

DATE: December 27, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-04403

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns about his conduct leading to his administrative discharge from the Army, his delinquent debts, and his intentional falsification of answers to questions in his most recent security clearance application about his finances. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On December 22, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline F (financial considerations), Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant answered the SOR and requested a hearing on January 19, 2005.

This case was originally assigned to another administrative judge on May 25, 2006, but transferred to me on June 9, 2006.⁽²⁾ I convened a hearing July 24, 2006, at which the parties appeared as scheduled, and the government presented nine exhibits (Gx1 - 9). Applicant testified in his own behalf, and submitted three post-hearing⁽³⁾ exhibits (Ax A - C). DOHA received the transcript (Tr) on August 2, 2006.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegation in SOR 1.a and 1.c. His admissions are incorporated herein and, after a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is 40 years old. Since 2004, he has owned his own company that has contracts with the Department of Defense, for which he requires a security clearance. Applicant served in the U.S. Army from 1984 until 1990, working

primarily in special forces assignments and military intelligence units. He held a security clearance as part of his Army duties. He was married in November 1987, but divorced in 1991. He and his ex-wife have one child, now 16 years old, for whom Applicant was obligated by the terms of the divorce to pay \$175 each month in support.

Applicant was administratively discharged from the Army after being investigated for larceny, a violation of Article 121 of the Uniform Code of Military Justice (UCMJ), and violation of a standing order, addressed by Article 92 of the UCMJ. While stationed in Germany, Applicant's driving privileges were revoked by his company commander, and the license plates for his car were confiscated. Applicant asked a friend to put the friend's tags on Applicant's car and drive it to Applicant's off-post residence. German police found the vehicle illegally parked, noticed the tags did not match a base sticker on the windshield, and called U.S. military police (MPs), who impounded the car.⁽⁴⁾ Applicant was offered a choice between facing non-judicial punishment under UCMJ Article 15 and being administratively discharged. He chose the latter and was discharged under honorable conditions in July 1990.⁽⁵⁾

After leaving the Army, Applicant attended college for two years to study oceanography. He financed his tuition through student loans. Thereafter, he found work as a salvage diver and offshore welder on oil rigs in the Gulf of Mexico near Louisiana. In 1997, he was severely injured in a work-related boat accident. He was unable to work until 1999, and did not actually find work until 2000, when he was hired as a document technician. While unemployed, he fell behind on his student loan and child support payments. As a plaintiff in a civil suit over the accident, Applicant eventually received about \$270,000 after paying his attorney's fees.

Applicant claims he paid his child support directly to his ex-wife until he was injured. However, in September 2001, she moved in state court to enforce a sizable arrearage. In March 2002, the court determined that Applicant owed \$23,199.29 in back child support, and ordered Applicant's monthly support payments increased to \$200. His pay was garnished to satisfy this debt, but Applicant paid the balance of the arrearage on April 12, 2004.⁽⁶⁾ Applicant asserts⁽⁷⁾ he thought the attorney had paid Applicant's past due debts, including child support and student loans, from the settlement funds.

On August 2, 2004, Applicant responded to DOHA interrogatories about his finances. Three delinquent student loans totaling \$22,457 were listed and Applicant was asked what he had done to resolve the debts. Applicant responded he planned to pay off a balance due of \$18,692.75 in September 2004. In response to the SOR, and at his hearing, Applicant claimed he had paid off his student loans. In support of his claim, Applicant provided a statement from the U.S. Department of Education⁽⁸⁾ stating he paid over \$5,000 in interest on his student loans during 2005. The document does not reflect a loan repayment status. In signed, sworn statements given to a government investigator in May 2002 and June 2003, Applicant stated his student loans were being collected as one account to which he was paying \$200 each month. He stated the balance due was about \$9,100 in May 2002.⁽⁹⁾

In 2002, Applicant was hired by a company that required him to travel as part of his duties. He was given a corporate credit card and had generated a balance due in excess of \$5,000 for work-related travel expenses at the time he left the company in 2004. Applicant claims the company did not reimburse him for the travel, but acknowledges it was his responsibility to pay the debt anyway. A credit report⁽¹⁰⁾ obtained during Applicant's background investigation showed the credit card company had obtained a judgment against Applicant in September 2004 for \$8,457. Applicant claims to have satisfied the judgment.⁽¹¹⁾ The credit report also lists a lien for \$2,956 filed against Applicant in September 2001. Applicant has consistently claimed he does not know what this debt is for.

