

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant has a history of financial delinquencies, including a child support arrearage, failures to file federal income tax returns, and unpaid tax liens. He mistakenly answered "no" to three questions on his security clearance application (SF 86) about bankruptcy filings, unpaid tax liens, and unpaid judgments. He refuted the allegations of intentionally falsifying his SF 86, but he failed to mitigate the security concern based on financial considerations. Clearance is denied.

CASENO: 05-01856.h1

DATE: 02/13/2006

DATE: February 13, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-01856

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant has a history of financial delinquencies, including a child support arrearage, failures to file federal income tax returns, and unpaid tax liens. He mistakenly answered "no" to three questions on his security clearance application (SF 86) about bankruptcy filings, unpaid tax liens, and unpaid judgments. He refuted the allegations of intentionally falsifying his SF 86, but he failed to mitigate the security concern based on financial considerations. Clearance is denied.

### STATEMENT OF THE CASE

On May 3, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). Under Guideline F, it alleges Applicant filed two petitions for Chapter 13 bankruptcy that were both dismissed (SOR ¶¶ 1.a., 1.b.); and he owes a child support arrearage of about \$24,735 (¶ 3.c.), a hospital bill of about \$167 (¶ 1.e.), unpaid rent (¶ 1.f.), and unsatisfied federal tax liens for several tax years (¶¶ 1.d., 1.g., and 1.h.). Under Guideline E, it alleges he falsified his answers on his SF 86 regarding bankruptcies (¶ 2.a.), tax liens (¶ 2.b.), and unpaid judgments (¶ 2.c.).

Applicant answered the SOR in writing on May 31, 2005. He admitted the allegations under Guideline F except for the hospital bill and unpaid rent (SOR ¶¶ 1.e. and 1.f.), and he denied all the allegations of falsification under Guideline E. He requested a hearing.

The case was assigned to me on November 22, 2005 and heard on December 19, 2005 as scheduled. I kept the record open until January 31, 2006, to enable Applicant to obtain and submit evidence regarding his delinquent federal taxes. Applicant submitted additional evidence, and it is incorporated in the record as Applicant's Exhibit (AX) D. DOHA received the transcript (Tr.) on January 5, 2006.

### FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 50-year-old facility security officer for a federal contractor. He has held a clearance and worked for federal contractors for almost 20 years.<sup>(1)</sup> He has eleven years of formal education, and he obtained his General Educational Development (GED) certificate while serving on active duty in the U.S. Army from November 1972 until June 1980.<sup>(2)</sup> He is married and has two children from the marriage. He also has two children from a previous relationship.<sup>(3)</sup>

In early 1991, Applicant purchased a townhouse jointly with a woman with whom he was living and had two children. They separated, and he was left responsible for the mortgage payments. He filed a Chapter 13 bankruptcy petition in November 1991. When his attorney advised him the bankruptcy could adversely affect his security clearance, he dismissed the bankruptcy and allowed the lender to foreclose on the property.<sup>(4)</sup>

Shortly after his former companion left him, she obtained a court order requiring him to pay \$400 per month for their two children. He questioned the paternity of the children, but blood tests established he was the father. He did not pay the child support during the six months he contested paternity, thereby accumulating an arrearage he was financially unable to pay.<sup>(5)</sup> Judgments were entered against him in August 2000, October 2002, and June 2003 for the child support arrearage, which was about \$24,735 in 2003. The children are now adults, and he is paying only the arrearage. His pay is being garnished for \$400 per month to satisfy the arrearage, which has been reduced to about \$20,926.<sup>(6)</sup>

When Applicant purchased the townhouse, he withdrew funds from his retirement account, without realizing the funds would be taxable income. He did not file federal income tax returns in 1991 and 1992, because he could not afford to pay the income taxes on the proceeds from his retirement account. A tax lien for about \$11,095 was filed against him in February 1997. In December 2001, two additional liens were filed. The first was for about \$8,761 for tax years 1993 and 1994, and the second was for about \$1,208 for tax years 1998 and 1999.<sup>(7)</sup> A refund of \$2,062 for tax year 2003 was

applied to his delinquent taxes.<sup>(8)</sup> When he was interviewed by a security investigator in August 2004, he was not making any payments on the delinquent taxes.<sup>(9)</sup> Some time after August 2004, a tax levy was placed on his wages. The levy was released in January 2005 because of his low income.<sup>(10)</sup> Until the levy was released, payments on the delinquent taxes were being deducted from his wages.<sup>(11)</sup>

A judgment for \$167 was entered against Applicant in October 1997 for an emergency medical bill. He testified his wife paid the judgment, but they no longer have any record of payment, because his wife destroyed the cancelled checks covering that period.<sup>(12)</sup>

Applicant filed a second Chapter 13 petition in July 1999, because he was financially overextended and owed federal income taxes. He dismissed this petition after the Internal Revenue Service (IRS), which had placed a lien on his home, refused to agree to a payment plan. The lender foreclosed on this home when Applicant was unable to make his house payments.<sup>(13)</sup>

Applicant suffers from a heart defect that caused him to suffer two strokes, the first in April-May 2000 and the second about a year later. In September 2002, he was laid off. For a while, he worked part-time, earning about \$40,000 per year.<sup>(14)</sup> He returned to full-time work with a new employer in April 2005, earning \$55,000 per year.

Until recently, Applicant's monthly take-home pay was about \$3,000, after deduction of the child support arrearage payments. He has no car payments, home mortgage payments, or credit card accounts. His net monthly remainder is usually about \$200. He has no savings and no vested retirement accounts.<sup>(15)</sup> He recently received a pay raise of about \$3,000 per year. He hopes to use the raise to negotiate a new payment plan with the IRS.<sup>(16)</sup> I held the record open to enable him to produce evidence of a payment plan. On January 31, 2006, he submitted copies of a bill from the IRS for \$1,439.30 and copies of postal money orders for that amount. It is unclear whether the bill and payment are intended to show full satisfaction of a tax debt, an unscheduled partial payment, or the beginning of a negotiated settlement of his tax liability.<sup>(17)</sup>

A judgment was entered against Applicant for unpaid rent in May 2001 (SOR ¶ 1.f.). He disputed the debt. He testified he contacted the apartment manager, told the manager he had never lived in the city and state where the apartment was located, and learned the delinquent renter was a person with the same first and last name but a different middle initial and social security number.<sup>(18)</sup>

Applicant executed a SF 86 on June 24, 2003. He answered "no" to questions 33 (bankruptcy petitions in the last seven years), 36 (tax liens in the last seven years), and 37 (unpaid judgments in the last seven years). However, he disclosed the tax liens in response to question 34 (wage garnishments), and a home mortgage foreclosure in response to questions

35 (repossessions) and 38 (debts more than 180 days delinquent).<sup>(19)</sup> He testified he was unaware of the unpaid judgments for child support, medical services, and unpaid rent when he executed his SF 86.<sup>(20)</sup>

Applicant denied intentionally falsifying his answers to questions 33, 36, and 37. He testified he "done the cardinal sin" (sic) by rushing through the questionnaire. He did not disclose the second bankruptcy, preceding his SF 86 by only four years, because he hurried through the application and inadvertently omitted it.<sup>(21)</sup> He disclosed the second bankruptcy when questioned by a security investigator in August 2004.<sup>(22)</sup>

## **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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline F (Financial Considerations)**

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history establishes both DC 1 and DC 3.

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or an isolated incident (MC 2). Directive ¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant has multiple delinquent debts that are not yet fully resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems also can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially

arose due to conditions beyond his control, those conditions are not necessarily mitigating unless Applicant acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003).

The breakup of Applicant's relationship in 1991 left him solely responsible for making the payments on his townhouse. He had already made a foolish financial decision to invade his retirement funds to buy the townhouse, not realizing the tax consequences. He lost his investment when the lender foreclosed on the townhouse. He accumulated a child support arrearage almost immediately after the breakup by not paying child support for six months while he contested paternity. Because he was financially overextended, he did not file his federal income tax returns for two years. There is no evidence he requested an extension of time to file his returns or took any steps to negotiate a settlement with the IRS. He lost another home to foreclosure in 1999. He suffered two strokes in 2000 and 2001, causing him to be laid off from work and unable to work full-time for a substantial period.

The breakup of his relationship was a condition beyond his control. However, his financial difficulties were largely the result of buying a house he could not afford, not considering the tax consequences of withdrawing his retirement funds, incurring penalties and interest for failing to file his federal income tax returns for two years, and buying a second house he could not afford. Applicant's illness in 2000-2001 certainly was beyond his control, but he was already in dire financial straits when it occurred. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). I conclude Applicant has not established MC 3.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999). Applicant paid off the medical bill and justifiably disputed the judgment for unpaid rent. However, there is little evidence of voluntary actions to pay the child support arrearage or unpaid income taxes. Any payments on those obligations were the result of involuntary measures such as garnishments of his wages and imposition of tax liens. After the hearing, Applicant presented evidence of a substantial payment to the IRS, but he submitted no evidence of a final settlement or long-term payment agreement. His recent pay increase makes more money available to pay past due obligations, but insufficient time has elapsed for Applicant to establish a track record of systematically resolving his past due obligations. I conclude Applicant has not carried his burden of establishing MC 6.

Applicant's life has been a financial struggle since at least 1991. At the hearing he seemed honest and sincere, but he has a track record of bad financial judgment and neglect of his obligations. He has not presented sufficient evidence to convince me he has changed his financial habits. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude he has not mitigated the security concern based on financial considerations.

### **Guideline E (Personal Conduct)**

Under this guideline, 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. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶E2.A5.1.2.2.

When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

The SOR ¶ 2.a. alleges Applicant falsified his SF 86 by not disclosing his bankruptcy filing in 1999. Applicant denied intentional falsification. His only explanation for omitting the 4-year-old bankruptcy filing was that he made the "cardinal sin" of hurrying through the execution of the form. At first blush, this explanation seems weak and implausible in light of his long experience as a facility security officer. On the other hand, he disclosed considerable derogatory information on his SF 86, and the bankruptcy filing had little security significance in itself, because it merely reflected his financial distress disclosed elsewhere in the SF 86. His other derogatory disclosures in response to the wrong questions, e.g., disclosing tax liens in response to the question about garnishments and disclosing mortgage foreclosures in response to the question about repossessions, reflect either inattention or confusion. He impressed me as honest, unguarded, and very sincere at the hearing, but he also seemed befuddled when questioned about the omissions from his SF 86. His inaccurate execution of his SF 86 was consistent with his inattentive and erratic approach to financial management. I am satisfied his omission of the 1999 bankruptcy filing was the product of negligence, but was not an intentional falsification. Accordingly, I conclude he has refuted the allegation in SOR ¶ 2.a.

Applicant also neglected to disclose the federal tax liens in response to question 36 (liens placed against property during last seven years). However, he disclosed his wages were subject to a tax levy under question 34 (garnishments). I am satisfied this response also is a product of negligence or confusion, but not an intentional falsification. I conclude he has refuted the allegation in SOR ¶ 2.b.

Finally, Applicant neglected to disclose unpaid judgments against him for the child support arrearage, a medical bill, and unpaid rent. He testified he was unaware of the judgments. He also testified his wife had paid the medical bill, and he had been informed by the apartment manager that the judgment for unpaid rent was against another person with the same first and last names. I conclude he has refuted the allegation in SOR ¶ 2.c.

## **FORMAL FINDINGS**



The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Government Exhibit (GX) 1 at 1, 8.
2. *Id.* at 6; Tr. 7.
3. Tr. 61-62.
4. Tr. 38-39.
5. Tr. 41-44.
6. Tr.40-42; GX 4.
7. GX 6.
8. AX B.
9. GX 2 at 2.
10. AX C; Tr. 45.
11. Tr. 54.
12. Tr. 47-48.
13. Tr. 39-40.
14. Tr. 34-35, 37-38.
15. Tr. 55-58.
16. Tr. 58-59.
17. AX D at 4.
18. Tr. 49-49.
19. GX 1 at 9.
20. Tr. 52.
21. Tr. 59-61.

