

KEYWORD: Financial; Criminal Conduct; Personal Conduct

DIGEST: Applicant has a history of criminal conduct. He failed to fully disclose the circumstances of his being fired from a job in 2001 and the related criminal conduct in a security clearance application he submitted in 2002 and in a statement he provided in 2003. Clearance is denied.

CASENO: 03-19060.h1

DATE: 03/23/2006

DATE: March 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19060

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of criminal conduct. He failed to fully disclose the circumstances of his being fired from a job in 2001 and the related criminal conduct in a security clearance application he submitted in 2002 and in a statement he provided in 2003. Clearance is denied.

STATEMENT OF THE CASE

On December 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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, and Guideline E, personal conduct. Applicant submitted an answer to the SOR that was received by DOHA on February 25, 2005, admitted all SOR allegations except those contained in subparagraphs 3.a through 3.d, and requested a hearing.

The case was assigned to me on August 26, 2005. A notice of hearing was issued on October 3, 2005, scheduling the hearing for October 26, 2005. The hearing was conducted as scheduled. The government submitted 20 documentary exhibits that were marked as Government Exhibits (GE) 1-20, and admitted into the record without objection. Applicant testified and submitted five documentary exhibits that were marked as Applicant's Exhibits (AE) 1-5, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Groups of documents pertaining to the six debts listed in the SOR were timely received, marked as AE 6-10, and admitted into the record without objection. The transcript was received on November 9, 2005.

FINDINGS OF FACT

Applicant's admissions to the 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 31-year-old man who has been employed by a defense contractor since June 2002, presently as a preservation specialist. He was previously employed as an avionics installer outside the defense industry from March 2001 until June 2002, and was unemployed from January 2001 until March 2001. Before that he was employed as a sales manager in a retail store from August 1999 until January 2001, when he was terminated after he was caught stealing from his employer. Prior to that job, Applicant worked as a laborer from May 1999 until August 1999, a relief manager from January 1999 until May 1999, a helper from November 1998 until January 1999, and as a parts sales manager from September 1994 until November 1998. Applicant reported in a security clearance application (SF 86) he submitted in December 2002 that he left this last job by mutual agreement with his employer following allegations of misconduct on his part dealing with not wearing the required uniform.

Applicant graduated from high school in 1993 and enlisted in the U. S. Air Force in March 1994. He attained the rank of senior airman (paygrade E-4), and was honorably discharged in March 1998. [\(2\)](#)

Applicant was first married in August 1994, and divorced from that wife in April 1998. Although there were no children born of this marriage, Applicant has a 12-year-old daughter from an earlier relationship for whom he pays child support in the amount of \$137.00 per month. Applicant has been remarried since October 2000. He has two sons, ages five and six, and a stepson, age 15, from this marriage.

The SOR lists six debts totaling approximately \$18,600.00 that were either submitted for collection or charged off as bad debts. The debt listed in SOR subparagraph 1.a resulted from a deficit owing after an automobile was repossessed. Applicant submitted proof he has been making payments on this debt and that the balancing owing of \$5,116.43 as of March 2004 had been reduced to \$3,116.43 as of September 2005. (AE 8) Applicant submitted documentary evidence indicating he had negotiated a reduced settlement on the debt listed in SOR subparagraph 1.b (AE 2), had made regular payments on the debt between July 2003 and August 2004, and had reduced the amount owing during that time from \$7,650.00 to \$5,890.00. (AE 7) The only documentary evidence of any payment having been made after August 2004 is of a \$50.00 payment made in October 2004. (AE 4)

Applicant submitted proof he had negotiated a reduced settlement on the credit card debt alleged in SOR subparagraph 1.c, and has been making regular payments on this account since July 2004. (AE 6) The account listed in SOR subparagraph 1.d was satisfied in full as of February 25, 2005, by means of the government seizing a portion of an income tax refund owing to Applicant and applying it to payment of this debt. Applicant has paid the creditor listed in SOR subparagraphs 1.e and 1.f all but \$70.00 of the total amount owing on those two debts plus two additional debts owing to that creditor that were not listed in the SOR.

Applicant was convicted of Disorderly Conduct-Fighting in November 1995, and was sentenced to six months unsupervised probation. The charge resulted from a pushing and shoving match Applicant engaged in with his ex-wife during the course of an argument. Although the arresting officer observed bruises on the ex-wife's arms, the more serious charge of Assault-Intent/Reckless/Injure was not referred for prosecution.

Applicant was notified by mail that he had issued a bad check in January 1998, and was required to report to the local police station. He did as directed and was required to pay a fine and attend a class, although it is unclear whether he ever actually appeared in court.

Applicant was accused of sexually molesting his three-year-old nephew in February 2000. The police conducted an investigation of the allegation after which the local prosecutor's office declined to issue a complaint. Applicant denies this allegation, and there is insufficient record evidence to substantiate it.

Applicant was convicted of Theft in February 2001, and placed on 12 months probation. He was also required to make restitution in the amount of \$662.62, and to pay fines and court costs in the amount of \$270.00. This conviction resulted from Applicant's actions in ringing up fraudulent refunds while employed in a retail store and stealing the money that was refunded. Applicant was also fired as a result of this criminal activity.

