

KEYWORD: Financial; Criminal Conduct

DIGEST: Applicant had considerable debt from the failure of his businesses, and engaged in criminal conduct by failing to appear in court and shoplifting. Applicant mitigated the financial considerations and criminal conduct security concerns. Clearance is granted.

CASENO: 04-02153.h1

DATE: 11/30/2005

DATE: November 30, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02153

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Dana Jacobson, Esq.

SYNOPSIS

Applicant had considerable debt from the failure of his businesses, and engaged in criminal conduct by failing to appear in court and shoplifting. Applicant mitigated the financial considerations and criminal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 10 February 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision ⁽¹⁾-security concerns raised under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 23 March 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 8 July 2005. On 18 August 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 25 August 2005.

FINDINGS OF FACT

Applicant is 50 years old and currently unemployed. He was employed as a linguist for a defense contractor and will be rehired if he can obtain a security clearance. Ex. L. He was born and raised in Egypt. He came to the U.S in late 1978 or early 1979 as a student. He became a naturalized U.S. citizen in September 1992 and obtained a U.S. passport in January 1999. Applicant is married to a native-born U.S. citizen; they have two children.

In 1987, Applicant was arrested for failure to identify himself to a police officer. He spent one night in jail and was then released. A judge dismissed the case because there was not sufficient evidence to establish he did not identify himself. Ex. A.

In 1990, he was arrested on two counts of speeding and one count of failing to appear. He was driving a taxi to support himself while he attended college. He paid the fine and has had only one ticket since.

Applicant owned two import-export business. He traded apples and automotive parts to the Middle East. A business in Egypt placed several small orders with Applicant. Applicant shipped the goods and was paid. The business in Egypt then submitted a large order and paid \$60,000 towards the purchase. Applicant shipped the order, but was never paid the amount due, well over \$200,000. His inability to collect the remaining monies owed him ruined his businesses and his personal finances.

As a result of Applicant's business losses and inability to pay his bills, a financial company that had loaned Applicant money to purchase equipment sued him. Applicant's lawyer withdrew from the case, leaving Applicant to fend for himself. The opposing attorney believed Applicant failed to provide all the discovery to which the opposing party was entitled. To exert pressure on Applicant to comply with the discovery request, in May 2001, the opposing attorney convinced the judge to hold Applicant in civil contempt and incarcerate him until he produced the documents. The documents were eventually produced and Applicant was released. The company obtained a judgment against Applicant. The opposing party's attorney reports that Applicant was always cooperative, may have been overmatched because his attorney withdrew, and greatly assisted in liquidating the remaining collateral and getting the plaintiff the best price for it by engaging buyers from the middle east. His assistance was so substantial, the finance company released him from the judgment in the fall of 2001. Tr. 18-21, 27.

Applicant was employed as an Arab linguist for a defense contractor from January-August 2003, during which time he served in both Hungary and Iraq. In Iraq, he accompanied military units on front-line assignments. "He witnessed military and civilian casualties and the gruesome aftermath of a bomb explosion." Ex. G at 1. The captain in command praises Applicant' attitude, performance, and professionalism. Ex. I.

While Applicant was deployed to Iraq with the U.S. military, one of his creditors filed suit. A default judgment was entered against him, although because of the deployment, Applicant was not in a position to defend himself.

Applicant sought legal help to resolve his financial situation. When the attorney representing him was unable to arrange settlements which Applicant could afford, he recommended Applicant file Chapter 13 bankruptcy. Applicant did so in June 2005. The total debt load is in excess of \$224,000. Tr. 28. Applicant's monthly payments are \$150 for five years. The expectation is that the priority claims of \$1,675 will be paid in full and the unsecured creditors will receive approximately 3 % of their allowed claims. Applicant has already made at least two payments to the trustee. Ex. B.

In August 2003, after he returned from Iraq, Applicant was arrested for shoplifting at a military base exchange. He stole

a pair of sunglasses valued at approximately \$160. Ex. 5 at 8. The U.S. Magistrate Judge sentenced Applicant to a fine and one year of supervised probation. After Applicant completed the conditions of supervision, including the completing of an alternatives to shoplifting class, he was placed on unsupervised probation in March 2004. He successfully completed his probation in September 2004. Applicant was scheduled to return to Iraq a few days after he was arrested. Instead, the company terminated him. (2) He is ashamed of his conduct. He still does not know why he did it.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline F-Financial Considerations

In the SOR, DOHA alleged Applicant had two judgments entered against him for \$117,796 plus \$15,474 in attorneys' fees (¶ 1.a) and \$61,000 (¶ 1.e); accounts in collection status for \$3,757 (¶ 1.b), \$328 (¶ 1.c), \$895 (¶ 1.d), \$18,626 (¶ 1.f), and \$3,100 (¶ 1.g); and had a past due debt of \$180 (¶ 1.h). An applicant who is financially overextended is at risk

of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established each of the allegations in SOR ¶ 1, except ¶¶ 1.c and 1.h. The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline F. Applicant has a history of not meeting his financial obligations (DC E2.A6.1.2.1) and is unable to satisfy his debts (DC E2.A6.1.2.3). An applicant may mitigate financial considerations security concerns by establishing that the conditions resulting in the debts were largely beyond his control (MC E2.A6.1.3.3) and he has initiated a good-faith effort to repay overdue creditors or otherwise resolve the debts (MC E2.A6.1.3.6). Applicant's debts resulted from business losses he incurred when a middle eastern purchaser failed to pay Applicant for the goods. Applicant is resolving these debts through a Chapter 13 bankruptcy. I found it significant that Applicant willingly worked with one of his creditors to ensure they were able to sell the collateral at a sufficiently high price to warrant releasing Applicant from the judgment it had obtained. Applicant is committed to fixing his financial situation, has made positive strides to do so, and future financial problems of this magnitude are unlikely. Applicant's payments to the bankruptcy trustee are small and well within his ability to pay. After considering all of the evidence of record, I find for Applicant on ¶ 1.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested in 1987 for failing to identify himself to a police officer (¶ 2.a); was arrested in 1990 for two counts of speeding and failing to appear (¶ 2.b); was arrested and charged with contempt of court (¶ 2.c), and arrested in August 2003 for shoplifting and later convicted of the offense (¶ 2.d). Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline J. Applicant engaged in criminal conduct (DC E2.A10.1.2.1) by committing multiple lesser criminal offenses (DC E2.A10.1.2). In evaluating Applicant's case, I considered that some of the offenses alleged were not criminal-speeding is a traffic as opposed to a criminal offense, and civil contempt of court is not a criminal offense. The most serious offense is the shoplifting offense which occurred in August 2003. I considered that this offense occurred shortly after Applicant returned from duty with combat forces in Iraq and shortly before he was to return to duty there. Applicant completed his probation and the required alternatives to shoplifting course, sought psychological counseling, and is remorseful for the offense. I conclude Applicant's criminal behavior was not recent (MC E2.A10.1.3.1) and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). After considering all the circumstances of the case, the disqualifying and mitigating conditions, and the adjudicative process factors, I find for 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

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. As required by Exec. Or. 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).

2. In April 2004, Applicant requested a psychological evaluation because he was "considering over-seas employment that will require a security clearance and documentation of his psychological fitness for duty." Ex. G at 1. Applicant apparently told the clinical psychologist that he was terminated from employment because he declined to return to a hostile duty zone. *Id.* He also reported to the psychologist that he had "no police or legal history." *Id.* at 2.