

KEYWORD: Financial; Criminal Conduct; Personal Conduct

DIGEST: Applicant incurred eight debts exceeding \$9,000.00 after being granted bankruptcy protection in 1999. He has successfully mitigated this concern as a result of aggressively resolving or paying these debts. Applicant was arrested eight times for criminal offenses and cited one time for a traffic-related offense from 1989 to 2002. Six of these arrests involved some form of physical altercation. Applicant asserts that only one of those arrests, which occurred in 1997, resulted in a conviction. Applicant falsified his 2002 security clearance application by failing to list pertinent past arrests. Applicant did not mitigate the remaining criminal and personal conduct concerns. Clearance is denied.CASENO: 02-33153.h1

DATE: 07/21/2004

DATE: July 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33153

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant incurred eight debts exceeding \$9,000.00 after being granted bankruptcy protection in 1999. He has successfully mitigated this concern as a result of aggressively resolving or paying these debts. Applicant was arrested eight times for criminal offenses and cited one time for a traffic-related offense from 1989 to 2002. Six of these arrests involved some form of physical altercation. Applicant asserts that only one of those arrests, which occurred in 1997, resulted in a conviction. Applicant falsified his 2002 security clearance application by failing to list pertinent past arrests. Applicant did not mitigate the remaining criminal and personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 9, 2003, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-Applicant failed to meet the financial considerations (Guideline F), criminal conduct (Guideline J), and personal conduct (Guideline E) personnel security guidelines of the Directive. Applicant answered the SOR in writing on November 7, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on January 29, 2004. On February 24, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance.

The government offered 21 documents, which were admitted without objection as Government Exhibits (GE) 1 through 21. The Applicant offered 13 documents, which were admitted without objection as Applicant Exhibits (AE) A through M. The record was held open to afford Applicant the opportunity to submit additional documents. The Applicant submitted eight additional documents, which were admitted without objection as AE N through U. DOHA received the transcript (Tr.) of the proceeding on March 5, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a., 2.a., 2.b., 2.f., 2.g., 2.h., and 2.i. Applicant denied the SOR allegations in subparagraphs 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 2.c., 2.d., 2.e., 2.j, and 3.a. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 43-year-old single man, who has two children from a previous relationship, a 24-year-old son, who is independent, and a 17-year-old daughter, who lives with her mother. Applicant provides support for his daughter. Applicant currently has a long-term on-going relationship with a woman, who he describes as his girlfriend. ⁽³⁾ Tr. 82.

Applicant graduated from college with a bachelor of science degree and majored in industrial engineering technology. He has also completed approximately 12 hours of graduate work in industrial management and water resources management. Tr. 85-86.

Applicant filed for Chapter 7 bankruptcy protection on September 21, 1998 and was granted a discharge on January 8, 1999. Total liabilities listed on Applicant's bankruptcy petition were \$30,525.44. Tr. 33, GE 18.

Following bankruptcy, Applicant became indebted and was in arrears to eight creditors totaling \$9,402.54 as of 2002. At his hearing, Applicant provided documentation that he had settled or paid seven of the eight debts. He provided documentation that he is attempting to resolve the eighth debt. All debts cited under financial considerations (Guideline F) have been resolved with the exception of the eighth debt. The debt involves an amount of \$307.54 owed to a previous landlord. Applicant has submitted evidence that he is making a good-faith attempt to resolve the matter. Tr. 21-33, 40-45, AE A-U, GE 4, 5, 7, 8, 20.

Applicant attributes his past financial difficulties to the costs associated with a custody battle with the mother of his two children, increases in child support, costs associated with subsequent moves, uncovered medical expenses, underemployment, and unemployment. Tr. 32-35, 44, GE 3, 5.

Applicant has the following criminal conduct concerns:

1. Applicant was arrested in July 1989 while living in State A for battery. Applicant testified that he was dropping his children off at their mother's house and her boyfriend assaulted him with a knife. Applicant sustained cuts on his fingers. Applicant was found not guilty. Tr. 70-71, GE 11, App. Answer to SOR.

