

Date: December 6, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0681

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Matthew E. Malone, Esquire

Attorney-Advisor to Department Counsel

William S. Fields, Esquire

Department Counsel

Pro se

STATEMENT OF CASE

On September 23, 1996, the Defense Office of Hearings and Appeals (DOHA), 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, issued a Statement of Reasons (SOR) to ----- (Applicant), which detailed reasons 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, continued, denied, or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

In a sworn written statement, dated October 15, 1996, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to Administrative Judge Kathryn Moen Braeman on November 6, 1996, but due to caseload considerations, was reassigned to, and received by, this Administrative Judge on November 6, 1996. A notice of hearing was issued on November 7, 1996, and the hearing was held before me on November 13, 1996.⁽¹⁾ During the course of the hearing, eight Government exhibits and no Applicant exhibits (none were offered),⁽²⁾ and the testimony of one witness (the Applicant), were received. The transcript was received on November 26, 1996.

RULINGS ON PROCEDURE

During the proceeding, Department Counsel moved to amend the SOR to conform to the expected evidence. Specifically, he sought to amend subparagraph 1.c. thereof by deleting the figure \$7,831.97, and substituting therefor the figure \$5,315.00. There being no objection by Applicant, the motion was granted, and the SOR was amended as described above.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to financial considerations under Criterion F (subparagraphs 1.a. through 1.p.). Those admissions are hereby incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 62 year old male employed by a defense contractor, and he is seeking to obtain a SECRET clearance. He was originally granted an earlier security clearance in February 1962, which he held for a number of years.

Applicant has been financially overextended since about April 1989,⁽³⁾ and as a consequence, he has established a history of not meeting his financial obligations. Notwithstanding his repeatedly declared intentions to resolve his outstanding financial obligations, he has demonstrated an inability or unwillingness to satisfy them.

Applicant was gainfully employed in the defense industry, making about \$75,000 per year, until about September 1988, when he became self-employed and opened a franchise of a travel service company. Cash flow difficulties eventually arose in Applicant's commercial relationships, and in an attempt to maintain his business, he frequently advanced funds which were to have been reimbursed to his company by other organizations. They were not. The financial difficulties of other companies, including the franchise holder, had a negative impact on his operation, and the absence of reimbursements, and an inability to pay continuing business obligations, devastated his business. Applicant eventually fell far behind in his financial obligations arising out of both his business and his personal affairs, and his financial condition was out of control.

Applicant's inability to catch up on his finances resulted in accounts being charged off, turned over for collection, and in three instances (subparagraphs 1.b., 1.h., and 1.k.), judgments were entered against him by creditors. As he explained, he stopped contacting his creditors when it became an exercise in futility. Exacerbating Applicant's financial problems was his inability to return to the permanent workforce in a salaried position commensurate with his experience and training. During the period commencing in September 1988, and continuing until February 1995, Applicant was part of a workforce which was either self-employed, under-employed, or unemployed. One employer during the period June-September 1991 went into bankruptcy. In September 1994, he obtained part-time employment, and he held that position until he obtained his current position in February 1995. He currently earns approximately \$52,000 per year. Adding to his problems, Applicant's present employer has filed for bankruptcy protection under Chapter 11.

Applicant currently has outstanding past due financial obligations, to a number of different creditors, in the approximate amount of \$47,285.00.⁽⁴⁾ Of that amount, \$6,682.00 is attributed to business expenses (subparagraph 1.a.), and three accounts (subparagraphs 1.c., 1.f., and 1.l.), totaling approximately \$6,000.00 are speculated by Applicant to be the debts of his son -- a person with essentially the same name as Applicant.⁽⁵⁾ Even if true, the remaining balance of undisputed outstanding personal financial obligations would be about \$34,600.00.

Applicant has repeatedly indicated an intention to satisfy all of his outstanding financial obligations, but to date, with the exception of the one informal third party inquiry, has taken no action to resolve any of the debts. On February 12, 1996 -- nine months prior to the hearing, he stated:⁽⁶⁾

I want to repay all of my debts, but I did not just want to go to them one at a time because I believe that the other creditors would then come after me and I cannot afford to pay them all at one time. I wanted to save some money in order to contact a financial advisor or credit counselor to see if the creditors would negotiate a lesser amount as settlement on the accounts as soon as I have enough cash to do so. I hope to be able to do this sometime in 1996. I chose

not to file bankruptcy because I feel that I am liable to the payment of my debts. I fully intend to repay all of my debts. If after researching the accounts that I believe pertain to my son, they are debts of mine, I intend to pay these debts.

Five months later, in July 1996, Applicant had not taken one single additional step to resolve his outstanding financial obligations. Instead, he offered four explanations for further inaction: 1) his current employer had filed for bankruptcy protection and owed Applicant unreimbursed expenses and vacation pay, totaling about \$1,000.00 to \$1,200.00; 2) he had to obtain two secured credit cards for travel in connection with his job; 3) he had unexpected automobile repairs totaling \$2,500.00, as well as continuing auto lease payments of \$400.00 per month; and 4) he has not been able to save any money to apply towards his debts.

In his Response to SOR in October 1996, Applicant offered a fifth reason for his inaction: the debts have, for the most part, been charged off, and the creditors have not been exerting any pressure on him to repay his debts. During the hearing in November 1996, Applicant added a sixth reason for his failure to take any further action: he was afraid to reopen the matter for fear of opening "Pandora's box."

In fact, during the past seven years, Applicant has taken no personal action to obtain counseling for the problem; to initiate a good-faith effort to repay any of the overdue creditors; to satisfy any of the three judgments against him; to respond to at least one offer of settlement; or to resolve any issues pertaining to whether some of the debts were his or those of his son. Instead, he has offered a combination of promises, excuses, explanations, rationalizations, and justifications for his inaction.

