.3.6 ([*t*]*he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) applies.

Finally, the Government is appropriately concerned with what initially appears to be a $24,586 gambling loss.[(29)] Consequently, Department Counsel also argues that FC DC E2.A6.1.2.5 ([*f*]*inancial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern*) applies. I disagree. By itself, and combined with the checks returned from two casinos, a $24,586 loss could indicate a problem larger than just financial difficulty; this is especially true since Applicant continues to visit casinos. Applicant, however, has demonstrated that this loss was a reported offset from $24,586 in reported winnings, amounting to a net sum of zero. This allays concerns that the wagering loss represents a financial problem.[(30)] Similarly, the returned checks were cashed in order to make a loan to a fellow casino guest, not for his own use, and were put into the bankruptcy as unpaid debts at the urging of his lawyer. Today, he is currently living within his means, looking forward to retiring on his union pension, and he has sufficient funds in the bank to cover his few debts. While it is true that he continues to gamble once or twice a month, gambling, *per se*, is irrelevant unless it can be directly linked to a financial problem.[(31)] As for spending $50 to $100 per occasion, this is not an unreasonable amount in comparison to current entertainment costs. In sum, with his debts addressed through Chapter 13 bankruptcy and his gambling issues explained, I find that Applicant has mitigated security concerns arising from financial considerations.

Personal Conduct

The Regulation sets out several potentially disqualifying and mitigating conditions under Guideline E:

The SOR alleges that Applicant deliberately falsified material facts on the May 2002 electronic SF-86 because Question 33 regarding bankruptcy was answered in the negative. Inasmuch as Applicant filed for bankruptcy in 2000 and was paying the trustee in the Spring of 2002, a negative answer by Applicant in 2002 would have been untrue. Consequently, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*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 aware fiduciary responsibilities*) could apply. To make that determination, however, it first must be decided whether the negative answer on that electronic SF-86 was given or certified by Applicant after he had filed bankruptcy, or at least acknowledged by him through his signing that SF-86. This is pivotal because if that is the case, he answered Question 33 falsely. If, however, that SF-86 was filed on his behalf, without his knowledge, and based on the information contained in his 1999, personally completed SF-86, the incorrect answer cannot be automatically attributed to him and the disqualifying condition cannot apply.

Applicant states that he did not sign the May 2002 electronic SF-86 and that the answers must have been taken from his 1999 SF-86. The Government, on the other hand, argues that the form states it was signed by the Applicant and, therefore, he must have had the opportunity to correct the answer to Question 33. I disagree with the Government.

In 1999, Applicant personally completed a written SF-86, but his employer did not submit it for processing at that time. Nothing more happened until March 26, 2002, when Applicant was given a Release, a form regularly accompanying a SF-86, to sign. Two months later, another SF-86 was apparently attempted on ay 1, 2002, but what remains of that form is incomplete and lacks the pages bearing both Question 33 and a signature.[(32)] Finally, an electronic version was submitted on May 23, 2002, but "signed" on March 20, 2002.

A Release goes hand in hand with an SF-86 application.[(33)] There is no logical reason to execute a Release prior to the completion of an SF-86. Here, the March 26, 2002, Release was either meant to accompany the existent 1999 SF-86 or one of the not yet existent SF-86s of May 2002.

The May 1, 2002, SF-86 is no longer intact, therefore, a signatory date cannot be discerned. The next version of the SF-86 was electronically generated on May 23, 2002, and states that it was "signed" on March 20, 2002. If that form was "signed" on March 20, 2002, it is hard to imagine why the May 1, 2002, SF-86 was drafted, and on what date it might have stated it was signed. To follow the Government's argument, one would have to believe that Applicant signed a 2002 SF-86 on March 20, 2002, that was electronically composed two months later, then backdated to a March 2002 date. Moreover, having a Release be signed and dated March 26, 2002, for a SF-86 allegedly signed on March 20, 2002, but which was neither existent nor completed until late May 23, 2002,[(34)] makes little sense - especially when the Release and an SF-86 are inevitably part of the same package.[(35)]

The Government's acceptance of an electronically ascribed date and signature is somewhat narrow. An electronic filing does not auto-stamp itself; that information is provided by the one filling out the template. The existence of the intervening May 1, 2002, SF-86 and the lack of chronology of the documents at issue demonstrate Applicant's employer was not flawless in its handling of security clearance applications. Furthermore, having Applicant separately sign a Release one week after supposedly signing a SF-86 indicates that applications were not being processed efficiently. It is apparent that something irregular was happening with these various documents and that it was happening when they were in the possession of the company.

Applicant's theory, that the answers from his outdated 1999 SF-86 were administratively transposed to subsequent SF-86s he never saw, is far more plausible and demands far fewer mental gymnastics than the Government's assertion. Based on the facts, I find that Applicant did not personally sign the May 23, 2002, SF-86. Consequently, no disqualifying condition applies and I find in Applicant's favor with regard to SOR paragraph 2.

I considered all the facts and circumstances surrounding this case, including the "whole person" concept. Applicant is a mature man who found himself in financial straits and declared bankruptcy. He chose to file Chapter 13 bankruptcy and has demonstrated his ability to shoulder at least some of the financial burden, himself. As a pastime, he enjoys occasional gambling, usually at a moderate rate of $50 to $100 a visit. Noted in his bankruptcy paperwork, but readily explained, was a big win that was either lost, or which covered his losses. Regardless, it was a zero net gain and the evidence does not indicate that this was anything but an aberrant event. He has taken financial responsibility for the checks that were returned, and there is no evidence that they were anything but loans. As for the SF-86 at issue, it takes a strong leap of faith to conclude that an electronically ascribed "signature" necessarily means the application was personally signed or certified, especially in view of the surrounding facts and the limited evidence. I find that Applicant has mitigated security concerns under both financial considerations and personal conduct. Clearance is granted.

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:

Paragraph 1. Guideline F (Financial Considerations) FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Paragraph 2. Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

Arthur E. Marshall, Jr.

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

2. The FORM included an eight-page brief and seven documents.

3. Paralegal's Cover Letter to FORM, dated February 21, 2005.

4. Director's Memorandum for Administrative Judge, dated April 7, 2005.

5. Applicant's Response included a three-page brief and six documents.

6. *See, e.g.,* Applicant's File of Additional Relevant Material, dated March 25, 2005, at 3.

7. Government Item 7 (U.S. Bankruptcy Court Voluntary Petition, dated July 6, 2000) at 10-13.

8. Applicant's Answer to the SOR, dated December 30, 2004.

9. *Id.* at 21.

10. *Id.* at 19.

11. Applicant Item 4 (Statement from Bankruptcy Trustee, dated March 10, 2005).

12. Government Item 5 (Partial SF-86, dated May 1, 2002).

13. Applicant also denies knowledge of the May 1, 2002 SF-86.

14. Applicant, however, offers no evidence to support this statement other than the phone number of the supervisor who allegedly gave him this information.

15. Applicant Item 5 (Banking Balances, dated March 20, 2005).

16. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).

17. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

18. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

19. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

20. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

21. *Egan*, 484 U.S. 518, at 531.

22. *Id*.

23. *Id*.; Directive, Enclosure 2, ¶ E2.2.2.

24. Executive Order 10865 § 7.

25. Directive, Enclosure 2, ¶ E2.A6.1.1

26. Directive, Enclosure 2, ¶ E2.A5.1.1.

27. Inasmuch as Applicant was current as of month 56 of a 60-month bankruptcy repayment plan when the record closed, it is fair to assume that the final four payments of $264 were made or some other arrangement was made to conclude the matter.

28. *See, e.g.,* Applicant's File of Additional Relevant Material, dated March 25, 2005, at 3.

29. SOR, subparagraph 1.b.

30. This is especially true since the winnings and the losses so evenly match. Such a fact most likely implies either that Applicant had a big win that he then lost and quit, or he has considerable restraint and knows how to manage his losses and stop wagering. Regardless, I find SOR subparagraph 1.b in Applicant's favor.

31. The SOR only points to the $24,586 loss (without noting the entry for an equal sum in winnings), the checks which were written to casinos, and the fact he continues to visit casinos.

32. In its FORM at page 7, the Government refers to the incomplete SF-86, attached as Item 5, as "the original version of his security clearance application." The original application cited by Applicant, as the Government notes later on the same page, however, is the unproduced 1999 version of the SF-86, which was personally completed and signed by the Applicant at that time.

33. The release form, itself, notes that the information released by virtue of the authorization is "for official use by the Federal Government *only for purposes provided in this Standard Form 86* . . . ." (emphasis added)

34. This is especially true given that an intervening May 1, 2002, SF-86 had been completed, then aborted.

35. It is notable that the Release's language presupposes that it is complementing a preexistent SF-86.