2. Applicant was arrested in October 1993 in State A for disorderly conduct. The underlying conduct arose following an allegation of urinating in public. The charge was dismissed. Tr. 67-69, GE 10, 11, App. Answer to SOR.

3. Applicant was arrested in August 1994 in State A for battery. The underlying conduct involved an altercation in a bar. Applicant was found not guilty. Tr. 65-67. GE 6, 10, 11, App. Answer to SOR.

4. Applicant was arrested in August 1996 in State A for battery. The underlying conduct involved an altercation in a neighborhood after dropping off a female friend at her house. The charge was dismissed. Tr. 63-65, GE 6, 10, 11, App. Answer to SOR.

5. Applicant was arrested in November 1997 in State B for disorderly conduct and domestic abuse. The underlying conduct involved an altercation with his current girlfriend. Applicant was found guilty and paid fines and court costs. Tr. 58-63, GE 6, 16, App. Answer to SOR.

6. Applicant was arrested in July 1999 in State B for a contempt of court warrant based upon a failure to appear in court as ordered. The arresting officer was flagged down in a parking lot by Applicant's current girlfriend regarding a civil problem she was having with Applicant and the arresting officer ran a warrant check on Applicant. Applicant was fined. Tr. 56-57, GE 15, App. Answer to SOR.

7. Applicant was cited in October 1999 in State B for operating an auto after suspension (1st offense). Tr. 54-56, GE 5, 13, App. Answer to SOR.

8. Applicant was arrested in October 1999 in State B for battery and disorderly conduct. The underlying conduct involved an altercation with his current girlfriend. Charges were dismissed. Tr. 50-54, GE 6, 12, 13, 14, 19, App. Answer to SOR.

9. Applicant was arrested in May 2002 in State C for domestic abuse. The underlying conduct involved an altercation with his current girlfriend. Charges were denied. Tr. 45-50, GE 9, App. Answer to SOR.

Applicant was cited in his SOR for having been arrested in November 1988 in State A for theft. Applicant adamantly denied this allegation. The government was unable to provide source documents to further substantiate this charge other than a rap sheet which contained very basic information. Tr. 71-72, GE 11, App. Answer to SOR.

With the exception of the July 1999 arrest in State B, Applicant contends the cited arrests are allegations that have never been proven. He further asserts his arrests over a ten-year span only resulted in one conviction. Tr. 93. App. Answer to SOR.

Applicant was cited in his SOR for failing to disclose five arrests on the Security Clearance Application he submitted on April 8, 2002. Question 26 on the Application requires applicants to list pertinent arrests that occurred seven years prior to the form being completed. Specifically, the omitted arrests are the August 1996 arrest in State A, the July 1999 arrest in State B, the October 1999 citation in State B, the October 1999 arrest in State B, and the May 2002 arrest in State C. The May 2002 arrest in State C had not occurred at the time Applicant filled out his security clearance application in April 2002. Applicant only listed his November 1997 arrest and conviction in State B.

Applicant's explanation for failing to list his past arrests is, "If I left those out, it was not my intention to. I mean, I knew that you guys could find out anything that you wanted to. So it was not my intention to. Some of them I thought - well, like the one for contempt of court, that wasn't really an arrest. Like I said, I was not in there that long, and maybe I just forgot to write it down for that reason." Tr. 76.

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Under Guide F, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

In the SOR, DOHA alleged under Guideline F that Applicant filed for Chapter 7 bankruptcy on September 21, 1998 and was granted a discharge on January 8, 1999. It was further alleged that Applicant was in arrears for eight debts totaling \$9,402.54 as of 2002. Based on the record evidence, the government has established its case under Guideline F. Applicant has a history of not meeting financial obligations and has experienced an inability to satisfy debts. Disqualifying Conditions applicable under the Directive are contained in ¶ E2.A6.1.2.1 and ¶ E2.A6.1.2.3.

