

DATE: December 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-04745

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's financial irresponsibility and falsification of his clearance application renders him an unsuitable candidate for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 2 December 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of financial considerations and personal conduct. ⁽¹⁾ Applicant answered the SOR on 22 February 2006, and requested a hearing. DOHA assigned the case to me 29 March 2006, and I convened a hearing 10 May 2006. DOHA received the transcript (Tr.) 19 May 2006.

PROCEDURAL ISSUES

At the hearing, I left the record open to give Applicant an opportunity to produce any of the claimed documentation that he said he had, but did not bring to the hearing. Applicant timely provided several documents, to which Department Counsel did not object. Accordingly, I admit those documents as A.E. D.

FINDINGS OF FACT

Applicant denied the allegations of the SOR, except for SOR, ¶ 1.d., in which he admitted having a positive cash flow while making little effort to satisfy his delinquent debts. Accordingly, I incorporate his admissions as findings of fact.

Applicant--a 47-year-old chief systems architect for a defense contractor since August 2005--seeks reinstatement of the access to classified information he has had, as needed, since approximately 1978.

Applicant has a history of financial difficulties beginning most recently in 2003. ⁽²⁾ Between 1996 and May 2003, Applicant was self-employed, selling computer hardware and software. Initially, business was good, but declined after

September 2001. Applicant was able to continue operating for a time, but family finances tightened when his second child was born in spring 2002 and his wife lost her \$90,000-per-year job in spring 2003. Coupled with customers defaulting on payments owed to Applicant, by February 2003 he knew he had to stop operating his business. He obtained regular employment--at a lower salary--in May 2003. This is when the accounts alleged in the SOR began to fall delinquent.⁽³⁾ Applicant reported receiving dunning letters and telephone calls on these accounts (G.E. 5). In addition, between 1997 and 2003, Applicant failed to file his federal income tax returns in a timely fashion.⁽⁴⁾ He attributed his failure to file (Tr. 43-44) to being self-employed and working hard, having a very complicated tax situation, and believing that he would not owe any taxes. However, in January 2005, the Internal Revenue Service (IRS) filed a tax lien of \$24,232 against Applicant (SOR 1.e). In October 2005, IRS filed a second lien of \$14, 882 against Applicant.⁽⁵⁾

When Applicant received the IRS lien in January 2005, he immediately called the local IRS office and learned that the lien was for tax years 1997 through 2003 (A.E. D).⁽⁶⁾ Applicant testified (Tr. 47-48) that he filed his delinquent returns--including his late tax return for 2004--in August 2005. He refiled some of them in May 2006, when the IRS reported them lost. The IRS had processed his returns for 1997,1998, and 1999, with refunds due carried forward to his other tax years.

In January 2004, Applicant was given interim access to classified information so he could perform his contract duties for the government, and executed the required non-disclosure form (SF 312)(A.E. D).⁽⁷⁾ In March 2004, Applicant completed a clearance application for his background investigation (G.E. 1).⁽⁸⁾ However, he did not sign the application until August 2004. Applicant stated that he did not reread the application at the time he signed it. He answered "no" to two questions asking him to disclose any accounts delinquent 180 days (question 38) or 90 days (question 39). These answers were false, but Applicant denies falsifying the answers, claiming that the accounts were not delinquent when he completed the application. I find this claim not credible, as the most recently delinquent of the three accounts alleged in the SOR had been delinquent for at least eight months, since July 2003. Further, Applicant stated in January 2005 (G.E. 5) that he thought the account at SOR 1.b. fell past due in February or March 2003, and the account at SOR 1.a. fell past due in approximately May 2003.

When Applicant discussed these two delinquent accounts in January 2005 (G.E. 5), he acknowledged not making payments to the creditors and not being able to make payments despite showing positive cash flow on his personal financial statement (G.E. 6) Both accounts--with the same creditor--were for expenses related to his business. He described being contacted by the creditor or a collection agency early after the accounts fell past due, but was unable to pay the full amount due as demanded by the creditors.⁽⁹⁾ He stated his intention to pay these two accounts as soon as he had the means.

In August 2005, he left the contractor he was working for directly, and went to work as a consultant (subcontractor) to the contractor who currently requires him to have access to classified information. In effect, he is self-employed again, but now his remuneration is for personal services and not equipment sales. His average billable hours equate to an annual salary of over \$200,000. Initially, his contract with the company was to expire in March 2006, but was extended to June 2006, coincidentally with the expiration of the company's contract with the government. Applicant expected the company's contract, and his subcontract, to be extended to September 2006, to coincide with the government's fiscal year. After that, he expected to be a subcontractor on a new five-year contract. He acknowledges that he has no guarantees of employment beyond the end of the fiscal year, or perhaps the calendar year, but is hopeful for continued employment because the government contractor is a long-time incumbent with the government, and the program he is working on will not be deployed for many years. As a subcontractor, Applicant receives no paid benefits, so any sick time or vacation time taken reduces his billable hours.

The December 2005 SOR alleges four past due accounts totaling nearly \$43,000. With the addition of interest and an additional tax lien, the amount of indebtedness could be nearly \$58,000. Applicant claims to have tried to contact his creditors and the IRS, but produced little documentary support of any efforts before May 2006. His post-hearing submission (A.E. D) consists largely of copies of May 2006 letters addressed to his creditors and the IRS. He included a copy of a letter to the IRS in February 2005 that confirms that he received the lien in January 2005, learned that it was for tax years 1997-2003, and began the process of filing his late tax returns. He also included corroboration of some

follow-up with the IRS in March and June 2005. The only debt he has paid is the debt at SOR 1.c., for which he provided a May 2006 offer to settle the \$11,141 account for \$4,500 and Applicant's May 2006 cashier's check for that amount, mailed within the time agreed.

Applicant reports no problems with his current finances. He did complete courses in financial freedom in fall 2004 (Tr. 37) and spring 2005 (Tr. 37; A.E. A).

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also 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 for or against Applicant. However, specific adjudicative 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. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are guidelines F (Financial Considerations) and E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their 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

The government established a case for disqualification under Guideline F, and Applicant did not mitigate the security concerns. Applicant has a history of financial difficulties beginning most recently in February 2003, when he was forced to shutter his business and take other employment. He stopped paying on the credit card accounts he used to fund his business, and they fell delinquent.⁽¹¹⁾ For more than seven years, tax years 1997 through 2003, he failed to file his federal income tax returns as he knew he was required to do. His stated reason--that he thought he would not owe any taxes--is nonsensical enough considered against tax years 1997-1999, when he at least filed estimated tax payments. His stated reason is disingenuous considered against tax years 2000-2003, when he made no estimated tax payments. Not until the IRS filed a lien against him in January 1995 did he take any steps to address tax years 1997-2003, and even then, he was already delinquent in filing his 2004 federal income tax return. Complicating Applicant's finances is the potentially shifting nature of his employment. Applicant's ability to make progress on his debts is contingent on his remaining employed on a contract that has yet to be awarded. His current employment is guaranteed only through the end of 2006.

Applicant does not meet any of the mitigating conditions under Guideline F. His evidence does not establish that his financial problems are behind him. His efforts to pay his creditors have been lackadaisical at best. His financial problems are recent,⁽¹²⁾ and not isolated.⁽¹³⁾ Although the financial decline of his business between 2001 and 2003 is reasonably considered beyond his control, his indebtedness to the IRS is not,⁽¹⁴⁾ being the direct result of his deliberate failure to file his federal income tax returns for seven years. The amount of that indebtedness has yet to be conclusively determined, in part because Applicant did not even submit the returns until August 2005. It may be some time before Applicant is even in a position to have the lien lifted and have him establish a payment schedule with the IRS. Although Applicant completed two courses on financial freedom, he did not provide evidence of a budget or that he has otherwise

brought the problem under control.⁽¹⁵⁾ Further, most of his repayment efforts appear to be belated, and now complicated by the difficulty in tracking the original debt from the original creditor to the successor creditor.⁽¹⁶⁾ Finally, Applicant has not demonstrated to my satisfaction the ability to avoid financial problems in the future. I conclude Guideline F against Applicant.

