

KEYWORD: Criminal Conduct; Personal Conduct; Financial

DIGEST: Applicant has a history of financial problems, including two Chapter 7 bankruptcy cases, the most recent of which was discharged in 2005. He is currently paying off a \$20,000 indebtedness to the IRS for unpaid income taxes. It is too soon to tell if Applicant has established a financially responsible lifestyle. Clearance is denied.

CASENO: 02-25236.h1

DATE: 06/06/2006

DATE: June 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-25236

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Ray T. Blank Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of financial problems, including two Chapter 7 bankruptcy cases, the most recent of which was discharged in 2005. He is currently paying off a \$20,000 indebtedness to the IRS for unpaid income taxes. It is too soon to tell if Applicant has established a financially responsible lifestyle. Clearance is denied.

STATEMENT OF THE CASE

This case arose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 13, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J for criminal conduct, Guideline E for personal conduct (falsification of security-clearance applications), and Guideline F for financial considerations. Applicant replied to the SOR on September 24, 2004, and requested a hearing. The case was originally assigned to another administrative judge on September 9, 2005, and it was reassigned to me November 22, 2005. A notice of hearing was issued scheduling the hearing for December 8, 2005. Applicant appeared without counsel and the hearing took place as scheduled. Department Counsel offered 19 exhibits ⁽²⁾ on the merits, all of which were admitted without objections. Applicant offered no exhibits, but testified on his own behalf. DOHA received the transcript December 16, 2005.

At Applicant's request (R. 48-49), the record was left open until December 30, 2005, to allow him the opportunity to submit documentary information about his financial situation. In that regard, the following matters were singled out: (1) proof of payment of the state tax lien as alleged in SOR subparagraph 3.d; (2) the recent Chapter 7 bankruptcy case, including the schedules and the discharge order as alleged in SOR subparagraph 3.e; (3) his installment payment arrangement with the IRS; and (4) his child support payment record (R. 81-86). To date, no documents were received.

FINDINGS OF FACT

In his response to the SOR, Applicant admitted the criminal conduct allegations in subparagraphs 1.a, 1.b, 1.g, 1.h, and 1.i, and he denied the remaining allegations. He denied the falsifications allegations in subparagraphs 2.a and 2.b. He admitted the financial allegations in subparagraphs 3.a-3.e. In addition, he provided a brief explanation for each admission and denial. Applicant's admissions and explanations are incorporated herein as findings of fact. In addition, I make the following findings of fact.

Applicant is a 43-year-old man who is seeking to retain a security clearance for his employment with a defense contractor. His work involves computer engineering with simulations. He has served in this position since July 1999. His annual salary in 2005 was about \$51,000. Before working for a defense contractor, Applicant served on active duty as a Sailor from 1984 to 1999. He was honorably discharged in April 1999 at the pay grade of E-5 due to a medical disability for which he received disability severance pay of \$44,259.

Applicant married in September 1984 and divorced in June 2000. He has two children from the marriage, ages 13 and 16. The couple separated sometime before July 1997; an *Order Pendente Lite* was entered in July 1997 requiring Applicant to pay spouse and child support. In February 2000, Applicant was found in contempt of court for failing to pay spouse and child support (Exhibit 14). The court ordered him to pay an arrearage of more than \$16,000, and ordered him jailed for no more than six months until he purged himself of the contempt. Applicant paid \$14,000 by selling a sports car and was released provided he pay the balance of the arrearage, which he did. The June 2000 divorce decree (Exhibit 16) requires Applicant to pay \$981.50 per month for child support. He makes his payments bi-weekly by wage withholding. Applicant maintains he is current with his child support payments, although he submitted no documentation to verify his claim.

A. The Criminal Conduct Matters

Applicant has a history of criminal conduct. ⁽³⁾ The bulk of these matters relate to his marriage, but there are two unrelated. This first is a trespassing offense in 1984 resulting in a \$45 fine. The second is an Article 15, UCMJ, nonjudicial punishment proceeding in the Navy in 1992. It was based on Applicant's lending of money to other sailors and charging an 100% interest rate.