Applicant previously served on active military service from August 1952 until August 1956. He has been employed by his present employer since February 1995. Co-workers, former subordinates, and long-term friends support his application, and have characterized him with such terms as trustworthiness, discretion, dependable, and professional.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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 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 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.

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

[Financial Considerations - Criterion F]: 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 include:

(1) a history of not meeting financial obligations;

(3) inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

(3) 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);

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽⁷⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to the potential for, rather than actual risk of, compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Criterion F, the Government has established its case. Applicant has been portrayed as a person who is financially overextended, with a history of bad debts and delinquent or uncollectible accounts or debts written off by creditors as uncollectible losses, and who has displayed an indifference to, or disregard of, those financial obligations, with little or no apparent or voluntary effort to satisfy them. Based on the evidence, I conclude that the characterization is a fair one.

Applicant's initial financial difficulties commenced after he had left a salaried position in the defense industry where he was earning approximately \$75,000 per year, and entered an entrepreneurial endeavor by opening his own franchise of a travel service company. The business eventually faltered when cash flow difficulties arose, and first Applicant's business, and then his personal, financial obligations escalated to a point beyond immediate repair. Accounts were

charged off, turned over for collection, and judgments were entered against him. Eventually, Applicant stopped contacting his creditors.

There is no evidence that Applicant had been living a lifestyle reflecting irresponsible, reckless, or improvident expenditures. Rather, his initial financial problems were exacerbated by factors largely beyond his control, namely business reverses. His condition was further buffeted by his inability to return to the permanent workforce in a salaried position commensurate with his experience and training, and his having spent significant periods of time, from September 1988, until February 1995, as part of a workforce which was either self-employed, under-employed, or unemployed. He obtained his present position in February 1995, and currently earns approximately \$52,000 per year.

While it is true that Applicant has repeatedly expressed an intention to satisfy his outstanding financial obligations, his inaction stands in stark contrast to his declared intentions. One fact is inescapable, and it is that during the past seven years, Applicant has taken no personal action to obtain counseling for the problem; to initiate a good-faith effort to repay any of the overdue creditors; to satisfy any of the three judgments against him; to respond to at least one offer of settlement; or to resolve any issues pertaining to whether some of the debts were his or those of his son. Instead, he has exhibited an indifference to, and disregard of, his outstanding financial obligations, both business and personal; seemingly attempted to ignore the situation; and offered a combination of hollow promises, excuses, explanations, rationalizations, and justifications for his inaction.

I am not insensitive to the realities of life, and can empathize with Applicant's initial predicament. However, despite his eventual employment -- whether it was self-employment, under-employment, or his present employment at \$52,000 per year, Applicant managed to earn a living sufficient to cover his current needs and responsibilities, with something left over to be saved, invested, spent, or turned over to creditors. It appears that he opened new lines of credit, saved some money, invested some money, spent other money, and leased a car for \$1,000 down, and \$418.86 per month.⁽⁸⁾ He has failed to offer any evidence of mitigation other than professed good intentions, and simply chose to ignore the old creditors. Moreover, he has repeatedly failed to follow-up on promises to initiate good-faith efforts to resolve his outstanding financial obligations. His seven years of inaction, generally, and the period since February 1995, specifically, as well as his repeated failures to initiate any such efforts, I find to be significant.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 1.a. through 1.p. of the SOR are concluded against Applicant.

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 Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion F: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Subparagraph 1.k.: Against the Applicant

Subparagraph 1.l.: Against the Applicant

Subparagraph 1.m.: Against the Applicant

Subparagraph 1.n.: Against the Applicant

Subparagraph 1.o.: Against the Applicant

Subparagraph 1.p.: Against the 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.

Robert R. Gales

Chief Administrative Judge

1. It should be noted that while Item 8, Enclosure 3, of the Directive requires that an applicant be afforded at least 15 days notice in advance of the time and place of the hearing, Applicant had previously waived that period, requested an expedited process, and agreed to proceed at the time and place proposed. At the hearing itself, Applicant again indicated a willingness to proceed. *See*, Transcript (Tr.), at 9.
2. On November 14, 1996, one day after the record closed, a letter was submitted in Applicant's behalf by an attorney whom Applicant had previously identified as his prospective representative. No mention was made that the attorney was to have appeared as a witness, rather than as a representative. Because no request had been made by Applicant to keep the record open in anticipation of the submission, and the submission was made after the record had closed, I have not considered the document nor the information appearing therein.
3. Despite the clear evidence of financial overextension, Applicant disputes the characterization, and minimizes the importance of the currency of the situation by pointing out that the debts were incurred in the late 1980s and early 1990s, and he has managed to avoid accumulating any additional debts. *See* Response to SOR, at 2.
4. One creditor (subparagraph 1.d.) had offered to settle the account for \$4,001.81, which was a discount of 50 percent, but Applicant made no personal effort to do so. He did, however, in February 1996, ask an unidentified third party to inquire about the account. Also, Applicant contends that the debts identified in subparagraphs 1.d. and 1.o. are the same debt, but he has offered no evidence to support his contention. The two credit reports (Government Exhibits 4 and 8) reflect the existence of two separate account numbers as well as different amounts owed. Moreover, Applicant's own sworn statement of July 1996 (Government Exhibit 2, at 2 and 3) reflects them to be separate debts. *See contra*, his sworn statement of February 1996 (Government Exhibit 5, at 4), wherein he says they are the same debt.

5. Applicant's son has a "junior" at the end of his name.

6. *See*, Government Exhibit 5, at 4 and 5.

7. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

8. *See*, Government Exhibit 2, at 4.