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. Even if I accept Applicant's claim of an electronic submission of a clearance application without a paper copy being generated, he could not have believed he had no delinquent accounts when he submitted that information. By his own testimony he was shuttering his business in February 2003 because he could no longer meet his business expenses, and stopped paying on his business accounts in February/March and May 2003. By his own testimony the earliest he could have submitted the phantom clearance application was September 2003, at which time the accounts were delinquent at least 90 days--and his wife had lost her job for at least as long. With that drop in income from his wife losing her job, it is unlikely he could do more than meet his current living expenses, if that. I conclude he deliberately concealed the nature and extent of his financial problems on his clearance application.⁽¹⁷⁾ In addition, none of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision, particularly where Applicant had financial problems adjudicated in the early 1990s.⁽¹⁸⁾ Although the falsifications were isolated, they were recent, and Applicant only provided the correct information when asked by the investigator in January 2005.⁽¹⁹⁾ He did not correct the falsification before being asked about it.⁽²⁰⁾ Applicant did not claim he received bad advice about what he was required to disclose on his clearance application.⁽²¹⁾ I conclude Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: 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 denied

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. Applicant experienced financial problems, previously adjudicated in his favor, from the mid-1980s to the early 1990s (G.E. 1, 3).

3. Applicant's credit reports (G.E. 4, 7, 8) reflect the date of last activity on SOR 1.a. and 1.b. as May 2003. Although the debt at 1.c. first appears in July 2004 (G.E. 7), it appears to be a successor creditor on an account referred for collection in July 2003 (G.E. 4).
4. For tax years 1997, 1998, and 1999, he filed estimated payments but no returns. For tax years 2000, 2001, and 2002, he filed neither estimated payments nor returns.
5. The two liens were filed in different states, so it is impossible to know if the IRS is asserting an aggregate lien totaling over \$39,000 or a recalculated lien now at \$14,822. Applicant's post-hearing submissions (A.E. D) include no IRS records reflecting his current status, only Applicant's May 2006 requests to IRS for information on the status of his tax returns.
6. In January 2005, Applicant had been given until the end of February 2005 to file the delinquent tax returns, predicated on the IRS sending him the information they had on those tax years. Applicant characterized the lien as being based on IRS "mishandling" of his tax returns for certain years, when at least the January 2005 lien was based on absentee returns filed by IRS, using information available directly available to the IRS, in lieu of Applicant's timely returns. Applicant requested, and was apparently granted, further extensions of time to file the late returns.
7. The duties involved a ship-board deployment in February or March 2004 to test the system he was working on. Applicant asserted that he could not have been given this access if he had not already submitted a clearance application, but there is no record evidence of any clearance application before March 2004 (G.E. 2). Even his testimony (Tr. 65) puts the earliest date he could have submitted his application as September 2003, when the delinquencies were at least 90 days old.
8. A conclusion I reach because Applicant used the electronic version of the clearance application, which automatically generates a print date.
9. Applicant claims that the debt at 1.b. was originally about \$20,000, and despite the creditor's insistent on payment-in-full, he had made periodic payments on-line--reducing the balance to about \$5,000--until his access to on-line payment was terminated when the creditor sold the account. The balance had since risen to \$7,202 and Applicant acknowledged he did not have the means to pay it off.
10. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
11. E2.A6.1.2.1 A history of not meeting financial obligations; E2.A6.1.2.3 Inability or unwillingness to satisfy debts;
12. E2.A6.1.3.1 The behavior was not recent;
13. E2.A6.1.3.2 It was an isolated incident;
14. E2.A6.1.3.3 The conditions that resulted n the behavior were largely beyond the person's control. . . ;
15. E2.A6.1.3.4 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;
16. H2.A6.1.3.6 The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
17. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;
18. E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
19. E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided

correct information voluntarily;

20. E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

21. E2.A5.1.3.4. Omission of material facts was caused or significantly contributed by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;