The criminal conduct matters relating to his marriage are summarized in the following table.

Date	Description	Result
Jun. 1986	Charged with assault and battery against his wife. The police took Applicant into custody.	Dismissed.
Jan. 1987	Charged with assault and battery against his wife. He reported to the police station where he was processed (photographed and fingerprinted) and released.	Dismissed.
Jun. 1987	Charged with assault and battery against his wife. He reported to the police station where he was processed and released.	Found not guilty.
Dec. 1987	Bad check offense. He reported to the police station where he was processed and released.	Dismissed upon payment of restitution.
Dec. 1987	Charged with assault and battery, threats to kill, and larceny; all charges related to his wife. He reported to the police station where he was processed and released. The matter was continued allowing Applicant to participate in family counseling.	Dismissed.
Oct. 1994	Issued a protective order directing him to refrain from committing further acts of domestic violence.	Not applicable.
Aug. 1995	Charged with breaking and entering in the daytime with intent to commit assault. The house was his own and there was no one home at the time. He reported to the police station where he was processed and released.	<i>Nolle prossed.</i>
Mar. 1997	Charged with assault and battery of his wife. He reported to the police station where he was processed and released.	Pleaded not guilty, but found guilty as charged. Sentenced to 30 days in jail, suspended for two years based on good behavior.

Of the eight incidents involving his wife, Applicant stands convicted of only the March 1997 assault and battery. Since then, Applicant has had no further incidents of criminal conduct. There are no charges pending against him.

B. The Falsification Allegations

Applicant held a security clearance while serving in the Navy. On or about October 24, 1989, Applicant completed a security-clearance application (Exhibit 2). In signing the application, Applicant certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a false statement could be punished under federal law. In response to Question 21.a, Applicant denied ever being arrested, charged, cited, or held by federal, state, or other law enforcement authorities (including nonjudicial punishment) regardless whether the matter was dropped or dismissed or he was found not guilty. Applicant did not mention any of his pre-October 1989 arrests.

On or about August 2, 2000, Applicant completed a security-clearance application (Exhibit 1). In signing the application, Applicant certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a false statement could be punished under federal law. The

application included several questions (Questions 21-26) asking Applicant about his police record. He disclosed his 1992 nonjudicial punishment in response to Question 21, and he disclosed the February 2000 contempt of court (which appears to be civil contempt) in response to Question 26.⁽⁴⁾ He did not disclose in response to Question 26, however, his arrest for breaking and entering in 1995 or his arrest and conviction for assault and battery in 1997.

Applicant did not consider himself arrested when he reported to the police station (as opposed to be taken into custody by the police) and was processed and released. He now understands he was mistaken.

C. The Financial Matters

Applicant has a history of financial problems. In addition to the 1992 nonjudicial punishment for what was, in essence, loan-sharking, Applicant has been through bankruptcy twice and has indebtedness for unpaid income taxes.

In December 1995, while still married and living with his wife, Applicant filed a Chapter 13 bankruptcy petition. Chapter 13 is sometimes called a wage-earner plan because it allows a person with a regular income to pay creditors under a court-approved plan. In April 1997 the case converted from Chapter 13 to Chapter 7. The purpose of Chapter 7 is to obtain a court-approved discharge releasing the person from liability and providing the so-called fresh start. The court granted Applicant a Chapter 7 discharge in July 1997.

In February 2004, Applicant's employer submitted an adverse information report to the Defense Department based on receipt of a state tax department third party lien adjustment (Exhibit 17). The lien was filed in November 2003 requiring the employer to deduct \$150 per pay period from Applicant's salary until the tax debt was satisfied. The lien was issued when Applicant failed to file a state income tax return for tax year 2000. Applicant maintains the lien was paid off through the payroll deduction, but he did not submit documentary proof to support his claim.

Sometime in early 2004, Applicant was sued for \$8,172 for the deficiency balance on a loan after a voluntary repossession of a car. Applicant maintains this debt was included in his recent Chapter 7 bankruptcy case, but he did not submit documentary proof to support his claim.

In April 2004, Applicant filed a Chapter 7 bankruptcy petition with total liabilities exceeding \$80,000. Applicant maintains that the court granted him a Chapter 7 discharge in April 2005, but he did not submit documentary proof to support his claim.

Applicant attributes the first bankruptcy to his difficult marriage and poor money management. He attributes the second bankruptcy to poor money management or financial irresponsibility.

In addition to the financial matters alleged in the SOR, Applicant is indebted to the IRS for unpaid federal income taxes. He incurred the debts when he failed to file returns for several years (approximately 1997-2002). He believes he currently owes about \$20,000, and he is paying the IRS by an installment payment arrangement at the rate of \$400 monthly. He is in his second year of the arrangement and maintains he is current with his payments, but he did not submit documentary proof to support his claims.

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 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. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁵⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

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.⁽⁶⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁷⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽⁸⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Supreme Court in *Department of Navy v. 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 J, ⁽¹²⁾ criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. The record evidence is clear: Applicant has a history of criminal conduct from 1984 to 1997. Aside from the trespass offense in 1984 and the Article 15, UCMJ, proceeding in 1992, the criminal conduct involved Applicant's then wife. He was arrested on multiple occasions and convicted once in 1997. Given these circumstances, DC 1 ⁽¹³⁾ applies against Applicant. Applicant's inability or unwillingness to conduct his relationship with his spouse in such a way as to avoid law-enforcement intervention creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude Applicant receives credit in mitigation. Applicant's last run-in with the criminal law was 1997. This incident took place about nine years ago; thus, his criminal behavior may be considered as not recent under MC 1. ⁽¹⁴⁾ Applicant receives credit under MC 4 ⁽¹⁵⁾ because he is no longer married thereby reducing the likelihood of additional offenses. Also, Applicant receives credit under MC 6 ⁽¹⁶⁾ based on the passage of time without further incidents. Taken together, these matters constitute evidence of reform and rehabilitation.

This case presents both disqualifying and mitigating facts and circumstances requiring me to balance one against the other. Applicant was involved in a rather difficult or tumultuous marriage. Although arrested and charged with crimes on several occasions, he was convicted once for a misdemeanor offense. He has been gainfully employed for many years. He has had no further incidents of criminal behavior since the 1997 arrest. This pattern of law-abiding behavior since 1997, and certainly since his June 2000 divorce, suggests that Applicant's criminal conduct problems were due to a difficult marriage and are now behind him. Based on the record evidence as a whole, I conclude the evidence of reform and rehabilitation is sufficient to successfully explain, extenuate, or mitigate the criminal conduct security concern. Accordingly, Guideline J is decided for Applicant.

Personal conduct under Guideline E ⁽¹⁷⁾ 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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not

need to be reported.

Here, based on the record evidence as a whole, the government failed to establish its case under Guideline E. The record evidence is insufficient to prove that Applicant knowingly and willfully made false answers on security-clearance applications in 1989 and 2000.

Concerning the 1989 application, Applicant submitted it when serving as a Sailor for his security clearance with the Navy. Given the regular course of business, I presume that Navy security officials reviewed his application and his answer to Question 21.a and determined a security concern was not present. Absent evidence to the contrary, the presumption stands.

Concerning the 2000 application, Applicant should have reported his 1995 arrest and his 1997 arrest and conviction when he answered Question 26. In both instances, Applicant reported to the police as opposed to be taken into custody by police. Given these facts, coupled with Applicant's misunderstanding of what an arrest meant, it is reasonable to conclude that Applicant did not think he had to report these two arrests. Concerning the assault and battery conviction, the alleged falsification is undermined by Applicant's disclosure of another matter in response to the same question. It is contrary to common sense to disclose one matter and at the same time attempt to omit, conceal, or hide other matters. Accordingly, Guideline E is decided for Applicant.

Under Guideline F, [\(18\)](#) a security concern typically exists for two different types of situations--significant unpaid debts or unexplained affluence. 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 properly handling and safeguarding classified information. Some people encounter financial problems through no fault of their own. For others, financial problems appear to be part of a general tendency toward irresponsibility that is a security concern.

