

DATE: February 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32076

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant filed for bankruptcy protection in 2002, and thereafter allowed additional debts to become delinquent. He has been arrested on several occasions for alcohol-related incidents, including domestic assault charges. Applicant has mitigated the security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On December 4, 2003, 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 F, financial considerations, Guideline J, criminal conduct, Guideline G, alcohol consumption, and Guideline E, personal conduct.

Applicant submitted an answer to the SOR that was received by DOHA on January 26, 2004. However, DOHA notified Applicant by letter dated February 17, 2004 that his answer was deficient in that it was not notarized and he did not indicate whether he requesting a hearing. Applicant thereafter resubmitted the answer, requested a hearing, and had the answer notarized on March 2, 2004. Applicant admitted all SOR allegations except subparagraphs 1.f., 2.a., and 2.b., although he denied any of the allegations created a security concern.

The case was assigned to me on November 8, 2004. A notice of hearing was issued on December 2, 2004, scheduling the hearing for December 16, 2004. The hearing was conducted as scheduled. The government submitted 11 documentary exhibits that were marked as Government Exhibits (GE) 1-11 and admitted into the record without objection. Applicant testified and submitted 21 exhibits that were marked as Applicant's Exhibits (AE) 1-21 and admitted into the record without objection. The transcript was received on December 29, 2004.

FINDINGS OF FACT

Applicant's admissions to the allegations contained in the SOR 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 36-year-old man who was employed as an insulator by a defense contractor from January 1988 to July 2001, at which time he was promoted to production foreman. His performance appraisals and promotion to a supervisory position demonstrate he is considered to be a good employee. He has also worked part-time jobs as a pizza cook and as an insurance agent. Applicant served as a member of the U.S. Navy Reserve from March 1997 until recently, attaining the rank of Petty Officer Third Class (E-4).⁽²⁾ He graduated from high school in 1987, and obtained a certificate from a community college in 1993. More recently, he completed an effective business writing class by attending night school two nights a week.

Applicant was married in July 1988 and divorced in March 2004. He has two children from that marriage, ages 15 and 10, for whom he pays child support in the amount of \$795.00 per month. He married again in August 2004, and has a child who was born in August 2003.

Applicant's first marriage was at times turbulent, due at least in part to his wife's excessive consumption of alcohol. He was charged once in 1992, twice in 1995, and once in 1999 with either assault or domestic assault arising from arguments with his wife.⁽³⁾ He denies striking his wife on all occasions except the 1992 offense when he admits hitting her after she hit him knocking off his glasses. The 1995 charges were dismissed. He was required to obtain counseling following the 1992 arrest, and to attend an anger management class after the 1999 arrest. Although not alleged in the SOR, Applicant was charged with another domestic violence offense involving a woman other than his wife in December 2002. Once again, Applicant denies striking the woman and claims he was charged after she struck him with a cup causing an injury that required medical attention. The charges were dismissed.

Applicant admits he consumed alcohol before the 1995 offenses, although he denies being intoxicated or that his consumption of alcohol precipitated the incidents. Applicant was also convicted in May 1995 and June 1995 of being drunk in public,⁽⁴⁾ and received minimal fines on both occasions. He explains that on each of those occasions he was drinking beer in his front yard when he was arrested.

Applicant provided a statement to the Defense Security Service (DSS) on September 13, 2001, in which he acknowledged he had a drink in the morning to try to ease the effect of alcohol he had consumed the night before. The statement does not provide any further information as to when or how many times this may have occurred. He testified the times he drank in the morning were on weekends. The totality of his statement clearly indicates that Applicant denies having any alcohol problem. He testified he now consumes two to three beers on weekends, and the last time he may have been intoxicated was on July 4, 2002.

Applicant filed for protection under Chapter 7 of the bankruptcy code in January 2002 and obtained a discharge in May 2002. He listed assets of \$76,934.00 and liabilities of \$75,652.00 in the bankruptcy. The secured claims consisted of a home mortgage in the amount of \$55,800.00, two vehicles totaling \$8,345.08,⁽⁵⁾ furniture in the amount of \$1,480.00, and a second mortgage in the amount of \$1,076.49. Unsecured creditors consisted of federal taxes of \$2,800.00, a revolving charge of \$482.55, a personal loan in the amount of \$5,000.00, and a home security system services charge of \$668.58.

