

DATE: August 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-04525

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Moore M.O. Ibekwe, Esq.

SYNOPSIS

Applicant has failed to mitigate the financial and personal conduct security concerns that exist in this case. Clearance is denied.

STATEMENT OF THE CASE

On July 29, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F (financial considerations) and Guideline E (personal conduct). Applicant submitted a sworn answer to the SOR, dated September 6, 2005, admitted all Guideline F allegations except those contained in subparagraphs 1.d, 1.e, 1.h, and 1.i, denied all Guideline E allegations, and requested a hearing.

This case was assigned to me on January 19, 2006. A notice of hearing was issued on February 13, 2006, scheduling the hearing for March 2, 2006. Applicant appeared at the scheduled hearing with an attorney who entered his appearance (Appellate Exhibit I) and requested a continuance for personal reasons. The hearing was continued generally, and a new notice of hearing was issued on April 7, 2006, rescheduling the hearing for April 25, 2006. The hearing was conducted as rescheduled. The government submitted 12 documentary exhibits that were marked as Government Exhibits (GE) 1-12, and admitted into the record without objection. Applicant testified, called one witness to testify on his behalf, and submitted eight documentary exhibits that were marked as Applicant's Exhibits (AE) 1-8, and admitted into the record without objection. The transcripts were received on March 21, 2006, and May 8, 2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 62 years old and has been employed as a project manager by a defense contractor since June 2005. He was employed as a military analyst by a different defense contractor from October 2003 until June 2005; was unemployed from August 2002 until October 2003; was employed as a business manager outside the defense industry from December 2001 until August 2002; was unemployed from September 1998 until December 2001; and was employed by the U.S. Army from May 1997 until September 1998. Applicant retired as a Colonel (paygrade 0-6) from the Army National Guard in September 1995, having served on active duty for approximately 24 years.

Applicant was married in June 1968, divorced in May 1973, and has one adult daughter from that marriage. He remarried in April 1975, separated from this wife in 1993, and has been divorced from this wife since May 2000. Applicant has been married a third time since June 2004. He submitted the testimony of one witness and written statements from numerous people who have known him personally and professionally for many years. Those persons attest to his reputation for being honest, dependable, loyal, trustworthy, dedicated, truthful, and conscientious.

Applicant possessed a security clearance from sometime in the 1960s until at least the time of his retirement from the national guard in 1995. On December 8, 1983, Applicant was notified that his command intended to "deny/revoke your eligibility for access to Sensitive Compartmented Information (SCI) and your collateral security clearance." (GE 12) The basis for the notification was an unpaid debt in the amount of \$3,174.40 that resulted in entry of a judgment against Applicant in February 1978, a bankruptcy petition that was filed in October 1982 and that was still pending, and Applicant's statement during a June 1983 interview that he did not have any delinquent bills. The matter was adjudicated in his favor on April 1984. (GE 12) No other action has been taken to revoke or downgrade Applicant's security clearance prior to the filing of the SOR herein.

The 1982 bankruptcy petition was filed under Chapter 13 of the bankruptcy code. The trustee twice moved to dismiss the petition due to Applicant's failure to remain current with the payment plan. (GE 9). However, Applicant eventually made all payments under the plan and obtained a discharge in September 1984.

Applicant again filed for protection under Chapter 13 of the bankruptcy code in April 2003. That petition was dismissed in June 2003 due to Applicant's failure to attend a scheduled hearing. Applicant testified he sought bankruptcy protection because of his inability to remain current with his debts because of unemployment, and that his failure to attend the hearing was because of a family medical emergency.

Applicant sought Chapter 13 bankruptcy protection a third time on February 2, 2004. He testified he filed for bankruptcy protection on this occasion to protect his house from a foreclosure proceeding. However, he was able to sell the house and resolve the foreclosure issue with the mortgage company and voluntarily had the bankruptcy petition dismissed on February 18, 2004.

SOR subparagraphs 1.d and 1.e allege two collection accounts, totaling \$502.00, that had not been paid as of July 19, 2005. Applicant submitted proof he paid both accounts several weeks after he received the SOR. (AE 3 & 4)

Subparagraph 1.f alleges delinquent state taxes in the amount of \$1,869.00. Although a tax lien has been filed and the taxes have been delinquent for at least several years, Applicant has not made any payment on those taxes. Subparagraph 1.g alleges delinquent federal income taxes in the amount of \$57,290.00 for tax years 1989-1993, 1995-1997, 1999 and 2000. The IRS levied a tax lien against Applicant on April 18, 2002, and began seizing \$1,595.78 from his monthly military retirement pay. (AE 1) Applicant's January 2006 retiree account statement (AE 1) showed a balance owing of \$2,773.83. Accordingly, the evidence indicates the federal tax debt has now been satisfied.

Subparagraph 1.h alleges a charged off credit card debt in the amount of \$440.00. In October 2004, Applicant provided a statement to an investigator from the Office of Personnel Management (OPM) in which he acknowledged the balance owing was approximately \$450.00 and claimed that he was making a monthly payment in the amount of \$50.00 on the account. (GE 5) Applicant's January 2006 credit report (GE 2) discloses the balance owing on the account was \$440.00 and the last date of activity was March 2003. Applicant testified he paid this account in full sometime after he filed his answer to the SOR (Tr. 54). He did not provide any verification of this assertion.

