

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-08030

DECISION OF ADMINISTRATIVE JUDGE

JACQUELINE T. WILLIAMS

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 52 years old and employed as a painter by a defense contractor for about four years. He has delinquent debt totaling approximately \$61,000. He also deliberately falsified material facts on several questions on his security clearance application. He has a history of criminal activity, which includes approximately 10 arrests. He has also been incarcerated, and on two separate occasions, he served more than one year in jail. Applicant is prohibited from holding a security clearance based on his incarcerations for more than a year in 1985 and 1990. Applicant has failed to mitigate the criminal conduct, personal conduct, and financial considerations security concerns. Clearance is denied.

STATEMENT OF THE CASE

On April 8, 2004, Applicant executed a security a Security Clearance Application (SF 86).⁽¹⁾ On June 13, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted or revoked.

In a sworn, written statement, certified on August 8, 2006, Applicant responded to the SOR allegations and requested an in-person hearing. The case was assigned to me on September 26, 2006. A Notice of Hearing was issued on October 6, 2006, scheduling the hearing for October 27, 2006. The hearing was conducted as scheduled. At the hearing, the Government submitted nine exhibits, admitted as Gov. Exs. 1-9 without objection. Applicant submitted two exhibits, admitted as Exs. A and B without objection. The transcript (Tr.) was received on November 13, 2006.

MOTION

During the hearing, Department Counsel moved to withdraw allegation ¶ 1.g of the SOR.⁽²⁾ Applicant testified that the allegation was false because at the time frame alleged, he was already incarcerated.⁽³⁾ Department Counsel's motion was granted.

FINDINGS OF FACT

Applicant admitted the factual allegations pertaining to criminal conduct under Guideline J, subparagraphs 1.a through 1.h, 1.l, and 1.m. He denied the allegations in subparagraph 1.i through 1.k. He admitted the allegations in guideline E, subparagraph 2.a, 2.b, 2.d, and 2.e. He denied the allegation in subparagraph 2.c. Applicant admitted the allegations pertaining to financial considerations under Guideline F, subparagraphs 3.b through 3.e. He denied the allegation in subparagraph 3.a. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is 52 years old and has been employed by a defense contractor as a painter for about four years.⁽⁴⁾ He has been married and divorced twice. He has two sons aged 21 and 16 for whom he continues to pay child support, which includes past due child support obligations.

Applicant was arrested on July 3, 1984, and charged with financial transaction card theft, a felony, and four counts of financial transaction card fraud. He pled guilty and was placed on probation for three years. The court ordered him to pay a \$20 charge for each count and restitution of \$624.25. He was arrested for a probation violation on August 20, 1985, and served two years, three months, and seven days in confinement.

On September 24, 1984, Applicant was arrested and charged with writing bad checks. He was convicted and sentenced to 10 days, suspended on payment of fines, and fined \$55. In 1985, Applicant was charged with violation of Georgia employment security law. He testified that this incident was related to the writing of the bad checks.⁽⁵⁾

Applicant was arrested on June 30, 1985, and charged with theft of an automobile, a felony. He pled guilty and was sentenced to four years confinement, concurrent with the sentence for his arrest on July 3, 1984, as mentioned above.

On April 26, 1990, Applicant was arrested and charged with two counts of forgery, a felony; uttering, a felony; and petit larceny. He was found guilty of forgery and sentenced to three years in jail, which was suspended, and he was placed on three years probation. The uttering and petit larceny counts were *nolle prosequi*.

Applicant was arrested on October 15, 1990, and charged with embezzlement, a felony. He was found guilty and sentenced to four years in a state penitentiary. He served two months in a correction center, 24 months at a minimum security center, and was placed on probation for two years.

He was charged with failure to appear on January 17, 1992. The charge was *nolle prosequi*.

On July 23, 1993, Applicant was charged with contempt of court. Applicant denied this allegation.

On September 9, 2000, Applicant was arrested and charged with trespassing. Applicant denied this allegation.

On November 13, 2000, Applicant was arrested and charged with failure to appear on a misdemeanor charge and a probation violation. The probation violation charge was dismissed. He served three months in jail. Applicant denied this allegation.

When completing his SF 86 in April 2004, Applicant responded "no" to Question 21, which asked whether he been charged with or convicted of any felony offense.⁽⁶⁾ Applicant deliberately failed to list that he had been charged with or convicted of felony offenses in 1984, 1985, and 1990.