Applicant was separated from his wife when he filed for bankruptcy protection. Before filing for bankruptcy, Applicant had other accounts that were delinquent but that he had paid in full. He sought bankruptcy protection on the advice of his attorney, and the income and expenditure schedules filed in the bankruptcy indicate that Applicant's financial problems in large part arose from the separation from his wife and resulting costs of setting up his own household while paying child support of \$795.00 per month.

The SOR lists four delinquent accounts. The first two are to the same creditor, one in the amount of \$1,076.00 and the other in the amount of \$1,066.00. GE 5, a credit report, indicates both accounts were opened in March 1995. GE 7, another credit report, lists the two accounts separately, but in one of the listings shows the high credit amount to be \$1,076.00 with a balance owing of \$1,066.00. GE 11, the bankruptcy pleadings, lists this same creditor as holding a secured claim in the amount of \$1,076.49, and an account number similar to that contained in GE 5 and GE 7 except in

a scrambled fashion (i.e., the account number in GE 11 is 67050046 and in GE 5 and GE 7 it is 60705046). Finally, GE 11 contains a statement indicating the property secured by the mortgage held by this creditor was to be surrendered to the creditor. Accordingly, and despite the Applicant's admission to the debts listed in subparagraphs 1.a. and 1.b., it appears the two alleged debts may well be a single debt. Finally, I find there is insufficient evidence to find he remained liable on that debt following the 2002 discharge in bankruptcy.

The debt listed in subparagraph 1.c. in the amount of \$171.00 remains unpaid. Applicant's explanation of the nature of this debt (Tr. pp. 31-32) is essentially incomprehensible. However, considering the nature of the debt and what can be gleaned from his testimony it may be a towing charge owed to a city. He testified he has made arrangements to pay the debt. The last alleged debt, a utility bill owing in the amount of \$112.00, has been paid in full. (AE 12)

Although not alleged in the SOR, Applicant is indebted to the Internal Revenue Service (IRS) in the amount of \$10,695.76 for delinquent income taxes for the years 2000-02. He testified the underpayment of taxes resulted from his wife claiming their children as dependents on her tax returns, thereby depriving him of exemptions he had anticipated claiming. He has entered into a repayment agreement whereby he has been paying the IRS \$250.00 per month for a little over a year.

Applicant submitted a personal financial statement on July 9, 2003, in which he listed his net monthly pay as \$2,793.50, his net monthly expenses as \$2,200.00, and his debt payments as \$595.00. Included in his listed monthly expenses is his \$795.00 per month child support payment. AE 1 discloses that his actual semimonthly net pay after deduction of child support varies greatly depending on overtime worked, ranging from \$1,246.29 for the period ending November 15, 2004 to \$1,977.19 for the period ending November 30, 2004. (6) Accordingly, I find that Applicant's net pay is substantially more than the amount he listed in the 2003 financial statement, and/or his expenses are lower by at least the amount of the \$795.00 child support payment.

Applicant submitted a security clearance application (SF 86) on February 15, 2000, in which he listed a 1999 alcohol offense, but failed to list a 1995 offense in response to question 24. As he clarified in the statement he provided to DSS on September 13, 2001 (GE 4), both offenses actually occurred in 1995 within approximately one month of each other. In response to question 23, he listed a 1999 assault and battery charge that was pending, but failed to list two other domestic violence arrests in response to question 26.

Applicant's explanation for the omissions in the SF 86 is hardly a model of clarity, but seems to be that while he recalled the other domestic violence and drunk in public arrests, he could not recall when they occurred, and he was therefore unaware they were within the seven-year time frame requiring disclosure. Considering the information Applicant did submit, his appearance and demeanor while testifying, and the substance of his testimony, I find his omissions were not a deliberate omission of information from the SF 86.