Applicant submitted a security clearance application (SF 86) in December 2002. The SF 86 was executed by Applicant subject to the criminal penalties imposed by 18 U.S.C. § 1001 for knowingly and willfully making false statements in that document. While he disclosed he had been fired from the employment that resulted in his theft conviction, he listed the reason for being fired as: "violation of company policy."

Applicant provided a sworn statement to a Special Agent (SA) from the Defense Security Service (DSS) on February 19, 2003, that was also made subject to the criminal penalties imposed by 18 U.S.C. § 1001 for making knowing and willful false statements. In the statement, Applicant claimed he had refunded money to a friend who had returned some parts without providing all the required information, and that some of the information the friend provided was false. He claimed the reason he was fired was because it was determined he had been remiss in failing to have a manager approve the transaction. He then went on to assert he was charged with the theft because the loss prevention investigator was unable to contact the friend who had returned the merchandise.

Applicant listed the theft charge in response to an SF 86 question inquiring about criminal offenses, but in the remarks section under that question stated: "I plea bargained because my witness did not show to court, so by plea bargaining I got a lesser charge and payed a fine. . . ." At the hearing of this case, Applicant provided the following testimony:

Q Okay. Now let me ask you to flip the page and look at question 26. In question 26 it asks about your police record and other offenses. You indicated that, yes, you had an offense and it was the theft. Is this the thing the same theft that you were fired for from (name omitted)?

A It's the only theft on my record, yes.

Q Okay. And you explained that in the remarks section that you plea bargained it because your witness did not show to court, is that right?

A Correct.

Q Now, is that the same witness that you mentioned in your statement to the Defense Security Service's agent that you falsified?

A Yes, that's correct.

Q So is this a falsified remark as well there?

A Yes, it was.

Q Okay. So you were providing false information about the fact you didn't want the Government to know in questions 20 or 26 about the theft, right?

A No. I was trying to conceal my records because I knew my records are going to be pulled anyways.

In question 20 it asked had I ever been fired. I wrote yes, I wrote for violation of company - - violation of company policy. Theft is one of the company policies.

Under question 26 I wrote my theft down under being arrested and under the remarks I did not make a true statement. (Tr. pp. 32-34)

In the SF 86, Applicant also failed to disclose he had been charged with Issuing a Bad Check and he failed to list all of his debts that were then more than 90 days delinquent or that had been more than 180 days delinquent in the preceding seven years. His explanations that because of the way it was handled he did not consider the bad check charge to be an arrest, and he was following the instructions provided to him about what debts to list are credible.

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, and Guideline E, personal conduct 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.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

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

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 allowed a number of debts to become severely delinquent, submitted for collection, and/or charged off as bad debts. Disqualifying Condition (DC) 1: *A history of not meeting financial obligations*: and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

However, Applicant has been making steady payments on most of his delinquent accounts and has significantly reduced the amount of his indebtedness. One account has been fully satisfied, two accounts have a very minimal balance owing, and two others are being satisfied by allotments taken directly from Applicant's pay. Applicant was making consistent payments on the one remaining account, although there is no evidence of any payment having been made since October 2004. Mitigating Condition (MC) 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.* Considering all the evidence in this case, Guideline F is decided for Applicant.

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 convicted of Disorderly Conduct in 1995, Issuing a Bad Check in 1998, and Theft in 2001. The record evidence does not support finding he sexually abused his nephew as was alleged in February 2000. In addition to the offenses Applicant has been convicted of, he also committed criminal offenses under 18 U.S.C. § 1001 when he knowingly and wilfully provided false information in the SF 86 he submitted in December 2002, and in the statement he made to a SA from the DSS in February 2003. 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.

Although the last offense Applicant committed, the falsification of the DSS statement, occurred over three years ago, his criminal conduct spanned a period of seven years with several years passing between the commission of each offense. Based on his repetitious pattern of criminal conduct, I find 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* do not apply. The remaining mitigating conditions clearly have no applicability to the fact of this case. Guideline J is decided against 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 why he did not list all his financial delinquencies and the bad check charge in the SF 86 he submitted are credible. However, the evidence clearly establishes he deliberately provided false and/or misleading information in the SF 86 concerning the reason he was fired in 2001, and the circumstances that led up to his theft conviction. He also deliberately provided false and/or misleading information in the statement he made to a SA from the DSS in February 2003 about the circumstances leading up to his employment termination and theft conviction.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;* and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply. I have considered all mitigating conditions and none apply. Guideline E 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 failed to mitigate the security concern caused by his criminal and personal conduct. He has failed to overcome the case against him or satisfy 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 F: For Applicant

Subparagraphs a-g: For Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against Applicant

SOR ¶ 3-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph 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.

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 dates of Applicant's service in the Air Force and the dates of Applicant's first reported civilian employment as listed in the SF 86 he submitted (GE 1) overlap by several years. The record does not disclose whether this is in error or the first civilian employment was a part-time job Applicant held while in the Air Force.
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.
12. *Egan*, Executive Order 10865, and the Directive.