Subparagraph 1.i alleges a charged off credit card account in the amount of \$1,853.36. In his October 2004 OPM statement (GE 5) and in a second statement he provided to an OPM investigator in August 2004 (GE 4), Applicant

claimed to have negotiated an agreed upon settlement of this account requiring three monthly payments totaling \$1,100.00 and to have sent the creditor a good-faith payment in the amount of \$100.00. Applicant's January 2006 credit report (GE 2) does not list the successor creditor alleged in the SOR, however, Applicant testified: "The account was then transferred over to a person and I have, within the last month, spoke with that person and we have agreed upon a settlement amount." (Tr. 58)

Subparagraph 1.j. alleges a delinquent credit card account in the amount of \$5,167.00. In his October 2004 OPM statement (GE 5), Applicant admitted liability for this account and his failure to make payments on the account. He also stated he had asked the creditor to send him a current statement and expressed his intent to pay off the account in full. Applicant's credit reports (GE 2 & 3) indicate the account was listed in a chapter 13 bankruptcy filing. This account was listed in the Chapter 13 bankruptcy pleadings Applicant filed in April 2003 and February 2004 (GE 7 & 8) with the amount owing to the creditor being \$5,200.00. Applicant testified he paid an agreed upon settlement of this account in full approximately three months before the hearing. He again did not provide any verification of this assertion.

In a security clearance application he submitted in December 2003, Applicant disclosed that he had filed for Chapter 13 bankruptcy protection in April 2003 and that his wages were being garnished for temporary spousal support. However, he answered "No" to questions asking if any tax liens had been placed against his property, if he had been more than 180 days delinquent on any debt in the preceding seven years, or if he was then currently more than 90 days delinquent on any debt. All three of those answers were false.

Applicant testified he did not disclose the tax liens because he thought they were only referring to liens placed against real property. (Tr. 65) He testified he did not list his various delinquent accounts either because he didn't know what specific debts were delinquent or because he had entered into repayment agreements and was current on the repayments. (Tr. 74)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant has accumulated substantial delinquent debt as alleged in the SOR, had tax liens placed his against him, had a levy placed against his military retirement pay by the Internal Revenue Service, and found it necessary to file for Chapter 13 bankruptcy protection on two occasions in the past three and one-half years. Disqualifying Conditions (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debt* apply. The Chapter 13 bankruptcy petition filed by Applicant in 1982 was considered in a previous petition to deny/revoke his security clearance and was adjudicated in his favor. Accordingly, that SOR allegation is found for Applicant.

Applicant's financial problems were caused by the lengthy periods of unemployment he experienced in 2002-03 and 1998-2001. Mitigating Condition (MC) 3: *The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment . . .)* applies.

Applicant submitted proof he paid two of the alleged delinquent accounts shortly after being issued the SOR. The largest debt, the delinquent federal income taxes, was satisfied only as a result of the government filing a levy against Applicant's military retirement pay. He has not made any payment on the delinquent state taxes. Applicant testified he has paid the debts listed in subparagraphs 1.h and 1.j, however, he failed to provide any proof of the current alleged payments. Further, in earlier statements provided to OPM investigators he made false claims about either payments having been made on those accounts or his intention to comply with settlements he claimed to have negotiated relative to accounts. Applicant claimed in his 2004 OPM statements that he had entered into a repayment agreement with the creditor alleged in SOR subparagraph 1.i, and would shortly satisfy that account. In his hearing testimony, Applicant indicated the debt remained unpaid and that he had again entered into a negotiated settlement of the account just a month before the hearing.

Applicant's claims about the current status of the delinquent accounts listed in SOR subparagraphs 1.h, 1.i, and 1.j are unverified. The state taxes remain delinquent. Applicant's delinquent federal taxes were satisfied only as a result of the government seizing a portion of his military retirement pay. Accordingly, MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* does not apply.

The financial statements that are included with the statements Applicant provided to OPM investigators back in 2004, and his testimony about his and his current wife's income indicate he has been able to satisfy all his delinquent accounts for at least the past three years. Despite having the apparent ability to satisfy the accounts, Applicant has chosen instead to allow at least some of them to remain delinquent. Finally, his misleading and/or false assertions about what he was doing to resolve the accounts calls into question his willingness to address those accounts. Thus, and despite application of C 3, Guideline F is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. 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.

Applicant's explanations for not disclosing the tax liens and delinquent accounts in the security clearance application he submitted in December 2004 are not credible. Substantial amounts of money were being seized by the government from his retirement pay, and, as his testimony on cross-examination made clear, he was certainly aware of the delinquent credit card accounts that were in existence when he submitted the application. DC: 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* applies. I have considered all mitigating conditions and none apply. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, including the testimony and evidence provided by Applicant, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to mitigate the security concerns that exist in this case. He has not overcome the case against him or satisfied his ultimate burden of persuasion.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

Subparagraph f: Against Applicant

Subparagraph g: Against Applicant

Subparagraph h: Against Applicant

Subparagraph i: Against Applicant

Subparagraph j: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

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

10. *Id* at 531.

11. *Egan*, Executive Order 10865, and the Directive.