

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant owes approximately \$62,978.00 to 15 separate creditors on 18 separate accounts. When he applied for a security appearance, he answered in the negative when asked whether he was more than 90 days delinquent on any debts, even though six debts were 120 days past due. Clearance is denied.

CASENO: 02-17498.h1

DATE: 08/25/2004

DATE: August 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17498

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq, Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant owes approximately \$62,978.00 to 15 separate creditors on 18 separate accounts. When he applied for a security appearance, he answered in the negative when asked whether he was more than 90 days delinquent on any debts, even though six debts were 120 days past due. Clearance is denied.

STATEMENT OF THE CASE

On September 11, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines E (Personal Conduct) and F (Financial Considerations) of the Directive. Under Guideline E, the SOR alleges that Applicant falsified his security questionnaire by failing to list several debts that were more than 90 days past due. Under Guideline F, the SOR alleges that Applicant owes approximately \$62,978.00 to 15 different creditors on 18 accounts.

Applicant answered the SOR in writing on October 4, 2003, denied the allegation under Guideline E, and admitted all the allegations under Guideline F. He elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on December 30, 2003. Applicant received a complete copy of the file of relevant material (FORM) on January 20, 2004. He was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions, but he did not respond to the FORM. The case was assigned to another administrative judge on March 8, 2004. It was reassigned to me on August 3, 2004, based on workload considerations.

FINDINGS OF FACT

Applicant admitted that he owes approximately \$62,978.00 to 15 separate creditors on 18 separate accounts. Applicant also admitted that, as of November 6, 2001, six debts were already 120 days past due. His admissions are incorporated into my findings of fact. I also make the following findings:

Applicant is a 39-year-old employee of a defense contractor. (FORM, Item 5, p.1; Item 6, pp. 1-2) He is married and has one child. (FORM, Item 5, p. 3; Item 6, p. 3; Item 7, p. 14)

Applicant's spouse is employed outside the home. She lost her job in 1994, had a baby shortly thereafter, and was unemployed for 6-8 months.

Applicant signed an application for a security clearance on October 24, 2001. Question 39 on his security questionnaire asked whether he was currently more than 90 days delinquent on any debts. He answered, "No." (FORM, Item 6, pp. 1, 9)

As of July 1, 2003, Applicant and his spouse had a net monthly income of \$2, 985.00. After monthly expenses and payments on two debts, they had a net monthly remainder of \$76.00. They had savings of \$500.00. (FORM, Item 7, p. 3)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should 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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Financial Considerations

Under Guideline F (Financial Considerations), "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. Two disqualifying conditions (DC) under Guideline F could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. Applicant has admitted all the delinquent debts alleged in the SOR. His admissions are consistent with his credit reports. Thus, I conclude that DC 1 has been established.

DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial statement of July 1, 2003 shows a net monthly income of \$2,985.00. It also shows that Applicant is making monthly payments totaling \$150.00 per month on two accounts. He owes a total of \$5,801.00 on those two accounts. (FORM, Item 7, p. 3) The evidence shows no activity regarding the debts totaling approximately \$57,177.00 owed the remaining 13 creditors. Applicant has only \$76.00 per month remaining after paying his monthly expenses and the two overdue accounts. Even if Applicant is willing to resolve his debts, the evidence clearly establishes that he is unable to do so. I conclude that DC 3 is established.

Two mitigating conditions (MC) are relevant in this case. MC 3 applies when the conditions that resulted in the behavior were largely beyond the applicant's control. Directive ¶ E2.A6.1.3.3. MC 6 applies when an applicant has initiated a good-faith effort to pay his debts or otherwise resolve them. Directive ¶ E2.A6.1.3.6. Based on the evidence, I conclude that no other mitigating conditions are applicable.

Applicant's spouse lost her job in 1994 when her employer went out of business. She was unemployed for 6-8 months. Her loss of employment was beyond Applicant's control and contributed to Applicant's financial problems. Accordingly, I conclude that MC 3 is established

In a sworn statement dated November 17, 2003, Applicant stated, "When my financial situation stabilizes, I will attempt to pay off all in full." (FORM, Item 3, p. 1) There is nothing in the record directly contradicting Applicant's stated intention to pay his debts, and nothing showing lack of good faith on his part. The fact that he is making regular payments on two accounts suggests good faith. I conclude that MC 6 is established.

Notwithstanding the evidence supporting MC 3 and MC 6, I conclude that Applicant has not mitigated DC 2 and DC 3. The pertinent disqualifying and mitigating conditions should not be applied "in a rigid, mechanical manner." ISCR Decision No. 03-1148 at 3 (App. Bd. Aug. 10, 2004).

Furthermore, "the mere presence or absence of any particular . . . mitigating condition is not dispositive of a case." *Id.*, at 4. Based on all the evidence, I conclude that Applicant has not carried his burden of mitigating the security concerns raised by his overwhelming indebtedness.

Falsification

Under Guideline E (Personal Conduct), "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. Under DC 2 there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at *5 (App. Bd. Apr. 23, 2001).

Applicant admits that on November 6, 2001, he had six debts more than 120 days past due. Thus, when he represented two weeks earlier that he had no debts more than 90 days past due, his answer was either an honest mistake or a false answer. Proof that Applicant omitted information about his delinquent debts from his SF 86 shifted the burden to him to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). Applicant's denials of intent to conceal or mislead are relevant, but not conclusive or binding. They must be considered and weighed in the light of the record as a whole. ISCR Case No. 00-0302, *supra*.

In contrast to his false answer to Question 39, the record reflects that Applicant answered "yes" to Question 38 and disclosed one credit card debt of \$1992.00 that was delinquent more than 180 days. Arguably, Applicant's voluntary disclosure of derogatory information in Question 39 would support a lack of intent to deceive.

However, the record is devoid of any evidence supporting Applicant's bare-bones denial that he gave a false answer to Question 39. Although he responded to the SOR by stating, "I deny," he did not assert an honest mistake or give any other explanation for his answer. He did not respond to the FORM. I conclude that he has not explained his answer to Question 39 sufficiently to carry his burden of proof. Accordingly, I conclude that DC 2 is established.

Based on the evidence in the record, I conclude that no mitigating conditions under Directive ¶ E2.A5.1.3. are established. After considering the absence of mitigating conditions as well as the general adjudicative guidelines under Directive ¶ E2.2.1, I conclude that Applicant has not mitigated DC 2.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a-1.r: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge