

KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Forty year-old Applicant's indebtedness is mitigated due to existence of serious errors in credit bureau report and Applicant's payment of remaining smaller debts, but Applicant is not eligible for clearance because she was untruthful about material aspects of her personal background during the clearance screening process. Clearance is denied.

CASE NO: 01-15212.h1

DATE: 02/21/2002

DATE: February 21, 2002

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-15212

**DECISION OF ADMINISTRATIVE JUDGE
BURT SMITH**

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty year-old Applicant's indebtedness is mitigated due to existence of serious errors in credit bureau report and Applicant's payment of remaining smaller debts, but Applicant is not eligible for clearance because she was untruthful about material aspects of her personal background during the clearance screening process. Clearance is denied.

STATEMENT OF THE CASE

On September 14, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, 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. In an answer notarized October 3, 2001, Applicant responded to the allegations set forth in the SOR, with supporting documents, and she elected to have her case decided on the written record, in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to the Applicant on December 11, 2001, and she was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on December 19, 2001, and she submitted additional information on January 17, 2002. The case was assigned to the undersigned Administrative Judge on February 4, 2002.

FINDINGS OF FACT

The Applicant is forty years old, and she is employed by a defense contractor as a staff technician. She seeks a DoD security clearance in connection with her employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraphs 1, 2 and 3 of the Statement of Reasons. The following findings of fact are entered as to the allegations in the SOR.

Paragraph 1 Guideline F (Financial Considerations). The Government alleges the Applicant is ineligible for clearance because she has recurring financial difficulties as well as a former debt involving criminal conduct. The Applicant responds, in general, that the Government's information of indebtedness is largely inaccurate, and she denies engaging in any criminal conduct.

Beginning with subpara 1.a., Applicant denies the accuracy of the Government's credit bureau report (CBR, Gov. Ex. 5) which indicates she is indebted to a hospital in the amount of \$16,384, and the debt is eight years' delinquent. Applicant answers that she has never received services of any kind from the now-bankrupt hospital, and she attaches a credit report of her own which does not list the hospital as a creditor. The Government offers no evidence in rebuttal, and Applicant's explanation is accepted.

With regard to subpara. 1.b., the Government alleges Applicant is indebted to a savings and loan association in the amount of \$58,623 pertaining to a delinquent mortgage, and foreclosure proceedings have been initiated. Applicant responds that the CBR information is incorrect, and she submits a letter from the creditor's successor company confirming her mortgage loan was paid in full in 1996 and has a zero balance.

In subpara. 1.c. the Government alleges that Applicant owes a doctor \$128, and payment was referred to a collection agency in 1995. In her response Applicant denies the debt and states that neither the doctor nor the collection agency can be located to provide supporting information. The Government offers no evidence in rebuttal, and Applicant's denial is accepted.

Subpara. 1.d. of the SOR alleges that, based upon the CBR, the Applicant is indebted to a gas supplier for \$750, and the debt has been delinquent since 1996. However, Applicant presents a letter from the supplier confirming that Applicant is not a present or former customer of the company and she is not in debt. (A similar situation exists with respect to subpara. 1.i. where the named creditor informs Applicant that their accounting records do not reflect a debt owed by her.) Concerning subpara. 1.e., Applicant states that she has no recollection of services provided by the creditor, but she paid the debt to clear her record, and she attaches a receipt.

As to subpara. 1.f., Applicant wrote a check to a local merchant in 1996 but the check was returned for insufficient funds, and the merchant referred the check to the sheriff for prosecution as a hot check. Applicant made restitution, but she was nonetheless convicted of hot check charges. (Further discussion of this incident is presented below.)

With the exception of subpara. 1.i., discussed previously, the remainder of Paragraph 1. alleges Applicant's indebtedness to various creditors, mostly medical, in the total amount of approximately \$1,000. (SOR, subparas. 1.g.; 1.h.; 1.j.; 1.k.; 1.l.; and 1.m.) Applicant admits to some of the debts and denies others, but nevertheless she has paid all of the creditors in full and presents a receipt for each payment.

As noted above, the Government alleges that the debt in subpara. 1.f. involved criminal conduct on the Applicant's part. Concerning the origin of the debt, it is uncontroverted that in late 1996 Applicant wrote a hot check to a local merchant who turned the check over to the sheriff for prosecution. The sheriff then issued a warrant for Applicant's arrest.

The evidence is mixed regarding the chronology of events following issuance of the arrest warrant. However, upon a review of the record it is found that, more likely than not, Applicant learned of the warrant and made restitution, hoping to pre-empt an arrest and possible conviction for check fraud.

