

KEYWORD: Financial; Criminal Conduct; Personal Conduct

DIGEST: Applicant, a 32-year-old technician employed by a defense contractor, is unable to successfully mitigate the security concerns raised by his history of financial difficulties, criminal conduct, and work-related personal conduct. Clearance is denied.

CASENO: 02-17522.h1

DATE: 08/18/2004

DATE: August 18, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17522

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant, a 32-year-old technician employed by a defense contractor, is unable to successfully mitigate the security concerns raised by his history of financial difficulties, criminal conduct, and work-related personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On October 23, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline F for financial considerations, Guideline J for criminal conduct, and Guideline E for personal conduct. Applicant answered the SOR on November 5, 2003, and requested a hearing.

Department Counsel indicated he was ready to proceed on March 17, 2004, and the case was assigned to me March 22, 2004. On March 31, 2004, a notice of hearing was issued scheduling the hearing for April 21, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript May 4, 2004.

RULINGS ON PROCEDURE

Department Counsel moved to amend the SOR to conform to the record evidence as follows:

- SOR subparagraph 1.b was amended by deleting the figure "\$1238,847" substituting therefor the figure "\$128,847"; and
- SOR paragraph 2 was amended to add subparagraph 2.e by adding the words "In early 2002, you were charged with driving under the influence in Columbia, Maryland. On or about May 15, 2002, you received probation before judgment. You were placed on probation for two years and fined approximately \$300."

Applicant did not object, and the SOR was amended accordingly.

FINDINGS OF FACT

In his Answer, Applicant admitted the SOR allegations with explanation. His admissions are incorporated into my findings. After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 32-year-old unmarried man. He is seeking to retain a top-secret security clearance for his employment as a technician with a defense contractor.

1. Applicant's history of financial difficulties

Applicant has a history of financial difficulties and delinquent debts. A credit report was obtained in October 2000 during the background investigation (Exhibit 12). In summary, the report revealed Applicant had one account 90 days past due, nine accounts in a collection/charge off status, four liens/judgments, and one bankruptcy. His financial difficulties, as alleged in the SOR, are discussed below.

SOR subparagraph 1.a. Applicant is the father of an eight-year-old son. A civil complaint to determine paternity and establish support for the child was filed against Applicant in a state court. In February 1999, the court determined Applicant was the child's father and also ordered him to pay child support, including an amount for arrears. The court order also constituted a withholding order or garnishment of Applicant's wages for payment of child support. Applicant pays child support at the rate of \$644 monthly and his payments are now essentially current as the total balance owed is \$80.51 (Exhibit D).

SOR subparagraph 1.b. In September 1999, Applicant filed a petition for bankruptcy under Chapter 13, the so-called

wage earner repayment plan provision of the bankruptcy code. According to the summary of schedules, Applicant listed \$126,130 in assets and \$128,842 in liabilities. Unsecured debt consisted of \$7,598 with the balance of \$121,244 being secured claims (a lien for homeowners' association fees, a security agreement for a car, and a mortgage against a home). In March 2000, the bankruptcy court confirmed or approved the repayment plan requiring Applicant to pay \$250 monthly for 52 months. Applicant was unable to make the required payments resulting in the bankruptcy court dismissing the Chapter 13 case in December 2001 (Exhibit 18). In April 2002, Applicant was able to sell his house eliminating the major liability of the bankruptcy (Exhibit F).

SOR subparagraph 1.c. After the bankruptcy's dismissal, the homeowners' association obtained a civil judgment against Applicant for approximately \$3,050. The basis for the judgment was unpaid fees. As of April 17, 2002, the judgment was satisfied (Exhibit A).

SOR subparagraph 1.d. Applicant had a civil judgment taken against him by a security company due to an unpaid home security system account. The judgment was for about \$2,940. As of January 7, 2004, the judgment was satisfied (Exhibit C).

SOR subparagraph 1.e. Applicant had a charged off delinquent military-related credit card account in the amount of about \$132. As of November 3, 2003, the account has been paid (Exhibit B).