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 F, financial considerations, Guideline J, criminal conduct, Guideline G, alcohol consumption, and Guideline E, personal conduct with their respective DC and C, 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. (7) The government has the burden of proving controverted facts. (8) The burden of proof in a security clearance case is something less than a preponderance of evidence (9), although the

government is required to present substantial evidence to meet its burden of proof.⁽¹⁰⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹¹⁾ 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.⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

No one has a right to a security clearance⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁶⁾

CONCLUSIONS

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 obtained a discharge under Chapter 7 of the bankruptcy code in May 2002 and then allowed additional debts to become delinquent. Disqualifying Condition (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

Applicant's financial problems appear to have arisen in large part out of his separation from his wife, the expenses of setting up a new household, and the substantial child support payment he was required to make. To his credit, Applicant has periodically sought part-time employment to supplement his income and provide additional funds to satisfy his creditors. Additionally, and although not listed in the SOR, Applicant incurred delinquent taxes as a result of his divorce and has taken appropriate steps to resolve that debt. He has now either satisfied the delinquent accounts alleged in the SOR, or made payment arrangements with the creditors. Mitigating Conditions (MC) 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)*; and MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply.

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.

The evidence establishes Applicant was arrested on numerous occasions between 1992 and 1999 for domestic violence and public intoxication offenses. He was convicted of both public intoxication charges and small fines were imposed. He was twice referred for counseling in connection with the domestic violence offenses. 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.

The only evidence concerning the domestic violence offenses and their court dispositions is Applicant's statement and testimony that he was falsely accused of striking the women involved, except in the 1992 offense wherein he claims he hit his wife after she struck him. The only evidence concerning the drunk in public offenses is Applicant's assertions that he was not intoxicated but was merely drinking a beer in his yard. Additionally, it has been nearly six years since Applicant was last arrested for any of the offenses alleged in the SOR, and two years since the offense that was not alleged and of which he testified he was the victim and the charges were dismissed. MC 1: *The criminal behavior was not recent* applies.

Under Guideline G, alcohol consumption is a security concern because excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized

disclosure of classified information due to carelessness. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Applicant was twice convicted in 1995 of being drunk in public. He admits having consumed alcohol before two of his domestic violence arrests, and on occasion on weekends in the morning to ease the effect of alcohol he consumed the night before. DC 1: *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use* applies.

The only evidence concerning the alcohol-related domestic violence offenses is that Applicant was sober and that the alcohol did not contribute to either offense. The only evidence concerning the public intoxication offenses is that Applicant was sober and drinking a beer in his yard when he was arrested. Although the fact he was convicted of being drunk in public might indicate there was more to those offenses than what Applicant claims, absent some evidence, other than Applicant's accounts and/or proof of the elements of the offense of which he was convicted, there is no basis in the record to find other than what Applicant stated happened. Mitigating Conditions (MC) 2: *The problem occurred a number of years ago and there is no indication of a recent problem* applies.

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 explanation for not disclosing additional arrests in the SF 86 is credible. No disqualifying condition applies.

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 financial considerations, criminal conduct, alcohol consumption, and personal conduct. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guidelines F, J, H, and E are decided for Applicant. It is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

SOR ¶ 2-Guideline J: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

SOR ¶ 3-Guideline G: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

SOR ¶ 4-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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. Applicant served in the active reserve until December 1999, and the inactive reserve thereafter. AE 13 indicates his enlistment was to expire sometime within 90 days after October 25, 2004.
3. The government offered no evidence concerning the circumstances leading to any of Applicant's arrests or the disposition of any of the cases except Applicant's statements and testimony about what he remembers occurring. Accordingly, there being no contradictory evidence, his version is accepted as true.
4. The SOR alleges one of the offenses occurred in May 1999. The only evidence of record establishing that date is Applicant's statement contained in GE 1. However, Applicant explained in GE 4 that he had been in error and that both offenses occurred in 1995. There being no evidence admitted other than Applicant's statements about these offenses, I find, consistent with his statements, both offenses occurred in 1995.
5. The bankruptcy pleadings indicate that Applicant reaffirmed the debt on one of the vehicles and retained possession of that vehicle. He testified he still owes \$3,400.00 on that debt and has not made a payment in several years on the account. However, that debt was not alleged in the SOR.
6. I have not considered the pay stub for the period ending October 15, 2004, because it contains a large tuition reimbursement amount as part of the gross pay.
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
9. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
14. *Egan*, 484 U.S. at 528, 531.
15. *Id* at 531.
16. *Egan*, Executive Order 10865, and the Directive.