Applicant took the merchant's receipt to the magistrate's clerk in April 1997, seeking to have the arrest warrant withdrawn and charges dismissed. Unfortunately for Applicant, charges were not withdrawn or dismissed. Instead, a conviction for check fraud was entered by the clerk, and Applicant paid a \$90 fine. Even considering the informality of the clerk's process and the absence of a magistrate's involvement, Applicant's later claim that she had no knowledge of the conviction is not credible.

Paragraph 2 Guideline E (Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she willfully provided false material information to DoD during the clearance screening process. Applicant admits the information in question is erroneous, but she offers explanations to support her claim that no deception was intended.

In subparas. 2.a. through 2.c. the Government alleges that Applicant failed to disclose material information about her past arrests, convictions, and delinquent debts when she answered questions 24, 26, 38 and 39 on a Security Clearance Application completed by the Applicant on September 20, 1999. (Gov Ex. 4.) According to the SOR, the Applicant's omissions were deliberately made in an effort to deceive the Government.

Subpara. 2.a. pertains to Question 24 which asks Applicant whether she has "ever been charged with or convicted of any offense(s) related to alcohol or drugs". Applicant answered "No" to this question even though she was arrested and convicted of a DUI offense in December 1997. Applicant admits in her answer to the SOR that she knew of the arrest but claims she was not convicted until June 21, 2000, nine months after answering the question, and for that reason she answered "No". (Gov. Ex. 7.) Applicant provides no documentation to support this claim, but even if true it does not relieve her of the obligation to report the 1997 charge.

Subpara. 2.b. alleges Applicant falsely answered question 26 of the security application which asks Applicant whether she has been arrested for charged with any other offenses during the last seven years. Applicant answered "No" to the question even though she was convicted of the hot check offense in 1997. Applicant answers that she was unaware a

conviction was entered in the court records, but this claim of innocent mistake has been previously considered and rejected. (See discussion above pertaining to subpara. 1.f. of the SOR.)

The Government alleges under subpara. 2.c. that Applicant also gave false material information in response to questions 38 and 39 of the security questionnaire which asks Applicant if she is currently over 180 days or 90 days delinquent on any debts. Applicant answered "No" to each question, explaining in her SOR answer that she was unaware of any overdue debts at the time. In the earlier discussion concerning Applicant's debts it was found that when Applicant completed the security questionnaire she was indebted to at least six creditors for a total amount of approximately \$1,000, which she later paid.

Two findings are reached as to Applicant's denial of any delinquent debts. First, Applicant's claim that she had no knowledge of several debts totaling \$1,000 is not credible under all the circumstances. Second, although Applicant ultimately paid the debts in question this does not satisfy her obligation to truthfully inform the Government, when asked, that the debts existed.

In subpara. 2.d. of the SOR, the Government alleges Applicant deliberately failed to provide information pertaining to her DUI conviction during the security clearance interview and in her subsequent sworn statement of June 27, 2000. (Gov. Ex 6.) However, the content of Applicant's sworn statement is restricted entirely to financial matters, presumably reflecting the subject matter raised by the DoD agent during the preparatory interview.

Applicant has a duty to be truthful, but the evidence does not show that her DUI was a matter of any discussion or inquiry during the interview, even in an indirect sense. Under these circumstances it can not be found that Applicant's failure to admit her DUI was a deliberate and intentional act of deception. Evidence indicates the agent's questions and discussion were focused on Applicant's debts, and it is not likely Applicant was simultaneously thinking of her DUI.

However, the result is different with regard to subpara. 2.e.. Here the subject of the interview was clearly related to Applicant's debts, and she was asked about her financial history. In her sworn statement she claims "I have not issued any bad checks". (Gov. Ex. 6.), but this claim is found to be deliberately false. (See above discussion pertaining to subpara. 1.f. of the SOR.)

Paragraph 3 (Guideline J) Criminal Conduct. The Government alleges in this paragraph that Applicant is ineligible for clearance because her false official statements constitute felony criminal conduct under Title 18 United States Code section 1001. According to the Government, Applicant's felony criminal activity causes doubt as to her trustworthiness. Applicant admits to the facts alleged, but she denies any criminal intent.

The factual basis for the Government's allegations of criminal conduct arises out of the falsifications and deliberate omissions of material facts set forth under Paragraph 2 of the SOR.

These allegations have been discussed and addressed in the preceding portion of this decision. Accordingly, the findings entered as to Paragraph 2 of the SOR are incorporated by reference and are made applicable under Paragraph 3 as well.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

In addition to these guidelines the Directive provides that under the "whole person concept" the Administrative Judge shall also consider (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 entire record, I find the following adjudicative guidelines have application in this case:

GUIDELINE F - Financial Considerations.

Disqualifying Conditions.

2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

Mitigating Conditions.

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.);

6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

GUIDELINE E - Personal Conduct.

Conditions that could raise a security concern and may be disqualifying include:

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;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

Conditions that could mitigate security concerns include:

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

GUIDELINE J - Criminal Conduct.

