

KEYWORD: Criminal Conduct; Personal Conduct; Financial

DIGEST: Applicant has mitigated the security concern caused by criminal conduct that ended in 2000. However, he has failed to mitigate the concern caused by his continuing display of financial irresponsibility. Clearance is denied.

CASENO: 02-28935.h1

DATE: 02/23/2005

DATE: February 23, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-28935

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esquire, Department Counsel

## **FOR APPLICANT**

M. Jefferson Euchler, Esq.

### **SYNOPSIS**

Applicant has mitigated the security concern caused by criminal conduct that ended in 2000. However, he has failed to mitigate the concern caused by his continuing display of financial irresponsibility. Clearance is denied.

### **STATEMENT OF THE CASE**

On February 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct), Guideline E (personal conduct), and Guideline F (financial considerations). Applicant submitted an answer to the SOR that was received by DOHA on March 5, 2004. Applicant admitted some SOR allegations, and denied others.

The case was assigned to me on November 8, 2004. A notice of hearing was issued on November 30, 2004, scheduling the hearing for December 17, 2004. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8 and admitted into the record without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted ten exhibits that were marked as Applicant's Exhibits (AE) 1-10 and admitted into the record without objection. The transcript was received on December 29, 2004.

The record was held open until January 7, 2005 to provide Applicant the opportunity to submit proof of payment of certain debts he testified were paid and for which he had receipts in a safe in storage. His attorney sent a letter to Department Counsel, dated January 7, 2005, in which he stated: "I am writing to inform you that at this time I have been unable to obtain additional documents as we had discussed at the close of the Hearing for the above-mentioned case." A copy of that letter was marked as Appellate Exhibit I and made part of the record.

## FINDINGS OF FACT

Applicant's admissions to some SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 30-year-old man who has been employed as an electronics technician by a defense contractor since September 2001. The performance evaluations, certificates, letters of appreciation, and letters of recommendation he presented attest to his excellent work performance and reputation as a diligent, dedicated, and even an outstanding employee. Applicant was previously employed as a telecommunications technician from May 1995 to August 2001, but was fired after information concerning outside work he was engaged in was discovered by his employer on his work computer. [\(2\)](#)

Although Applicant has never been married, he has three children, ages 12, 10, and 8, by two different women. He pays child support totaling \$989.00 per month to the mothers of his children. Applicant was previously in arrears on the child support because of one of the mother's delay in identifying him as the father. Applicant's support payments are withheld from his pay and he is now current with the support. As a result of those deductions, his net pay is currently only \$320.00 every two weeks.

Applicant was convicted of Receiving Stolen Property and Destroyed Property in 1992 after he drove a stolen automobile through a fence while he was attempting to flee from police. He was sentenced to 12 months jail (suspended), placed on unsupervised probation for one year, and ordered to pay costs in the amount of \$490.00.

Applicant was charged with Abusive Language based upon words he directed at a police officer in April 1996. That charge was dismissed the following month. He was charged with trespassing and two firearm charges in January 1997, after he became involved in an argument with a girlfriend. He admits having a weapon in his car at the time, but denies he displayed or discharged the weapon. The charges were dismissed in February 1997. Applicant was charged with Disorderly Conduct, Public Intoxication, and Possession of Marijuana in December 1998, after he became intoxicated and was thrown out of a nightclub. The marijuana was found in his sock when he was searched at a police station. All charges were dismissed in February 1999.

Applicant was next arrested in January 1999, following an argument with the mother of one of his children. He was charged with Assault and Battery of a Family Member, and admits grabbing the woman's arm. Applicant was convicted of this offense and sentenced to 60 days jail (suspended for two years on condition of good behavior and completion of a local offender's program), and ordered to pay costs in the amount of \$50.00.

The SOR alleges Applicant was found guilty of Disorderly Conduct in April 1999, and sentenced to ten days in jail. Applicant denies this charge. The only evidence offered to support this allegation is a computer printout of a lexis search based solely on Applicant's name. Applicant's name is hardly uncommon, and, accordingly, there is insufficient evidence to support this allegation.