On his SF 86, Applicant responded "no" to Question 26, which asked whether in the last seven years, he had been

arrested for, charged with, or convicted of any offense(s) not listed elsewhere on the SF 86.⁽⁷⁾ Applicant deliberately failed to list that on at least two separate occasions in 2000, he was arrested and/or charged with offenses.

Applicant responded "no" to Question 37 on his SF 86, which asked whether in the last seven years he had any unpaid judgments.⁽⁸⁾ He deliberately failed to list that a judgment was filed against him in the last seven years for child support, totaling \$6,376.

On his SF 86, Applicant responded "no" to Questions 38 and 39, which asked whether in the last seven years he had been over 180 or 90 days delinquent on any debts. He failed to list that he was over 180 days delinquent on two debts (¶¶ 3.a and 3.b below). Also, he was over 90 days delinquent on the same debts mentioned earlier in this paragraph.

A credit bureau report, dated August 13, 2006, which serves as a basis for the financial allegations in the SOR, indicates Applicant has five debts, totaling approximately \$61,107. The debts at issue are as follows:

¶ **3.a/Arrow Services (\$740)** Account was placed for collection in about August 2000. Applicant denied responsibility for this debt.⁽⁹⁾ He has not done anything to determine whether this is his debt.⁽¹⁰⁾

¶ **3.b/Department of Social Services (\$6,376)** Account is for a judgment placed against Applicant by Child Support Enforcement in April 2001. This debt has not been paid. He submitted a credit bureau report which indicates two child support judgments against Applicant for \$4,541 and \$6,376. He admitted responsibility for these debts.⁽¹¹⁾ He testified that these debts are being paid through payroll deductions.⁽¹²⁾

¶ **3.c/Department of Social Services (\$4,541)**⁽¹³⁾ Account is for a judgment placed against Applicant by Child Support Enforcement in May 2004. This debt has not been paid.

¶ **3.d/Child/Family Support Obligations (\$29,560)** This debt was placed against Applicant in March 2004 for his youngest son, living with his mother in a state other than where Applicant lives.⁽¹⁴⁾ This debt has not been paid

¶ **3.e/Delinquent Tax Lien (\$19,890)** Applicant is currently paying off this debt. He submitted a document to show payments made by him to the IRS based on a settlement he made with them. He pays \$600 a month starting back in November 2005.⁽¹⁵⁾ Applicant went a couple of years without paying taxes, and he also had arrearage because not enough tax was being withheld from his paychecks.⁽¹⁶⁾

Applicant's financial difficulties began in the mid-1980s.⁽¹⁷⁾ When he was released from jail, his debts were delinquent and it took awhile before he was able to get a job to pay his current and delinquent bills. At that time, he was also married and when he divorced, his debts included child support.⁽¹⁸⁾ Child support payments were processed through payroll deduction, but there were arrears due to the period of Applicant's incarceration.⁽¹⁹⁾ Every year his tax returns are automatically put toward child support arrears.⁽²⁰⁾

Applicant does not have a financial budget. His significant other handles his finances.⁽²¹⁾ He possesses a BMW 2002 car and his car payment is \$752 a month.⁽²²⁾ He has about \$2,000 outstanding in medical expenses that were not covered by his insurance.⁽²³⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation

of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁴⁾ The Government has the burden of proving controverted facts.⁽²⁵⁾ The burden of proof is something less than a preponderance of evidence.⁽²⁶⁾ 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.⁽²⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁸⁾

No one has a right to a security clearance⁽²⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽³⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽³¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽³²⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J (Criminal Conduct): *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Guideline E (Personal Conduct): *The Concern:* 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

Guideline F (Financial Considerations): *The Concern:* 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. § 986(c)(1) (Smith Amendment), which was subsequently amended and revised, mandates restrictions on the granting or renewal of security clearances. Under the provision, a person convicted in any court of the United States of a crime, who was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year, may not be granted a security clearance by DoD. In meritorious cases, the disqualification may be waived.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

Criminal Conduct

The Government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct. Applicant has been convicted of the following: financial transaction card theft and credit card fraud in 1984; writing bad checks in 1984; violation of employment security law in 1985; theft of an automobile; forgery in 1990; embezzlement 1990, and a few other charges of failure to appear, trespassing, and a couple of probation violations. Consequently, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*allegations or admission of criminal conduct, regardless of*

whether the person was formally charged) and CC DC E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply.

Various factors can mitigate the criminal conduct security concern. However, since there is a plethora of criminal charges of different types against Applicant for 1984 to 2000. None of the available Criminal Conduct Mitigating Conditions apply. Moreover, Title 10 U.S.C. § 986(c)(1) applies with respect to two of Applicant's convictions. He was convicted of larceny and served one year and one day of incarceration. His conviction for grand larceny and forgery included three years of incarceration. Applicant has not mitigated the Government's case. Accordingly, allegations 1.a through 1.f, and 1.h through 1.m are concluded against Applicant.

Personal Conduct

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

Applicant deliberately falsified material facts on his SF 86. He failed to list that he had been charged with or convicted of felony offenses in 1984, 1985, and 1990. He then failed to disclose that on at least two separate occasions in 2000, he had been arrested and/or charged with offenses. Finally, he did not disclose that he had debts that were more than 180 or 90 days delinquent. Consequently, Personal Conduct Disqualifying Condition 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*) applies. None of the available Personal Conduct Mitigating Conditions apply. Applicant has not mitigated the Government's case. Accordingly, allegations 2.a through 2.e are concluded against Applicant.

Financial Considerations

Under Guideline F, a security concern exists for an individual who is financially overextended. The person is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be unconcerned, negligent, or careless in properly handling and safeguarding classified information. Applicant has a history of financial problems. His current delinquent debts total approximately \$61,107. Thus Financial Considerations Disqualifying Conditions (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.

Various conditions can mitigate security concerns arising from financial difficulties. Nearly two-thirds of Applicant's debt, \$40,477, is for outstanding child support payments. Moreover, there is a \$20,000 tax lien against him. Yet, Applicant has a car note for a 2002 BMW for \$752. Undoubtedly, a lower car payment would give him more liquidity so he could pay greater amounts to reduce his child support arrears and outstanding tax debts. Applicant is a prime candidate for participating in financial counseling, since he was unaware of his spending habits or monthly outlay of expenses at the hearing. Consequently, none of the available Financial Considerations Mitigating Conditions apply. Applicant has not mitigated the Government's case. Accordingly, allegations 3.a through 3.e are concluded against Applicant.

I have considered all the evidence in the case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant has a hard time acting as a mature, responsible adult. Applicant has a criminal history with a myriad of arrests and charges, including being in and out of jail numerous times between 1984 and 2000. Moreover, he deliberately falsified several questions on his SF 86. Based on the evidence of record, however, it is clearly not consistent with the national interest to grant Applicant a security clearance. For the reasons stated, I conclude Applicant is not suitable for access to classified information.

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:

Paragraph 1. Guideline J (Criminal Conduct): 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: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

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

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Paragraph 3. Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against Applicant

DECISION

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

Jacqueline T. Williams

Administrative Judge

1. Gov. Ex. 1 (Security Clearance Application, certified April 8, 2004).
2. SOR ¶ 1.g stated: "You were charged on about November 27, 1990, in Norfolk, Virginia, with Failure to Appear. The case was nolle prosequi."
3. Tr. 133.
4. *Id.*; Tr. 18-19.
5. Tr. 106.
6. Question 21 (Your Police Record - Felony Offenses Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607).
7. Question 26 (Your Police Record - Other Offenses In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.)
8. Question 37 (Your Financial Record - Unpaid Judgments In the last 7 years, have you had any judgments against you that have not been paid?)
9. Tr. 40-43.
10. Tr. 42-44.
11. Tr. 44-45; Ex. A (Credit Bureau Report, dated October 26, 2006).
12. Tr. 46.
13. *See* ¶ 3.b above.
14. Tr. 48.
15. Tr. 56-59; Ex. B (Taxpayer payment history, dated October 26, 2006).
16. Tr. 61-65.
17. Tr. 25-28.
18. Tr. 29-30.
19. Tr. 31-32.
20. Tr. 46.
21. Tr. 65.
22. Tr. 75, 82.
23. Tr. 81

24. ISCR Case No. 96-0277 (July 11, 1997) at 2.
25. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
26. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
27. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
28. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
29. *Egan*, 484 U.S. at 531.
30. *Id.*
31. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
32. Executive Order 10865 § 7.