Conditions that could raise a security concern and may be disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

(No mitigating conditions have application.)

Additionally, the federal felony provisions of 18 USC 1001, pertaining to false material statements, are considered in reaching a decision in this case.

CONCLUSIONS

In DOHA cases, the Government has the initial burden of going forward with sufficient evidence to prove controverted facts alleged in the Statement of Reasons. If the Government is successful, the burden then shifts to the Applicant to produce evidence sufficient to overcome or outweigh the Government's proof. In all cases, however, the Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

As noted by the United States Supreme Court in Department of Navy v. Egan, 484 U.S. 518, 531 (1988) "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Thus, the Applicant's ultimate burden of persuasion is a heavy one.

The Government is first concerned that Applicant has a pattern of excessive indebtedness which causes doubt as to her reliability and trustworthiness in a security environment. Where an Applicant repeatedly fails to demonstrate responsible conduct in the payment of lawful creditors, it gives rise to the possibility that Applicant may not pay due regard to rules and regulations governing his or her conduct as a clearance holder. Furthermore, an Applicant's serious indebtedness, if it exists, might attract the attention of unfriendly agents probing for weaknesses in the defense security system.

Regarding Applicant's debts identified in Paragraph 1 of the SOR the Government has met its initial burden of proof. The CBR, normally a reliable indicator of a debtor's financial habits and solvency, provides a picture of delinquent indebtedness on the Applicant's part. However, Applicant responds with persuasive evidence that the most serious part of the CBR is inaccurate.

According to the CBR the Applicant is indebted to a hospital and a mortgage company in the total and overdue amount of approximately \$75K. (SOR, subparas. 1.a. and 1.b.) Applicant denies these debts and casts doubt upon their existence with evidence sufficiently strong to support a conclusion in Applicant's favor. Furthermore, Applicant proves that three smaller debts are likely the result of errors in accounting or reporting. (SOR subparas. 1.c.; 1.d.; and 1.i.) As to the remaining delinquent debts totaling approximately \$1,000, Applicant has taken steps to pay each creditor in full.

There remains the meaning and significance of Applicant's hot check which she wrote to a local merchant in 1996. (SOR, subpara. 1.f.) The Applicant made restitution on the check, and there is no evidence she ever repeated this offense which occurred six years ago. For these reasons, Applicant's misconduct is mitigated although her duty to disclose the incident to the Government is a separate matter further discussed under Guidelines E and J. As to her indebtedness, though, Paragraph 1 of the SOR is concluded in favor of the Applicant.

As noted in the discussion above, Paragraphs 2 and 3 of the SOR are based upon the same facts which are largely undisputed. The Government meets its initial burden of proving that Applicant deliberately submitted false information when she completed a security questionnaire in September 1999. Applicant knowingly and willfully provided false negative answers to questions 24, 26, 38, and 39 of the questionnaire. In a sworn statement of June 27, 2000, Applicant also provided false information concerning her bad check. (The Government does not meet its initial burden of proving a deliberate omission by Applicant as alleged under subpara. 2.d.)

These questions pertained to Applicant's past arrests, convictions, delinquent debts, and unlawful conduct, and accurate information of this nature is highly important in making proper clearance decisions. In the absence of correct information the Government might grant clearance to a person who is not eligible for access to classified information.

Additionally, Applicant violated the felony provisions of 18 USC 1001 by knowingly providing false information when she gave untruthful answers on the questionnaire and in her sworn statement. Repeated instances of dishonest conduct during the security clearance process provide ample grounds to conclude that the Applicant is not a person in whom the Government can place its trust.

Upon a review of the entire record, to include Applicant's explanations in mitigation, extenuation and refutation, it is concluded that Applicant deliberately denied or withheld material information during the security clearance process, as alleged under Paragraphs 2 and 3 of the SOR, except subpara. 2.d. By doing so, and executing her questionnaire and sworn statement under a promise of truth, the Applicant violated the felony provisions of 18 USC 1001. Applicant's evidence in her defense has been considered, but she does not meet her ultimate burden of persuasion.

On balance, it is concluded that Applicant has not presented sufficient evidence in extenuation, mitigation, refutation or changed circumstances to overcome or outweigh the Government's evidence of personal misconduct and criminal activity under Paragraphs 2 and 3 of the SOR. As discussed above, Paragraph 1 of the SOR is concluded in Applicant's favor.

FORMAL FINDINGS

Paragraph 1. Guideline F: FOR THE APPLICANT

Subparas. 1.a.-1.m.: For the Applicant.

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparas. 2.a. - 2.c.: Against the Applicant.

Subpara. 2.d.: For the Applicant.

Subpara. 2.e.: Against the Applicant.

Paragraph 3. Guideline J: AGAINST THE APPLICANT

Subpara. 3.a.: 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge