

DATE: October 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-07371

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant and his wife became financially overextended, and they both obtained separate Chapter 7 bankruptcy discharges. They divorced shortly thereafter, and Applicant found himself with large debts but drastically less household income. His financial problems were exacerbated by physical disability, uninsured medical expenses, and uninsured hurricane damage to his home. He plausibly and credibly explained why he failed to disclose his financial problems on his security clearance application (SF 86). He has rebutted the allegation of falsifying his SF 86, but he has not mitigated the security concern based on financial considerations. Clearance is denied.

STATEMENT OF THE CASE

On February 10, 2006, 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 raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on March 4, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on July 20, 2006. The case was heard on August 22, 2006, as scheduled. I kept the record open for 15 days to permit Applicant to submit additional documentary evidence. His post-hearing submission was received on September 1, 2006, and it is incorporated in the record as Applicant's Exhibit (AX) T. DOHA received the hearing transcript (Tr.) on September 1, 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 make the

following findings:

Applicant is a 42-year-old employee of a defense contractor, for whom he has worked since June 2002. He had an interim clearance until the SOR was issued, but he has never held a final security clearance (Tr. 7). He has a reputation for honesty, integrity, competence, and conscientious duty performance (AX H through S).

Applicant was married in May 1993. In 1996, Applicant was diagnosed with lymphoma, and he was treated with radiation and chemotherapy. He also developed serious skin infections, pancreatitis, and diabetes (Tr. 70-72). He was unable to work for about 11 months during 1996. He received 80% of his pay for three months and 65% thereafter (Tr. 73). While he was unable to work, his wife filed for bankruptcy and her debts were discharged. Shortly thereafter, they separated. He filed a Chapter 7 bankruptcy petition in March 1997 and received a discharge in July 1997 (GX 8). In his bankruptcy petition, he did not list the joint debts alleged in SOR ¶¶ 1.c, 1.h, 1.s, and 1.t.

Applicant was divorced in October 1997. His ex-wife was a trauma nurse in an emergency room and made considerably more money than he did. He was making about \$28,000 per year and she was making almost \$60,000 (Tr. 92). When they divorced, Applicant was left with the house payments, several credit card debts, and a substantially reduced income.

His lymphoma recurred in 1999, causing him to be disabled for three months, at 60% of his pay (Tr. 72). In 2004, he was unable to work for almost six months. He received 60% of his pay for three months and no pay for almost three months (Tr. 72).

The SOR alleges 20 delinquent debts totaling about \$13,243. Several debts were joint debts with his ex-wife. In his answer to the SOR, he denied six debts and admitted the remaining debts totaling about \$9,500.

The evidence concerning the debts alleged in the SOR is summarized in the table below. The debts identified as "joint" were incurred before Applicant's divorce.

SOR	Creditor	Amount	Status at Hearing	Record
1.a	Credit card	\$3,256	Unpaid	GX 4
1.b	Credit card	\$2,160	Unpaid	GX 4
1.c	Credit card (joint)	\$526	Unpaid	GX 2 at 7; GX 4
1.d	Satellite TV	\$141	Disputed	Answer to SOR
1.e	Medical	\$50	Paid	GX 4; AX A at 1
1.f	Medical	\$695	Paid in part	Answer to SOR; Tr. 61
1.g	Medical	\$523	Paid in part	GX 4; AX A at 2; Tr. 63
1.h	Credit card (joint)	\$549	Unpaid	Answer to SOR; GX 2 at 5
1.i	Medical	\$1,281	Unpaid	Answer to SOR
1.j	Medical	\$243	Paid in part	Answer to SOR; AX A at 1-2; Tr. 55
1.k	Electric	\$343	Disputed	Answer to SOR
1.l	Medical	\$384	Unpaid	Answer to SOR
1.m	Medical	\$290	Unpaid	Answer to SOR
1.n	Credit card	\$930	Unpaid	Answer to SOR
1.o	Cable Box	\$295	Disputed	Answer to SOR
1.p	Medical	\$96	Paid	Answer to SOR
1.q	Medical	\$350	Disputed	Answer to SOR
1.r	Medical	\$120	Unpaid	Answer to SOR
1.s	Rent (joint)	\$828	Disputed	Answer to SOR
1.t	Electric (joint)	\$183	Disputed	Answer to SOR

In a personal financial statement dated January 28, 2005 (GX 2 at 13), Applicant reported net monthly income of \$2,098, expenses of \$930, debt payments of \$769, and a net remainder of \$399. In his listing of debt payments, he reported monthly payments totaling \$100 on various delinquent debts.

At the hearing, Applicant asserted he had made payments on the medical bills alleged in SOR ¶¶ 1.e, 1.f, 1.g, 1.j, and 1.p. He was unable to produce receipts for the payments. However, I found his testimony plausible, credible, and corroborated by his personal financial statement (GX 2) noting small payments on delinquent debts.