Applicant submitted a security clearance application on or about November 28, 2000. In response to question 38, which asked if he had any debts in the preceding seven years that were more than 180 days past due, Applicant answered "yes" and listed a \$350 credit card debt. In response to question 39, which asked of Applicant was, at the time he filled out the questionnaire, more than 90 days past due on any debt, he answered "no."⁽¹²⁾ Applicant has denied knowing, until he was interviewed by government investigators in 2002, that he was past due on any financial obligations other than the credit card debt he listed.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽¹³⁾ to be considered in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.⁽¹⁴⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹⁵⁾ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁽¹⁶⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁽¹⁷⁾

CONCLUSIONS

Financial Considerations. The government alleged Applicant was more than 120 days past due in making payments on a student loan totaling \$22,457 (SOR 1.a), owed \$2,956 for a state tax lien from September 2001 (SOR 1.b), owed \$5,773 for a delinquent credit card account charged off in June 2003 (SOR 1.c), and owed \$8,457 for a delinquent credit card account for which a judgment against Applicant was entered in 2004 (SOR 1.d).

As to the allegation in SOR 1.a, Applicant claims the student loan debt alleged in SOR 1.a has been paid. Indeed, there is no listing of such a collection account in the 2004 credit report entered as Gx. 9. The interrogatories sent to Applicant in 2004 (Gx. 4) refer to much higher balances than the one he listed in his May 2002 statement to investigators, but the basis for that part of the interrogatories is unclear. However, the information Applicant submitted (Ax B) shows only that Applicant paid more than \$5,000 in interest on those student loans in 2005. I conclude from the available information that Applicant is still paying his student loans, despite his claim he paid them. The record is unclear as to their status as of the hearing - current or delinquent - but Appellant has not contested that, at some point, they were past due because of his 1997 accident. On balance, however, available information supports the allegation in SOR 1.a.

As to the allegation in SOR 1.b, Gx. 9 lists a lien entered in September 2001 against Applicant in favor of the state of California. Applicant denies any knowledge of this lien. Again, it is unclear what formed the basis for the question about this debt in the DOHA interrogatories in 2004, and it was not discussed in either statement to investigators in 2002 and 2003. However, it remains on his credit report, and Applicant has not addressed this debt in any way despite being on notice since 2004 that this item was attributable to him. Available information also supports the allegation in SOR 1.b.

As to the allegations in SOR 1.c and 1.d, I conclude from the available information that these are the same account. I find for the Applicant on SOR 1.c. However, the credit report still lists an unpaid judgment against Applicant as alleged in SOR 1.d and the information he submitted in response (Ax. C) does not support his claim he paid this debt. That document has no indicia of reliability, such as a date stamp of filing by the clerk of court or a signature by a judge or magistrate who would have entered the order. Available information supports the allegation in SOR 1.d.

Based on the foregoing, the facts established through SOR 1.a, 1.b, and 1.d raise a security concern addressed in the Directive under Guideline F; that is, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.⁽¹⁸⁾ These facts further require consideration of Guideline F disqualifying condition (DC) 1 and DC 3.⁽¹⁹⁾ By contrast, available information supports consideration of mitigating condition (MC) 3⁽²⁰⁾ relative to

his student loan payments because he was unemployed for an extended period due to his on-the-job injuries in 1997. However, there is insufficient information to warrant consideration of any of the other Guideline F mitigating conditions (21) that might apply to these facts. Applicant has at least two delinquencies several years old, a lien and a civil judgment, that he has not addressed. Notwithstanding the fact he received over \$200,000 from his civil suit, it appears from the personal financial statement he submitted in 2002 (Gx. 2) that he had over \$2,000 remaining each month after expenses, an amount that would have enabled him to satisfy both debts over the past four years. Further, Applicant has been on notice since he received the SOR in 2004, that the government's information showed he was still delinquent on his student loan. Applicant was given every opportunity (including extra time after the hearing) to document his claim this account was paid, but he failed to do so. I conclude this guideline against the Applicant.

Personal Conduct. The government alleged Applicant was administratively discharged from the Army in 1990 after being investigated for two UCMJ violations (SOR 2.a), and that he deliberately falsified his answers to two questions about his finances in a security clearance application (SF 86) he submitted in November 2000 (SOR 2.b and 2.c). As to SOR 2.b and 2.c, it is specifically alleged Applicant deliberately omitted his student loans as being more than 180 days past due, and omitted the fact he owed more than \$22,000 in back child support when he filled out the questionnaire. Applicant claims his attorney was to pay the student loan and his medical bills from the civil suit settlement proceeds, and that he was unaware at the time he filled out the SF 86 that the attorney had failed to do so. However, as to his child support obligation, it is clear from his 2002 statement to investigators that he knew when he was out of work he could not pay his child support between 1997 and 1999. The fact he was not asked to appear in court until September 2001 does not change his knowledge that he was seriously delinquent in these payments. Thus, he should have answered "yes" to questions 38 and/or 39. Accordingly, available information tends to support the allegations in SOR 2.b and 2.c, but relative only to his delinquent child support obligation. As to SOR 2.a, available information supports the allegation as stated.

The facts established through SOR 2.a, 2.b, and 2.c raise security concerns addressed in the Directive under Guideline E; that is, 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. (22) The facts further warrant consideration of DC 2 and DC 5. (23) Applicant intentionally withheld relevant information about his finances from his SF 86. Together with the conduct leading to his administrative discharge from the Army in 1990, and his inconsistent statements about what he did or did not do, available information presents a pattern of untrustworthiness and rules violations that undermine his suitability to hold a clearance. Of the mitigating conditions that might apply to these facts, the record of available information does not support their consideration. On balance, I conclude this guideline against the Applicant.

