

DATE: November 21, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-04519

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 66 years old and works for a federal contractor. He owes a significant amount of money to the IRS for unpaid taxes and an outstanding judgment, relating to a failed business in 1992. When he completed his security clearance application, he failed to disclose the delinquent debts. He mitigated the security concerns raised by his personal conduct, but did not mitigate those raised by financial considerations. Clearance is denied.

STATEMENT OF THE CASE

On November 18, 2003, Applicant submitted a security clearance application. On June 16, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons under Guidelines F (Financial Considerations) and E (Personal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On July 7, 2006, Applicant filed his answer and elected to have the case decided on the written record in lieu of a hearing. On August 2, 2006, Department Counsel prepared a File of Relevant Material (FORM) containing 12 Items, and mailed it to him two days later. Applicant received the FORM on August 8, 2006, and submitted additional information on September 19, 2006, which I later marked Applicant Exhibit (AX) A. On September 25, 2006, the case was assigned to me.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his answer to the SOR, I make the following findings of

fact:

Applicant is 66 years old, married, and has two grown children. He served in the United States Navy from January 1963 until 1966, and received an honorable discharge. (Item 3 at 4) Subsequently, he has worked for federal contractors for many years and held a security clearance for more than 18 years. (Item 2 at 4) He has worked with classified information and been a courier for it. (AX A) In November 2003, he completed his security clearance application (SCA).

In the early 1990's, Applicant started a business that contracted with the federal government for services. The company experienced financial problems and subsequently filed a Chapter 11 bankruptcy that was discharged a couple years later. In 1994 and 1995, the Internal Revenue Service (IRS) filed tax liens against him, personally, for unpaid taxes for the year 1992. Those liens now total approximately \$99,000, as alleged in ¶ 1.a. (AX A at 4; Item 10 at 2) In October 2004, he hired a company to help resolve numerous financial matters. (Item 2 at 2) In January 2006, the IRS began taking \$742 from his monthly social security checks to pay off the debt. (Item 2 at 6)

In addition to the outstanding tax lien, Applicant admitted that a financing company charged off approximately \$12,000 for a car loan that he cosigned with his son in 2001. (Item 7 at 3) The car was returned after his son lost his job. Applicant attempted to negotiate a settlement but was unable to do so because the company wanted the full amount of the loan without an allowance for the returned vehicle. He refused to pay the claimed balance in full. (Item 2 at 2). He also acknowledged a 1996 civil judgment was entered against him in favor of two contractors who had contracted with his former business. He disputes that there were two separate judgments, as well as the amount. He does not have any records regarding the business deals or judgments. (AX A) Item 12 confirms that there is one January 1996 judgment for the two creditors in the amount of \$23,500, and not two separate ones as alleged in the SOR.

When Applicant signed his SCA, he certified his answers were "true, complete, and correct" to the best of his knowledge and belief. In response to Question 37. Your Financial Record - Unpaid Judgments (*In the last 7 years, have you had any judgments against you that has not been paid?*), and answered "No." He did not disclose the civil judgment. In response to Question 38. Your Financial Delinquencies - 180 Days (*In the last 7 years, have you been over 180 days delinquent on any debts(s)?*), he answered "No," and failed to list the tax liens and delinquent automobile loan. He also failed to list the debts under Question 39 - 90 Day (*Are you currently over 90 days delinquent on any debts?*).

In his October 2004 affidavit that addresses his answers to the financial questions in the SCA and details the status of numerous debts, Applicant acknowledged the outstanding tax liens and judgment, but denied that he attempted to falsify the SCA about them. "I indicated that I was not over 180 days late in payments in the past seven years. When I look back, I now recognize that I could possibly have been 180 days delinquent. If I were to answer that question again I would answer yes. I was not trying to hide or omit any information . . . I misread the question(s)." (Item 6 at 5-6). In his July 2006 Answer he reiterated that he did not intentionally falsify his application. He did not recall receiving notice of the judgments and miscalculated the seven years. He is current with all other financial obligations. (Item 2 at 4) I find his persistent denial and explanations reasonable given the age of the judgment and liens.

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria, which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct;

(4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must

include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Exec. Or. 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense 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. *Departments of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying conditions and an applicant's present security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); 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 clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline F - Financial Considerations: A security concern may exist when an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Guideline E - Personal Conduct: A security concern may exist when 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.

The disqualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

CONCLUSIONS

I considered all facts in evidence and legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR.

Guideline F: Financial Considerations

Based on the evidence, the Government established a potential disqualification under Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*), apply to this case. From 1992 to 2001, Applicant has a history of failing to meet his financial obligations as evidenced by his admissions and other documents. To-date the tax lien, judgment and auto loan remain outstanding because he is unable to pay them.

The Government having established a potential disqualification, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all mitigating conditions, I conclude Financial Consideration Mitigating Condition (FC

MC) E2.A6.1.3.1 (*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)*) applies. The bulk of Applicant's financial difficulties is the result of unexpected problems that arose because of a failed business in the early 1990's, which were factors beyond his control.

As that mitigating condition standing alone is insufficient to overcome the Government's present concern, I also considered FC MC E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*), and conclude it does not apply. Although Applicant consulted with a firm to assist him in resolving the tax problems in 2004, he did not begin making payments on the 15-year-old tax debt until January 2006, and did not present any evidence indicating an attempt to resolve the 1996 judgment or the automobile loan. Hence, those financial problems are not under control, as required by FC MC E2.A6.1.3.4.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SCA by failing to disclose the civil judgment, tax liens and delinquent car loan, which constituted a potential disqualification under Personal Conduct Disqualifying Condition (PC DC) 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*). Applicant denied those allegations.

When a falsification allegation is controverted or denied, 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 the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5(App. Bd. Jun. 9, 2004).

Applicant stated that he did not intentionally omit information about the tax lien, judgment or delinquent debt on the SCA. He did not disclose the January 1996 judgment under Question 37 because he misread the question, nor was he required to disclose it because it was beyond the seven-year time period when he completed the SCA. Although he should have disclosed the tax liens and automobile loan as delinquent, his explanation that he misread the questions is reasonable given the age of the lien and matter involving his son. His subsequent interview and affidavit, in which he candidly disclosed and discussed numerous financial obligations, supports his position that he did not intentionally falsify his SCA. Hence, the allegations contained in SOR ¶¶ 2.a through 2.c are decided in his favor.

The Whole Person Analysis

In addition to the disqualifying and mitigating conditions under Guideline J, I also considered factors included within the "whole person" concept, such as Applicant's age, his years of employment with federal contractors, and the fact that he has held a security clearance for a number of years without any problems. I also took into account the fact that the IRS debt and judgement arose from a 1992 business problem and that there are no other outstanding tax issues, in my evaluation of Applicant's risk and vulnerability in protecting our national interests. However, while I gave some weight to those facts and his expressed commitment to continue paying the tax debt, he did not begin a repayment plan for the \$98,000 debt until January 2006, and has not taken any steps to resolve the outstanding judgment or presented any substantive proof confirming his attempted negotiations with the finance company to-date. His dilatoriness in resolving these matters raises questions about his reliability and judgment, such that I am convinced that he should not hold a security clearance at this time, despite having held one in the past.

For the reasons stated, I conclude Applicant is not eligible for access to classified information. Accordingly, Applicant did not mitigate the security concerns raised by financial considerations, but did mitigate those raised by his personal conduct. Guideline F is decided against him, and Guideline E is decided for him.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of

Enclosure 3 of the Directive, are as follows:

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

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 and evidence presented in this case, it is not clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is denied.

Shari Dam

Administrative Judge