

KEYWORD: Financial

DIGEST: In November 1997, Applicant received a Bad Conduct Discharge from the U.S. Army pursuant to a court-martial at which he was found guilty of Larceny of Government Funds, False Official Statements, and Fraud Against the United States. Applicant has a history of financial problems. He attempted to resolve his financial over-extensions by filing for bankruptcy protection in 1996 and twice in 2002. Applicant failed to mitigate security concerns under Guideline F, Financial Considerations. Clearance is denied.

CASENO: 04-10810.h1

DATE: 06/06/2006

DATE: June 6, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-10810

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In November 1997, Applicant received a Bad Conduct Discharge from the U.S. Army pursuant to a court-martial at which he was found guilty of Larceny of Government Funds, False Official Statements, and Fraud Against the United States. Applicant has a history of financial problems. He attempted to resolve his financial over-extensions by filing for bankruptcy protection in 1996 and twice in 2002. Applicant failed to mitigate security concerns under Guideline F, Financial Considerations. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 23, 2005, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations). Applicant answered the SOR in writing on July 13, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me December 20, 2005. On January 30, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and submitted seven exhibits (Ex.) for admission to the record (Ex. 1 through 7). The Government's exhibits were admitted to the record without objection. Applicant called no witnesses and submitted thirteen exhibits, which were identified as Applicant's Ex. A through M and admitted to the record without objection. At the conclusion of the hearing, I left the record open until February 3, 2006, so that Applicant could, if he wished, submit additional information for the record. Applicant timely filed three exhibits, which were identified as Applicant's Ex. N, O, and P and admitted to the record without objection. On February 6, 2006, DOHA received the transcript (Tr.) of the proceeding.

## FINDINGS OF FACT

The SOR contains four allegations of disqualifying conduct under Guideline F, Financial Considerations. In his answer to the SOR, Applicant admitted the four Guideline F allegations and noted mitigating conditions. Applicant's admissions are incorporated as findings of fact.

Applicant is 44 years old and employed as a senior manager by a government contractor. (Ex. 1; Ex. N.) His current salary is \$95,000 per year. (Ex. N.) From 1984 to 1997, Applicant served on active duty in the U.S. Army, attaining the rank of sergeant (E-5).

Applicant has been married three times. He was married for the first time in November 1984, and he and his wife, a civilian, had five children. Applicant was divorced from his first wife in February 1993. One week later, he married his second wife, who, like Applicant, served on active duty as an enlisted person in the U.S. Army. When they were married, Applicant's second wife had no dependents. Applicant and his second wife are the parents of a son, born in May 1994. (Tr. 52;56-57.)

While in a relationship outside his second marriage, Applicant fathered a child, born in March 1995. The child is Applicant's youngest child. (Ex. I; Ex. I.) In November 1997, Applicant and his second wife were divorced. Applicant married his third wife in August 2005, and he is a stepfather to his third wife's three children. (Tr. 86-89.)

Of Applicant's seven biological children, three are now under the age of 17. Applicant provides \$700 in child support each month to his first wife; \$400 in child support each month to his second wife; and \$400 in child support each month to the woman who is the mother of his child born in March 1995. (Tr. 91.) He also provides support to his three step-children. (Tr. 89-91.)

In March 1995, while serving as a platoon sergeant in the Army, Applicant was given notice that for a period of two years, since his marriage to his second wife, another service member, he had received unauthorized payments of \$2,996 in excess of what he was entitled to under the Basic Allowance for Quarters (BAQ). Applicant repaid the overage, but because the amount in question was over \$500, a criminal investigation ensued. (Tr. 61-63; Answer to SOR.) The investigation revealed that, in addition to the BAQ overpayments, Applicant had allegedly received unauthorized Family Separation allowance payments, unauthorized dependant travel allowance payments, and unauthorized variable housing allowance payments. The total of all alleged overpayments was \$9,056.27. (Ex. 4 at 3.) Applicant was charged with (1) Larceny of Government Funds, (2) False Official Statements, and (3) Fraud Against the United States. (Ex. 3.)

Applicant's commander offered him an Article 15 non-judicial punishment. Applicant did not believe he was guilty of the charges, refused the Article 15, and the case was forwarded for an Article 32 investigation. Applicant was represented by counsel at the investigation and at all subsequent judicial proceedings. (Tr. 69-72.) At the conclusion of the Article 32 investigation, Applicant was tried by court-martial and found guilty of the charges. He was sentenced to a reduction in rank to E-1, forfeiture of all pay, and a bad conduct discharge. His security clearance was also revoked. (Ex. 4.)

Applicant appealed, and, as of June 20, 1996, he was placed on involuntary excess leave pending appellate review of his court martial. In November 1997 he was separated from the Army with a bad conduct discharge. (Ex. 4.)

Applicant's appeal argued that his second wife should have been held responsible for receiving unauthorized payments; that he had not been informed that the federal law affecting his BAQ payments had been amended; and that he did not receive effective assistance of counsel at his court-martial. (Tr. 62-68; 71-76; Answer to SOR.)

In February 1996, Applicant and his second wife petitioned for release from their dischargeable debts under Chapter 7. They listed personal property assets of \$23,250 and total liabilities of \$62,516.91. Included among their property claimed as exempt assets were a 1991 vehicle and two 1994 vehicles. On Schedule I, Current Income of Individual Debtors, Applicant reported no income and his wife reported \$1,702 in monthly income. The following notation appears on Schedule I: "He will be terminated from the Army as of March 1, 1996: he has not been received [sic] any pay since 8/95 (LES says NO PAY DUE)." On June 4, 1996, the bankruptcy court released Applicant and his second wife from all dischargeable debts. (Ex. 5.)

Because of his military record, Applicant had difficulty obtaining employment. He was employed at hourly wage jobs from approximately September 1996 to August 1998. He pursued training in computer technology for several months. In December 1998, he acquired a job as a computer technician, which he held for three months. Subsequently, he held two additional computer technology jobs--one for three months and the other for eleven months. After a two-month period of unemployment in 2000, he acquired a job as an implementation supervisor in June 2000, and he held that job until December 2001. That job paid him approximately \$104,000; however, Applicant said that with per diem, he earned nearly \$150,000 in that job. After a six-month period of unemployment, he was hired in May 2002 as a communications engineer by a government contractor, and he worked there until May 2005. In January 2005, he was given a formal offer letter by a federal contractor. The offer was conditioned on his receipt of a security clearance. He was unemployed from May 2005 until December 2005. In mid-December 2005, he accepted a position as a senior manager with a government contractor. The position paid \$95,000 per year. Applicant held that position at the time of his hearing. (Ex. 1; Ex. N; Ex. P; Tr. 77-82; 105-108.)

Applicant provided information from a tax preparation service showing his 2001 annual income was \$104,270; his 2002 annual income was \$31,828; his 2003 annual income was \$0, and his 2004 annual income was \$56,566. (Ex. M.)

On March 6, 2002, Applicant filed an individual petition for bankruptcy protection under Chapter 13. He listed assets of \$16,608 and liabilities of \$35,820. Two days later, Applicant was offered a job, which he took. He decided to rescind his Chapter 13 petition, but was told he could not do so. Applicant found the terms of the Chapter 13 payment plan detrimental. He consulted with the attorney who had filed his Chapter 13 petition. The attorney advised him to file a petition for bankruptcy under Chapter 7. (Ex. 6; Ex. 7 at 4; Tr. 83-84; Tr. 109-111.) On August 27, 2002, Applicant filed a Chapter 7 bankruptcy petition. He listed assets of \$1,100 and liabilities of \$52,345, and, on Schedule J of his petition, he listed his total monthly expenses as \$3,288. On his Statement of Financial Affairs, Applicant listed his 2001 employment income as \$100,000; his 2002 employment income as \$42,000; and his 2003 employment income as \$26,100. He further stated that in 2001 he had received \$2,000 in disability income; in 2002 he had received \$800 in disability income; and in 2003, he had received \$7,910 in disability income. (Ex. 7.) Applicant's Chapter 13 bankruptcy petition was dismissed. The bankruptcy court ordered his debts discharged under Chapter 7 on February 20, 2004. (Ex.6; Ex. 7.)

While Applicant obtained legal counsel for assistance in filing his three bankruptcies, he provided no evidence that he had received credit counseling or had a plan in place to pay any of his current or future financial obligations.

Applicant submitted 10 letters of character reference from co-workers and friends. The letters stated he was a person of character and reliability. (Ex. A, B, C, D, E, F, G, H, J, K.) Applicant's second wife and the woman who is the mother of his child born in March 1995 also submitted letters attesting to his concern for his children. (Ex. L; Ex. I)

## 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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 (App. Bd. Dec. 19, 2002); *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.

## CONCLUSIONS

### **Guideline F-Financial Considerations**

In the SOR, DOHA alleged that Applicant was charged with (1) Larceny of Government Funds, (2) False Official Statements, and (3) Fraud Against the United States; that he was subsequently tried by court-martial, found guilty of the charges, and sentenced to forfeit all pay and allowances, to be reduced from E-5 to E-1, and to receive a Bad Conduct Discharge in November 1997(¶ 1.a.); that Applicant petitioned for Chapter 7 bankruptcy in February 1996, claiming liabilities totaling approximately \$62,516.91, and he was released from all dischargeable debts by a Chapter 7 discharge in June 1996 (¶ 1.b.); that he petitioned for Chapter 13 bankruptcy in March 2002, claiming liabilities totaling approximately \$35,820, and the Chapter 13 petition was dismissed in May 2003 (¶ 1.c.); that he petitioned for Chapter 7 bankruptcy in August 2002, claiming liabilities totaling approximately \$52,345, and he was released of his dischargeable debts by a discharge in February 2004 (¶ 1.d.).