Here, based on the record evidence as a whole, the government established its case under Guideline F. The two bankruptcy cases, the lawsuit on the deficiency balance from the repossession, and the state income tax debt all demonstrate a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts. [\(19\)](#) In addition, the nonjudicial punishment for loan-sharking is a deceptive or illegal financial practice. [\(20\)](#) These matters, taken together, raise a security concern under the guideline. Further aggravating the situation is Applicant's indebtedness to the IRS, which he incurred when he failed to file returns for several years. He claims he is making payments, but the current status is not known with certainty.

I reviewed the mitigating conditions under the guideline and conclude Applicant receives some credit in mitigation. First, Applicant's financial problems cannot be viewed as not recent because the evidence shows just the opposite. [\(21\)](#)

The recent Chapter 7 bankruptcy is evidence on this point. Second, his multiple financial problems cannot be viewed as an isolated incident.⁽²²⁾ Third, it is a mitigating condition that Applicant's financial problems are not solely the result of his own making. His difficult marriage, separation, and divorce contributed to his financial problems, and he receives some credit in mitigation.⁽²³⁾ Fourth, Applicant receives little if any credit in mitigation for his efforts to repay or otherwise resolve his debts.⁽²⁴⁾ He has twice resorted to Chapter 7 bankruptcy proceedings to resolve his financial problems. Although one Chapter 7 case may be understandable, resorting to Chapter 7 twice is inconsistent with good-faith efforts.

Based on the record evidence as a whole, there are not strong indicators that Applicant's financial problems are being resolved, are under control, or are unlikely to recur. In other words, what is lacking here is a long-term track record of financially responsible behavior. It is too soon to tell if he is both willing and able to put his financial house in order. Applicant's overall financial situation is not indicative of a responsible person who can be relied upon to properly handle and safeguard classified information. Accordingly, Guideline F is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: For Applicant

Subparagraphs a-l: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraphs a-b: For Applicant

SOR ¶ 3-Guideline F: Against Applicant

Subparagraphs a-e: 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 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 (Directive).
2. Exhibit 4 is largely illegible and I have given it no weight.
3. SOR subparagraph 1.l alleges as criminal conduct that Applicant was held in contempt of court for failing to pay spouse and child support payments. The documentary evidence offered by the government (Exhibits 13, 14, and 15) does not prove this was criminal contempt as opposed to civil contempt, which is the norm in a domestic relations case. Given this lack of proof, this subparagraph is decided for Applicant. Likewise, SOR subparagraph 1.k alleges as criminal conduct that Applicant was charged and found guilty of contempt of court. The documentary evidence offered by the government (Exhibits 6 and 7) does not prove this was criminal contempt as opposed to civil contempt. Indeed, Exhibit 6 shows no disposition and Exhibit 7 shows it was dropped. Given this lack of proof, this subparagraph is decided for Applicant. It is hornbook law that contempts are classed as civil or criminal, and this should have been sorted out earlier in the process.
4. Question 26, in relevant part, asks "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in [Questions] 21, 22, 23, 24, or 25?"
5. Executive Order 10865, § 7.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
8. Directive, Enclosure 3, Item E3.1.14.

9. Directive, Enclosure 3, Item E3.1.15.
10. Directive, Enclosure 3, Item E3.1.15.
11. 484 U.S. at 528, 531 (1988).
12. Directive, Enclosure 2, Attachment 10.
13. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
14. E2.A10.1.3.1. The criminal behavior was not recent.
15. E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
16. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
17. Directive, Enclosure 2, Attachment 5.
18. Directive, Enclosure 2, Attachment 6.
19. E2.A6.1.2.1. A history of not meeting financial obligations; and E2.A6.1.2. 3. Inability or unwillingness to satisfy debts.
20. E2.A6.1.2.2. 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 breaches of trust.
21. E2.A6.1.3.1. The behavior was not recent.
22. E2.A6.1.3.2. It was an isolated incident.
23. E2.A6.1.3.3. 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).
24. E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.