SOR subparagraph 1.f. Applicant had a charged off credit card account in the amount of about \$777. The delinquency has been resolved by settlement (Exhibit 17).

SOR subparagraph 1.g. Applicant is alleged to have a charged off account with a telephone company for \$949. He agrees the account is his but disputes the amount, as he contends a security deposit refund error of about \$800 was incorrectly charged to the account (Exhibits L, M, and N). Because he is disputing the debt, it remains unpaid.

In February or March 2004, Applicant received a \$11,000 inheritance. He used about \$7,000 to pay off bills and other expenses, and he gave about \$4,000 to his mother. He now has little or no savings and his financial situation can be described as living paycheck-to-paycheck. His salary is about \$50,000 per year, but he has received job offers for substantially more money contingent on maintaining a security clearance (Exhibit P).

2. Applicant's history of criminal conduct

Applicant has a history of criminal conduct stemming from 1991 to about May 2004, including three alcohol-related offenses. His criminal history is discussed below in chronological order.

SOR subparagraph 1.c. Applicant enlisted in the Army and served on active duty from September 1989 to December 1995. In December 1991, Applicant, then serving at the rank of specialist, pay grade E-4, received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for 12 violations of Article 134, UCMJ, for fraudulently using another person's calling card to make telephone calls (Exhibit 13). Applicant obtained the calling card number when he was staffing a telephone switch board. The calls were apparently of short duration as the total cost was less than \$15.00. Applicant's company commander imposed the following punishment: reduction in pay grade to E-3, suspended; forfeiture of \$245.00 pay per month for one month; 14 days restriction; and 14 days extra duty. Applicant was honorably discharged from the Army in 1995 (Exhibit O).

SOR subparagraph 1.d. On or about October 9, 1993, Applicant was cited for or charged with the offense of possessing an open alcohol container. He was fined \$75.00.

SOR subparagraph 1.a. In May 1998, Applicant was charged with driving while intoxicated/driving under the influence (DWI/DUI). Papers were filed in court in October 1998 (Exhibit 6). Applicant failed to appear for trial in January 1999, a bench warrant was issued, and Applicant subsequently posted a \$5,000 bond. In November 1999, Applicant pled guilty to DWI and sentencing was deferred. Applicant appeared in court in January 2000 for sentencing on the DWI. The court granted him probation before judgment, struck the guilty finding, and placed Applicant on supervised probation for two years with certain conditions. Applicant was also fined \$350.00 and ordered to pay court costs of \$135.00. The DUI offense was *nolle prossed*.

SOR subparagraph 1.b. In August 2000, the state court found Applicant had violated his probation due to missing a probation meeting. The court struck the probation before judgment, entered a guilty finding on the DWI, and ordered Applicant to serve two days confinement. Applicant's probation was terminated unsatisfactorily (Exhibit 6).

SOR subparagraph 1.e. Most recently, in early 2002, Applicant was charged with DUI in his state of residence. On or about May 15, 2002, he received probation before judgment. He was placed on probation for two years and fined approximately \$300.00. At the time of the hearing and when the record closed, Applicant was still serving probation.

Applicant said he possesses a valid driver's license, although it is not issued by his state of residence. State law requires

an individual with an out-of-state driver's license, upon becoming a state resident, to obtain a driver's license within 60 days, and failure to do so is a misdemeanor.⁽²⁾

3. Applicant's work-related personal conduct

In July 1997, Applicant's then employer issued him a written reprimand for misuse and abuse of company resources (the company cable and wireless card) for personal use (Exhibit 11). Applicant used the card to make personal telephone calls and was required to repay the sum of \$1,047.26. He was warned he would be terminated if it occurred again.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only 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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline F,⁽¹²⁾ a security concern typically exists for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. 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, negligent, or careless in his obligation to protect classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline F. Applicant's financial history includes child support arrears, a dismissed Chapter 13 bankruptcy due to nonpayment, two money judgments, and two charged off accounts (I have attached no security significance to the disputed charged off account for \$949 in SOR subparagraph 1.g). These facts and circumstances demonstrate a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts.⁽¹³⁾ The same facts and circumstances also demonstrate financial irresponsibility.

