

KEYWORD: Financial; Criminal Conduct

DIGEST: Applicant was laid off from work in March 2001, and, for an extended period of time thereafter, unable to find sufficient employment to enable him to remain current on his debts. He is now working two jobs and making steady progress in satisfying all delinquent accounts. He has mitigated the financial considerations security concern, and related criminal conduct arising from his failure to timely file tax returns for the years he was unemployed/underemployed. Clearance is granted.

CASENO: 04-02986.h1

DATE: 03/16/2005

DATE: March 16, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02986

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant was laid off from work in March 2001, and, for an extended period of time thereafter, unable to find sufficient employment to enable him to remain current on his debts. He is now working two jobs and making steady progress in satisfying all delinquent accounts. He has mitigated the financial considerations security concern, and related criminal conduct arising from his failure to timely file tax returns for the years he was unemployed/underemployed. Clearance is granted.

STATEMENT OF THE CASE

On June 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F (financial considerations), and Guideline J (criminal conduct). Applicant submitted an answer to the SOR that was received by DOHA on July 21, 2004, denied all SOR allegations except subparagraphs 1.c., 1.I, 1.l., and 1.o., and requested a hearing.

The case was assigned to me on December 8, 2004. A notice of hearing was issued on December 8, 2004, scheduling the hearing for December 29, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. At the request of the Government, Administrative notice was taken of 26 U.S.C. § 7203 without objection. Applicant testified and submitted 37 exhibits that were marked as Applicant's Exhibits (AE) 1-37, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Fourteen additional documents were received, marked as AE 38-51, and admitted into the record without objection. The transcript was received on

January 10, 2005.

FINDINGS OF FACT

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

Applicant, a 35-year-old man who has never been married and has no dependents, is employed as a security guard by a defense contractor. He graduated from high school in 1987, has completed almost two years of college, and is presently pursuing an associate's degree. Applicant served on active duty in the U.S. Air Force from April 1990 until he was honorably discharged in May 1999 as a Sergeant. He served as a telecommunications systems control technician in the Air Force, and possessed a top-secret security clearance with sensitive compartmented access. There were never any complaints or allegations made alleging he mishandled or otherwise threatened the compromise of classified information.

Applicant left active duty in the Air Force for higher paying employment. He was employed by a telecommunications company as a network operations technician from May 1999 until his employment was abruptly terminated on March 2, 2001, due to a business realignment. (AE 1) Applicant's gross salary for the 2001 tax year was \$26,167.00. (AE 31) He was provided \$1,200.00 in severance pay upon his termination, and thereafter attempted to subsist on unemployment compensation while seeking a new job.

Applicant, unsuccessful in finding new employment in the locale where he was living, took up residence with a friend in his present state of residence hoping to find acceptable work there. After a period of time the friend asked him to leave, and he resided in his car for several months while continuing to search for a job. He remained unemployed until September 2001, when he found work as a stocker at a large retail store. To supplement his income, he worked part-time as a custodian for a cleaning service from January 2002 until May 2002, and at a golf course from June 2002 until October 2002. He was hired as a full-time security guard by his present employer in January 2003, and continues to work part-time as a stocker at the retail store.

Applicant is paid \$9.45 per hour at his full-time job, and nets approximately \$1,360.00 per month. He is paid \$8.10 per hour at his part-time job, works about 16-20 hours per week, and nets about \$500.00 per month. His letters of recommendation from both places of employment, and the friend who he resided with for a time, establish he is considered reliable, conscientious, honest, trustworthy, and a good and dependable employee.

Applicant was financially solvent until losing his job in March 2001. The only previous adverse information concerning him was a student loan that became delinquent in approximately 1993, which he resolved. (2) His finances began a dramatic downward spiral when he lost his job, which continued as he was forced to accept employment at a greatly reduced wage. Since regaining steady employment, Applicant has been repaying his past-due creditors and is well on his way to fully regaining financial stability.

The collection account alleged in SOR subparagraph 1.a. was paid off in April 2004 by application of an income tax refund. (AE 21) The charged off account alleged in SOR subparagraph 1.b. was paid in July 2004. (AE 22) Applicant testified he is making payments on the past due account alleged in SOR subparagraph 1.d., and that account is current, although he did not provide any proof of payment. He has been making payments on the charged off account listed in SOR subparagraph 1.e. since June 2004. (AE 23)

Applicant paid the charged off account listed in SOR subparagraph 1.f. in June 2004. (AE 25) Applicant testified he is making payments on the past due account alleged in SOR subparagraph 1.g., and that account is current, although he again did not provide proof of payment. The account listed in SOR subparagraph 1.h. is the same account that is listed in subparagraph 1.a., and the account listed in subparagraph 1.j. is the same account that is listed in subparagraph 1.d.

The charged off account listed in SOR subparagraph 1.k. has been paid. (AE 29) Applicant claims to be making payments on the past due account listed in SOR subparagraph 1.m., but again did not provide proof of payment. The only evidence in support of the allegation of nonpayment of a personal property tax that is made in SOR subparagraph 1.n. is Applicant's statement to a special agent of the Defense Security Service in January 2004. Applicant testified he was mistaken when he told the agent he was delinquent in payment of that tax, and he in fact does not owe the state anything. (AE 30)

Applicant made an admittedly bad decision by purchasing a timeshare in June 2001 after losing his job with the telecommunications company under an assumption that he would soon find acceptable replacement employment. That past due debt is reflected in SOR subparagraph 1.c. in the amount of \$6,598.00. Applicant made substantial payments on the account, totaling \$1,600.00, between October 2002 and August 2003, (AE 15) and has unsuccessfully attempted to work out a settlement with the creditor. Although not alleged in the SOR, he has also become delinquent on accumulated annual maintenance fees on the property in the amount of \$927.27 on which he has successfully negotiated a \$75.00 per month repayment plan. (AE 48)

To date, Applicant has not made any payment on the charged off accounts listed in SOR subparagraphs 1.i, and 1.l. He has, however, negotiated a repayment plan on the account in subparagraph 1.l. that will require him to make payments of \$210.05 per month for 36 months to repay the debt in full. (AE 51)

Applicant sought the assistance of a credit counseling service in July 2002, and was scheduled to begin a plan whereby he would repay his creditors by making payments to the service of \$79.68 weekly. (AE 7) However, before he could begin with the plan, his car was repossessed and he had to pay \$1,000.00 to get the car back, which he did with the assistance of his neighbor. (AE 1) As a result, he had to forego the repayment plan through the service.

Applicant paid \$8,263.00, through withholdings, in federal income taxes for the year 2000. However, that was an underpayment of \$358.00, which, with interest and penalties, left him owing \$610.68. He failed to file income tax returns for the years 2001 and 2002, although he had refunds owing him in the amounts of \$1,044.78 and \$0.01 respectively. He also failed to file a tax return for the year 2003, and currently owes \$113.65 for that year. Applicant has worked out a repayment plan with the Internal Revenue Service whereby he is paying \$60.00 per month with a total balance owing on all back taxes of \$561.34 as of November 2004. Applicant testified the reason he didn't file tax returns, despite being owed refunds for two of the three years, was because he was attempting to get his life together after losing his job and figured it was something he could take care of later.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline F, financial considerations, and Guideline J, criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under Guideline F, a security concern exists when a person has significant unpaid debts. An

individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant had numerous accounts, including income taxes, that became delinquent after he suddenly lost his job in March 2001. Many of those debts remained delinquent for several years, and some still are delinquent. DC 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

Applicant's financial troubles are directly attributable to his unexpected loss of employment and difficulty in finding work thereafter. His willingness to accept work as a stocker and custodian, having previously been employed as a technician in the Air Force and telecommunications industry, demonstrates his extended unemployment was not by choice. Mitigating Condition (MC) 3: *The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment, . . .)* applies.

Applicant sought out financial counseling in an effort to resolve his debt problems in July 2002, but was unable to undertake the payments that were called for. He has now repaid a number of his creditors, and is making payments to others. Although he still has two creditors he needs to make arrangements with, his actions thus far, including working two jobs and satisfying several creditors in full, indicate he is making a good-faith effort to repay all past due accounts. MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* applies. Guideline F is decided for Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant violated 26 U.S.C. § 7203, a misdemeanor, by willfully failing to file federal tax returns for the tax years 2001, 2002, and 2003. DC 2: *A single serious crime or multiple lesser offenses* applies. As indicated by the various notices from the IRS contained in AE 31, Applicant filed returns for those years sometime prior to March 2004, long before he received the SOR. He was owed a refund for two of the years, and has entered into a repayment plan that will have satisfied the other year for which he filed late in short order. Finally, his motive for not filing the returns was obviously not the intent of not paying his taxes. MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply. Guideline J is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has mitigated the criminal conduct and financial considerations security concerns. Accordingly, he has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a-o: For the Applicant

SOR ¶ 2-Guideline F: For the Applicant

Subparagraph a: For the Applicant

DECISION

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant testified he had a delinquent student loan from 1993. The only student loans listed in the credit reports (AE 3-5) were opened in 1997, and all credit reports indicate the loans have been paid with a zero balance.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

10. *Egan*, 484 U.S. at 528, 531.

11. *Id.* at 531.

12. *Egan*, Executive Order 10865, and the Directive.