Applicant's last arrest occurred in March 2000, when he was charged with Possession of Marijuana. He was convicted of this offense and sentenced to 30 days in jail (suspended), fined \$150.00 plus costs, and had his driver's license suspended. Applicant attended a drug program following this arrest, and successfully completed the program on January 20, 2001, despite having failed the intake drug screening conducted on December 2, 2000. Applicant admits he used marijuana about once or twice a week between 1994 and 2000. He denies having used marijuana since completion of the program in 2001.

Applicant was evicted from two apartments between January 1998 and October 2000. Five judgments, totaling \$1,629.00, were entered against him in connection with those evictions. Although Applicant testified he made at least a partial payment toward one of the judgments, he failed to present any documentation in support of that claim. He admits he has not made any payment toward at least one of the judgments.

Applicant had a student loan in the amount of \$1,828.00 placed for collection that as of July 2002 remained outstanding. He testified this account was satisfied by seizure of his income tax refund. Once again, he failed to submit any documentation in support of the claimed satisfaction of the account. However, considering the debt is owed to a federally guaranteed student loan program, his testimony concerning satisfaction of this account is credible.

Applicant had an automobile repossessed in about 1999 that resulted in a deficit owing after the resale of the vehicle in the amount of \$3,417.00. He has not made any payment on this account. Applicant has a second student loan in the amount of \$378.00 that has been submitted for collection and on which he has not made any payment. He had a cable television bill in the amount of \$122.00 that was submitted for collection in 1998, and which he claims to have paid. He failed to submit any proof of payment of this account.

Applicant submitted a security clearance application (SF 86) on April 15, 2002. In the SF 86, Applicant disclosed he had been fired from a job in 2001, attended drug classes in 1999, used marijuana for five and one-half years ending in November 1999, been convicted of domestic violence in 1997, been involved in a civil court action arising from an eviction, had two wage garnishments entered against him, and had suffered a repossession. The SOR contains numerous allegations of intentional falsifications by Applicant in the SF 86 and in a statement he provided because of incorrect or inaccurate answers he provided. Considering the explanations he provided in his statements and testimony for why he failed to fully disclose information, and the abundant adverse information he did disclose, I find he did not deliberately falsify the SF 86 or statement.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations, with their respective DC and MC, are most relevant in this case.

## **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> 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.<sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(12)</sup>

## **CONCLUSIONS**

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant was arrested on numerous occasions between 1992 and 2000. He was convicted of several offenses, one of which was charged as a felony but reduced to a misdemeanor as part of an apparent plea agreement. He admits criminal conduct in connection with at least the 1999 possession of marijuana charge that was dismissed. Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Applicant's last arrest for any offense happened nearly five years ago. The testimony of his witnesses, his successful completion of the drug program, his work performance, and the letters of recommendation he submitted establish he has matured significantly since that time and is unlikely to engage in criminal conduct in the future. Mitigating Condition (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply. Applicant has mitigated the security concern caused by his criminal conduct. Guideline J is decided for Applicant.

Under Guideline E personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's explanations for providing incorrect and/or inaccurate information in the statement he provided and the SF 86 he submitted are credible. Likewise, his explanation for the circumstances that resulted in his being fired from a job in 2001 are believable and not of a nature that creates a security concern. No disqualifying condition applies. Guideline E is decided for Applicant.

Under Guideline F, a security concern exists when a person has significant unpaid debts. An

individual who is financially overextended 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 irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant has collection accounts, judgments, and an automobile repossession deficit that have been outstanding for many years. He has failed to take any action to resolve these accounts, despite having been made aware of their security significance at least with issuance of the SOR in February 2004. DC 1: *A history of not meeting financial obligations*: and DC 3: *Inability or unwillingness to satisfy debts* apply in this case. No mitigating condition applies. Guideline F is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has mitigated the security concern caused by his criminal and personal conduct, but has failed to mitigate the financial considerations security concern. Accordingly, he has not overcome the case against him and satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a-i: For the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a-i: For the Applicant

SOR ¶ 3-Guideline F: Against the Applicant

Subparagraph a-d: 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. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The record establishes that this period of employment was briefly interrupted when Applicant was employed elsewhere from April to August, 1999.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.