I have reviewed the mitigating conditions under Guideline F and conclude that MC 6⁽¹⁴⁾ applies. Applicant is current with his child support, he sold the house that was the major liability in the Chapter 13 case, he has satisfied the two money judgments, and he has paid or settled two of the three charged off accounts. Although Applicant has resolved the financial matters alleged in the SOR, his overall financial situation remains marginal. Applicant has essentially no money in the bank and is living paycheck-to-paycheck despite earning a good salary and recently receiving a \$11,000 windfall. Time will tell if Applicant can establish and maintain a track record of financial responsibility and stability free from delinquent charged off accounts, money judgments, and other financial problems indicative of irresponsibility. At present, it is simply too soon to conclude that he has successfully mitigated the security concern. Guideline F is decided against Applicant.

Under Guideline J,⁽¹⁵⁾ criminal conduct is a security concern where a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Here, based on the record evidence as a whole, the government has established its case. Starting in December 1991 and continuing until about May 2004, Applicant was

involved in four lesser offenses and a probation violation. Three are alcohol-related offenses. The most recent offense, the 2002 DUI, resulted in Applicant serving a two-year term of probation, which he was still serving when the record closed in this case. Given these facts and circumstances, both DC 1 [\(16\)](#) and DC 2 [\(17\)](#) apply against Applicant.

I have reviewed the mitigating conditions under Guideline J and conclude none apply. Applicant has a history of multiple criminal offenses starting in 1991 to as recently as May 2004, as he was on probation when the record closed. In addition, Applicant is in violation of state law due to his failure to obtain a driver's license within 60 days of becoming a state resident. Although not alleged in the SOR, I can consider it on the issue of the likelihood of continuation or recurrence of criminal conduct. [\(18\)](#) Given all the circumstances, I cannot conclude there is clear evidence of successful rehabilitation and that Applicant has reestablished himself as a law-abiding citizen. Guideline J is decided against Applicant.

Under Guideline E, [\(19\)](#) 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. Here, based on the record evidence as a whole, the government has established its case. Applicant's misusing and abusing of company resources for more than \$1,000 in personal telephone calls is reliable, unfavorable information provided by an employer. [\(20\)](#)

I have reviewed the mitigating conditions under Guideline E and conclude none apply. Viewed in isolation, the somewhat dated 1997 written reprimand is not particularly significant. But viewed as part of the record evidence as a whole, it is not mitigated by the passage of time and remains a concern. Guideline E is decided against Applicant.

Security clearance decisions are not an exact science, but are predictive judgments about a person's security suitability in light of the person's past conduct and present circumstances. [\(21\)](#) Here, we have a man with a history of financial irresponsibility and a history of criminal behavior; in addition, in 1997 he was reprimanded by his employer due to his untrustworthy conduct. Taken together, the record evidence as a whole paints a picture of an individual who is not a suitable candidate for access to classified information. Based on the totality of the facts and circumstances--and the whole-person concept--I conclude Applicant has failed to successfully mitigate the security concerns.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: For the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

SOR ¶ 3-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Md. Trans. Code Ann. § 16 - 102(a)(6), (c).
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. Directive, Enclosure 2, Attachment 6, at pp. 29-30.
13. DC 1 ("A history of not meeting financial obligations;") and DC 3 ("Inability or unwillingness to satisfy debts;").
14. MC 6 ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;").
15. Directive, Enclosure 2, Attachment 10, at p. 37.
16. DC 1 ("Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;").
17. DC 2 ("A single serious crime or multiple lesser offenses;").
18. Directive, Enclosure 2, E2.2.1.9, at p. 17.
19. Directive, Enclosure 2, Attachment 5, at pp. 27-28.
20. DC 1 ("Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;").
21. *Egan*, 484 U.S. at 528-529.