Criminal Conduct. The government alleged that Applicant's deliberate falsification of his SF 86 was also criminal conduct, in that such conduct violates federal criminal law under 18 U.S.C. § 1001. The information presented to support this allegation consists of an unsigned SF 86. Generally, applicants will sign an SF 86 after reading an advisement that his answers are true to the best of his knowledge and that 18 U.S.C. § 1001 makes a deliberate false answer a criminal act punishable by five years in jail and/or a substantial fine. The elements of the offense are that the false statement be made to an agency of the United States government, that it is material to a matter within the jurisdiction of that agency, and that it be made knowing that it was false at the time it was made. Thus, it is not necessary that an applicant be aware, through oral advisement or by signing his questionnaire, that this statute applies to be held accountable thereunder.

Having determined under Guideline E, above, that Applicant deliberately withheld information about his finances from his SF 86, I further conclude he engaged in criminal conduct by violating 18 U.S.C. § 1001, as alleged in SOR 3.a. His false statement was made to the Department of Defense, it was deliberate, and it was material to matters squarely within the jurisdiction of this agency. Criminal conduct, as addressed in the Directive under Guideline J, is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (24)

The foregoing requires consideration of Guideline J DC 1 and DC 2. (25) However, this conduct was isolated, in that it involved one submission of an SF 86, and was not recent as the SF 86 was submitted six years ago. (26) Accordingly,

MC 1 and MC 2 ⁽²⁷⁾ must be considered here. Having considered all of the information relevant to Applicant's criminal conduct, I conclude this guideline for the Applicant.

Whole Person. In general, I conclude Applicant has not mitigated the government's security concerns about the results of his background investigation. I have carefully weighed all of the available evidence, which presents a cross-section of Applicant's life since about 1990, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Having also reviewed the record before me in the context of the whole person factors listed in Directive, Section 6.3, I conclude that Applicant is a mature adult, who is not inexperienced in managing his finances or in dealing with personnel security matters, such as applying for a clearance. Further, in responding to the government's concerns about his conduct in the Army, his knowledge of his financial problems when he applied for a clearance in November 2000, and whether or not he has addressed those financial problems, Applicant has been inconsistent in his statements and has not availed himself of several opportunities to document his claims in mitigation. All of the information available in this case shows an absence of rehabilitation and a likelihood Applicant's financial problems and lack of candor will continue in the future. Absent substantial information to mitigate these concerns, which Applicant failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline F (Financial): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Paragraph 3, Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 3.a: For 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Available information does not explain why more than a year elapsed between Applicant's request for hearing and the assignment of this case to an administrative judge.

3. Without objection, I left the record open to afford Applicant additional time to submit relevant information in support of his case. Department Counsel did not object to the admissibility of Applicant's submissions.

4. Gx. 8. The account of this incident at the time it occurred differs from Applicant's claim in response to the SOR that his friend took Applicant's car keys and drove the car with different tags without Applicant's knowledge.

5. Gx. 7.

6. Gx. 5; Gx. 6.

7. Gx. 2.

8. Ax. B.

9. Gx. 2 and Gx. 3.

10. Gx. 9.

11. Ax. C is an unsigned Order of Satisfaction that has not been executed by any official of the state court where the judgment was filed.

12. Gx. 1.

13. Directive, Enclosure 2.

14. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent,

willful, voluntary, or undertaken with knowledge of the consequences involved.

5. Absence or presence of rehabilitation.

6. Probability that the circumstances or conduct will continue or recur in the future;

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

16. *See Egan*, 484 U.S. at 528, 531.

17. *See Egan*; Directive, E2.2.2.

18. Directive, E2.A6.1.1.

19. Directive, E2.A6.1.2.1 (A history of not meeting financial obligations); E2.A6.1.2.3 (Inability or unwillingness to satisfy debts).

20. Directive, 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)).

21. Directive, E2.A6.1.3.1 (The behavior was not recent); E2.A6.1.3.2 (It was an isolated incident); 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); and E2.A6.1.3.6 (The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts).

22. Directive, E2.A5.1.1.

23. Directive, 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 award fiduciary responsibilities); E2.A5.1.2.5 (A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency).

24. Directive, E2.A10.1.1.

25. Directive, E2.A10.1.2.1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged); E2.A10.1.2.2 (A single serious crime or multiple lesser offenses).

26. Despite the fact the SF 86 in question is the basis for the current adjudication of Applicant's clearance, six years from the date of submission constitutes a significant passage of time for purposes of assessing Guideline J MC 1.

27. Directive, E2.A10.1.3.1 (The criminal behavior was not recent); E2.A10.1.3.2 (The crime was an isolated incident).