In a more recent financial statement dated October 28, 2005 (GX 3 at 2), he reported net monthly income of \$1,950, expenses of \$560, debt payments of \$1,379, and a net remainder of \$11. The debt payments were for a home mortgage and an automobile loan, both of which are current. He refinanced his home mortgage in order to take out about \$8,000 in equity to repair uninsured hurricane damage suffered in 2004 (AX F and G; Tr. 68-70, 99). He recently negotiated a modification of his automobile loan to reduce his monthly payments (AX E). He testified he has been directing his available funds to paying recent debts that have not been charged off or turned over for collection (Tr. 52). He has not considered filing another Chapter 7 bankruptcy (Tr. 95).

In March 10, 2004, Applicant submitted a SF 86. He answered "no" to question 38, asking if he had been more than 180 days delinquent on any debts in the last seven years, and question 39, asking if he was currently more than 90 days delinquent on any debts. He did not disclose the debts alleged in the SOR.

Applicant denied intentionally falsifying his SF 86. He testified he had previously executed a SF 86 in November 2002 (GX 9), on which he had answered "no" to the same two questions. When he resubmitted his SF 86 in March 2004, he was aware of his financial problems and concerned about their impact on his eligibility for a clearance. He discussed his concern with his facility security officer. With his background in law enforcement, he knew his background investigation would be rigorous and would uncover any financial problems. He testified that the March 2004 SF 86 was a copy of a SF 86 he executed in November 2002. He executed the November 2002 SF 86 electronically and did not pay attention to the questions about his finances (Tr. 78-82). When it was necessary to resubmit his SF 86, his security officer faxed him a signature page and two release forms. He signed and returned them without reviewing the November 2002 version or seeing the version that was submitted in March 2004 (Tr. 87-88). Applicant's testimony that the March 2004 SF 86 was a copy of the November 2002 version is corroborated by identical spelling and typographical errors in the answers to question 43 on both versions ("finacial" instead of "financial," "i" instead of "I," "ect" instead of "etc," and "physiciatrist" instead of "psychiatrist").

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 (App. Bd. Dec. 19, 2002).

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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information.

However, 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; *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. 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 credit history and his admissions raise DC 1. Applicant is willing to satisfy his debts, but he is unable to do so, thereby raising DC 3.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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).

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 resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems 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 circumstances beyond his control, it is appropriate to consider whether he acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003).

The evidence establishes several conditions beyond Applicant's control: his separation and divorce, his illnesses and resulting inability to work, his uninsured medical bills, and the hurricane damage to his home. However, the evidence also shows that Applicant and his ex-wife were living beyond their means before the onset of his disability and the divorce. After the divorce, he used his limited financial resources to save his home from foreclosure, but at the expense of allowing other obligations to become delinquent. He has been able to keep recent bills current, but unable to resolve the older debts. He is now in a position where he is faced with more than \$9,500 in delinquent debt, and a net monthly remainder of \$11. I conclude MC 3 is established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is not established because Applicant has not sought financial counseling. He has not consulted with anyone about the possibility of filing again for bankruptcy. His financial problems are not being resolved.

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). Good intentions alone are not enough to establish a "good-faith effort." MC 6 is not established, because Applicant has been financially unable to mount any effort to resolve his delinquent debts.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "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." Directive ¶ E2.A5.1.2.2.

Applicant admitted that his negative answers to questions 38 and 39 on his SF 86 were incorrect, but he denied intentionally concealing his financial problems. 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 the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)

Applicant's explanation that he reexecuted a two-year-old version of his SF 86 without checking it was plausible, credible, and corroborated by documentary evidence. I conclude DC 2 is not raised by the evidence. No other disqualifying conditions under this guideline are raised. I resolve the allegations under this guideline in Applicant's favor.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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.

Applicant's financial problems are extensive and serious. They began when he and his ex-wife spent beyond their means. Applicant's divorce and loss of his ex-wife's income, coupled with his medical problems, left him financially overextended. He has adopted sound financial habits with respect to current obligations, but lacks the financial means to resolve old delinquencies. He is a reliable, dependable, and skilled employee. While I am satisfied he is unlikely to repeat past financial mistakes, he is hopelessly overextended, and thus vulnerable to pressure, coercion, exploitation, or duress. After weighing the disqualifying and mitigating conditions under Guidelines F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the interests of national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: For Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: Against Applicant

Subparagraph 1.o: For Applicant

Subparagraph 1.p: For Applicant

Subparagraph 1.q: For Applicant

Subparagraph 1.r: Against Applicant

Subparagraph 1.s: For Applicant

Subparagraph 1.t: For Applicant

Subparagraph 1.u: Against Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge