

DATE: September 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-00846

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns about his delinquent debts in excess of \$38,000, which were recently discharged in bankruptcy. While most of his financial problems stemmed from a failed business in 2002, Applicant failed to take any tangible action on those debts until late 2005. 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 June 7, 2005, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline F (financial considerations). Specifically, the SOR alleged Applicant owed eight delinquent debts (SOR ¶¶ 1.a - 1.h) consisting of unpaid credit accounts charged-off as business losses, some of which had been referred to collection agencies. The SOR also alleged Applicant has made little effort to pay his debts despite having a net monthly remainder after expenses of about \$6,000 (SOR ¶ 1.i). In his timely response to the SOR, Applicant denied with explanation all of the SOR allegations and requested a hearing.

This case was originally assigned to another administrative judge on January 3, 2006, but transferred to me on February 15, 2006. A hearing originally scheduled for March 21, 2006, was continued to April 25, 2006. The parties appeared as scheduled and the government presented six exhibits (Gx1 - 6). Applicant testified in his own behalf and introduced five exhibits (Ax A - E). DOHA received the transcript (Tr) on May 8, 2006.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 50 years old and has a degree in electrical engineering. After high school, he enlisted in the U.S. Navy and

served from 1973 until 1977. He first received a security clearance while in the military and continued to hold a clearance through subsequent civilian work with government contractors through 1993.

After leaving a defense contractor position in the face of downsizing in 1993, Applicant found success in the real estate business. He eventually went into business for himself as the owner of two branches of a nationally-known real estate corporation. However, in 2001, the real estate business had already slowed when the attacks of September 11, 2001, had further devastating effects on that industry.

Sometime in 2002, Applicant was approached by someone who wished to buy Applicant's business. Applicant was offered \$400,000 for his business, provided Applicant opened and conveyed to the buyer a third office, and that the entire business was free and clear of any claims or debts. The buyer gave Applicant \$100,000 initially, of which Applicant used half to pay off the business' debts. However, the buyer's contribution also gave him access to the business assets as a partner. Applicant's new partner began to drain the business of cash and essentially mismanaged the business so that it failed. Applicant admittedly made poor decisions regarding the sale of his business and naively gave his new partner too much control over the business. (2) He closed the business as a corporate entity on December 31, 2002. Thereafter, the prospective buyer disappeared and Applicant abandoned any legal remedies in May 2003.

As a result of the failure of his real estate business, Applicant was unable to pay any of the business debts and many of his own debts. As alleged in SOR ¶¶ 1.b - 1.h, Applicant accrued at least \$38,000 in delinquent credit card, mobile phone, clothing store, and other accounts. Another collection debt for \$22,772, alleged in SOR ¶ 1.a, is undocumented in any of the information presented by Department Counsel or Applicant.

On November 28, 2005, Applicant filed for Chapter 7 bankruptcy liquidation of his personal and business debts. He declared \$737,000 in liabilities against \$388,000 in assets. As part of his petition, Applicant reaffirmed his mortgage and car payments. As his was a sole proprietorship incorporated as a subchapter S business, he felt he need not distinguish between his own debts and those directly related to his failed business for purposes of his bankruptcy petition. Further, filing as a business would have cost him several thousand dollars more. Applicant explained the fact he did not file for bankruptcy protection for almost three years after he terminated his business as a product of, alternatively, being overwhelmed by the failure of his business, lacking funds to pay attorney's fees and filing fees, or trying but failing to do it himself. On January 4, 2006, Applicant was relieved of the dischargeable debts listed in his Chapter 7 petition. Except for SOR 1.a, all of the debts alleged in SOR ¶¶ 1.b - 1.h were discharged.

In May 2003, a lien for \$54,000 was attached to Applicant's home as part of a lawsuit filed against Applicant as the owner of the real estate business. A similar lien for \$50,000 was also attached to Applicant's home in July 2002. (3) Applicant testified both claims remain unpaid despite Applicant's bankruptcy petition, and they preclude Applicant from selling his house or using the equity in his house without first satisfying the liens.

Applicant was effectively unemployed from May 2003 until November 2003, when he took a job with the same defense contractor he had left in 1993. Applicant again left that company in April 2006 to take a job as a sales engineer. (4) His base salary is \$60,000, but Applicant expects to earn at least an additional \$40,000. Applicant and his wife have been married for nearly 20 years. She earns about \$70,000 annually as a special education teacher for a school district near their home.

A personal financial statement appended to Applicant's signed, sworn statement to a government investigator in November 2004 showed Applicant and his wife have about \$6,000 remaining each month after expenses. In that same statement, Applicant stated he expected to file his bankruptcy petition in "early 2005" and that his attorney had advised him to stop paying any of his past debts. (5)

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines (6) 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

(7)

reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. 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⁽⁸⁾ 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.⁽⁹⁾ 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.⁽¹⁰⁾

CONCLUSIONS

Financial Considerations. The government alleged Applicant should be disqualified because he is delinquent on eight personal credit accounts (SOR ¶¶ 1.a - 1.h) totaling more than \$61,000. Except for SOR ¶ 1.a, the government presented sufficient information to support those allegations. The facts established raise security concerns addressed in the Directive under Guideline F. Specifically, an applicant who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts to generate funds to resolve their fiscal difficulties.⁽¹¹⁾ These facts further support application of Guideline F disqualifying condition (DC) 1⁽¹²⁾ and DC 3.⁽¹³⁾

The government also alleged that Applicant and his wife net about \$6,000 after expenses each month, and that this would have been sufficient to enable Applicant to pay the debts alleged had he made an effort to do so (SOR ¶ 1.i). Available information established Applicant and his wife have such funds remaining each month. However, the government did not establish, in light of all available information, that this constituted enough resources to resolve his debts.

In response, the Applicant presented information sufficient to warrant application of Guideline F mitigating condition (MC) 3.⁽¹⁴⁾ However, the benefit he may realize from MC 3 is limited. While Applicant's financial problems were brought about by the failure of his business in 2002, he has not adequately explained why he waited nearly three years to pay or otherwise resolve his debts. He failed to act on his claim to investigators in late 2004 that he would file bankruptcy in early 2005. Instead, he waited until five months after an SOR was issued to seek bankruptcy protection. Given his circumstances, bankruptcy liquidation of his debts after the failure of his business in 2002 and 2003 would have been a prudent resolution of his financial difficulties. However, when combined with questionable decisions that contributed to the demise of his business, doubts remain about Applicant's approach to his debts. Accordingly, concerns remain about Applicant's finances and undermine confidence he will not again be a security risk because of future delinquencies. Indeed, despite the discharge of his debts through bankruptcy, Applicant still has not resolved more than \$100,000 in liens against his home. Considering all of the available information about Applicant's financial problems and his efforts to resolve them, I conclude he has failed to mitigate the security concerns presented under Guideline F.

A fair and commonsense assessment⁽¹⁵⁾ of Applicant's financial problems, taken in the context of all of the information before me shows that reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has otherwise 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: For the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: 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. Tr., 58.
3. Ax E.
4. Applicant does not need a clearance for his current position, a fact that only became known late in the hearing (Tr., 54 - 55). Nonetheless, the Directive, Section 4.4.1, requires me to retain jurisdiction over this matter.
5. Gx 2.
6. Directive, Enclosure 2.
7. 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;
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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

10. *See Egan*; Directive E2.2.2.

11. Directive, E2.A6.1.1.

12. Directive, E2.A6.1.2.1. A history of not meeting financial obligations;

13. Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

14. 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).

15. Directive, E2.2.3.