Applicant's financial difficulties arose following a lengthy and costly custody battle with the mother of his two children. Several costly moves further exacerbated Applicant's financial situation. This led to his filing for bankruptcy. Following bankruptcy, Applicant experienced unemployment or underemployment and fell behind on his bills. Since accruing his post-bankruptcy debts, Applicant has made impressive strides in either repaying or resolving all of his debts. The only lingering debt is an outstanding balance of \$307.54 owed to a former landlord, with whom Applicant is attempting to reach a good-faith resolution. The bankruptcy was not recent, the conditions that resulted in Applicant's financial situation were largely beyond his control, and he has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. The Mitigating Conditions applicable under the Directive are contained in ¶ E2.A6.1.3.1, ¶ E2.A6.1.3.3, and ¶ E2.A6.1.3.6 and outweigh the Disqualifying Conditions. Therefore, I conclude this Guideline for Applicant.

Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

In the SOR, DOHA alleged under Guideline J that Applicant was arrested eight times for criminal offenses and cited one time for a traffic-related offense. Six of the eight arrests involve some form of physical altercation and three of the six arrests related to physical altercations with his girlfriend. The arrests and citation spanned a period in excess of ten years from 1989 through 2002. Of these arrests, Applicant was convicted one time, which was for his arrest in November 1997 in State B for disorderly conduct and domestic abuse. Applicant contends the arrests for which he was not convicted are allegations that have never been proven. Based on the record evidence, the government has proven its case under Guideline J. Applicant has a history of allegations or admission of criminal conduct and conduct involving a single serious crime or multiple lesser offenses. The Disqualifying Conditions applicable under the Directive are contained in ¶ E2.A10.1.2.1 and ¶ E2.A10.1.2.2

The number of Applicant's arrests over a period exceeding ten years is of considerable concern. Applicant's suggestion that he should only be held accountable for his one arrest resulting in a conviction is not persuasive. Applicant's behavior requiring law enforcement intervention in nine separate instances raises significant security clearance concerns regarding Applicant's judgment. I cannot accept the notion that Applicant is an ongoing victim of circumstance given the number of times he has been arrested between 1997 to 2002 and the number of jurisdictions involved. Further troubling is the fact that the majority of arrests involved physical altercations and the three most recent arrests involve the same person, his girlfriend. Applicant offered no persuasive evidence that he accepts personal responsibility for his conduct nor did he offer evidence that he is taking any action to prevent further incidents of this nature from reoccurring.

Given the fact that Applicant vehemently denies the November 1988 arrest in State A for theft and lack of source documents in the record, I am giving the Applicant the benefit of doubt and find in his favor on this allegation.

I find no Mitigating Conditions applicable under Directive. ¶ E2.A10.1.3. Accordingly, the Disqualifying Conditions outweigh the Mitigating Conditions. I conclude this Guideline against Applicant.

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

In the SOR, DOHA alleged that Applicant deliberately falsified facts on a security clearance application about his previous arrest record. In particular, Applicant is alleged to have omitted five pertinent arrests. The May 2002 arrest for domestic abuse is clearly not applicable given the fact Applicant had not been arrested for this offense when he completed the security clearance application in April 2002. Giving Applicant the benefit of the doubt that the citation

issued in October 1999 in State B was not an arrest still leaves three remaining arrests. Those arrests are the August 1996 arrest in State A for battery, the July 1999 arrest in State B for contempt of court, and the October 1999 arrest in State B for battery and disorderly conduct. Applicant's explanation that he forgot to list them is not plausible. Applicant's educational background and obvious ability to recall events coupled with the nature of the arrests fails to lend credence to his explanation. Even if Applicant forgot the arrests, his subsequent involvement with the court system should have jogged his memory.

Based on record evidence, the government has proven its case under Guideline E. Applicant's deliberate omission of relevant and material facts from his security clearance application raises a security concern. The Disqualifying Condition applicable under the Directive is contained in ¶ E2.A5.1.2.2.

I find no Mitigating Condition applicable under the Directive. ¶ E2.A5.1.3. Accordingly, the Disqualifying Condition outweighs the Mitigating Condition. I conclude this Guideline against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.I: Against Applicant

Subparagraph 2.j.: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

In light of all of 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.

Robert J. Tuider

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. This characterization is derived from my question, "And would you say that she is your significant other, girlfriend, fiancée?" Applicant's response was, "Yes. I am kind of disappointed that she would not show up today." Tr. 82. His three most recent arrests involved physical altercations with this girlfriend..