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting his financial obligations, and he has not demonstrated a willingness to satisfy his debts. These conditions raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. DOHA's Appeal Board has concluded that "[a] person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810 at 4 (App. Bd. June 8, 2000).

Applicant filed twice for bankruptcy protection under Chapter 7 and once for bankruptcy protection under Chapter 13. His Chapter 13 petition was dismissed. In response to his two Chapter 7 petitions, Applicant's debts were discharged in February 1996 and in February 2004. While a discharge in bankruptcy is a permissible way to acquire a clean financial slate, it is not a substitute "for evidence of a demonstrated track record of financial reform, a track record that is necessary to satisfy Applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue access to classified information." ISCR Case No. 98-0445 at 3 (App. Bd. April 2, 1999.)

While the record showed that most of Applicant's debts had been included in his Chapter 7 bankruptcy petitions and discharged by the bankruptcy courts, he failed to establish a track record of financial reform, and his failure, over a significant period of time, to stabilize his financial situation raises serious security concerns.

The Government has established, through Applicant's admissions and the record evidence, a *prima facie* case that Applicant is financially overextended. Applicant provided no persuasive evidence to rebut the financial concerns specified in the SOR and identified as disqualifying conditions under ¶¶ E2.A6.1.2.1., E2.A6.1.2.2., and E2.A6.1.2.3. of Guideline F. <sup>(3)</sup>

We turn to a review of the several conditions that could mitigate the security concerns raised by Applicant's financial delinquencies. Applicant's delinquencies date to at least 1996. His first filing of a Chapter 7 bankruptcy petition occurred in 1996 and his qualified debts were discharged that same year. His Chapter 13 bankruptcy was dismissed in 2003, and his qualified debts were discharged pursuant to a second chapter 7 bankruptcy petition in 2004. Applicant's financial delinquencies are long-standing, repetitive, and recent. Thus, neither mitigating condition E2.A6.1.3.1. nor mitigating condition E2.A6.1.3.2. applies. <sup>(4)</sup>

An applicant might be able to mitigate Guideline F security concerns if he can establish that the conditions that resulted in his financial delinquencies were largely beyond his control. <sup>(5)</sup> Although Applicant provided ample information about his family situation and employment difficulties, he failed to submit convincing evidence that his financial over-extension was not of his own making.

Applicant has not sought counseling for his financial problems. There is no indication in the evidentiary record that he has developed and implemented a practical plan for avoiding further indebtedness. Thus, mitigating conditions E2.A6.1.3.4. and E2.A6.1.3.6. do not apply. <sup>(6)</sup>

The facts of Applicant's case also raise a security concern under subparagraph E2.A6.1.2.2 of Guideline F because

Applicant was found guilty of Larceny of Government Funds, False Official Statements, and Fraud Against the United States. Applicant's conduct is a security concern because he breached a fiduciary duty to be honest and trustworthy in his financial dealings with his employer, the U.S. Government. He has a heavy burden to show that, despite this conduct, he is worthy of a security clearance

The behavior that gave rise to Applicant's court-martial occurred during a two-year period between 1993 and 1995. While this behavior was not recent, it was repetitive and not isolated. Accordingly, while mitigating condition E2.A6.1.3.1. applies to Applicant's behavior, it is not enough to overcome his heavy burden of persuasion. Mitigating condition E2.A6.1.3.2. does not apply, and no other Guideline F mitigating conditions are applicable. Accordingly, the Guideline F allegations of the SOR are concluded against the Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended.

### **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.: Against Applicant



## DECISION

In light of all of 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 Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Disqualifying Condition E2.A6.1.2.1 reads: " A history of not meeting financial obligations." Disqualifying Condition E2.A6.1.2.2. reads: "Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust." Disqualifying Condition E2.A6.1.2.3 reads:"Inability or unwillingness to satisfy debts."
4. Mitigating Condition E2.A6.1.3.1 reads: "The behavior was not recent." Mitigating Condition E2.A6.1.3.2 reads: "It was an isolated incident."
5. Mitigating Condition E2.A6.1.3.4. reads: "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)."
6. Mitigating Condition E2.A6.1.3.4. reads: "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." Mitigating Condition E2.A6.1.3.6 reads: "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."