

DATE: September 15, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06853

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant works in a family-owned over-the-road trucking company that does business with the Department of Defense. Applicant has a history of minor criminal offenses, including convictions for shoplifting in September 1988 and May 1992, and disorderly conduct in January 1999 and May 1999. Criminal charges for vandalism and resisting arrest in 1997 are still pending, and a bench warrant is still outstanding. Applicant also has some delinquent debts which accumulated while she was working to establish the new trucking business. Applicant has made progress toward mitigating her history of criminal conduct and financial difficulties. However, she has not resolved the outstanding criminal charges or financial problems that raise security concerns. Clearance is denied.

STATEMENT OF THE CASE

On June 27, 2002, Applicant submitted an application for a security clearance. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 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 (the "Directive"). On November 29, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline J, Criminal Conduct, and Guideline F, Financial Considerations.

Applicant answered the SOR in writing on March 1, 2005. She elected to have a hearing before an administrative judge.

The case was assigned to me on March 23, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on June 30, 2005. The government introduced Exhibits 1 through 7. Applicant testified on her own behalf. DOHA received the final transcript of the hearing (Tr.) on July 14, 2005.

FINDINGS OF FACT

Applicant denied all the allegations in the SOR. Applicant's Answer to SOR, dated March 1, 2005. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is 37 years old. Ex. 1 at 1. She works in a family-owned over-the-road trucking company that does business with the Department of Defense. Ex. 2 at 4.

In 1988, when Applicant was 20 years old, she was caught shoplifting two items of clothing from a department store. Ex. 2 at 3. She was held in the city jail for five days before appearing in court. Applicant pled no-contest. *Id.* The court found her guilty of burglary in the second degree and sentenced her to seven days' confinement (with credit for time served), and 36 months probation. Ex. 4. at 2.

In 1992, Applicant was caught shoplifting a tube of lipstick worth less than \$10.00. Ex. 2 at 2. She was charged with petty larceny, and held in jail for five days until her court appearance. *Id.* Applicant pled no-contest to the charge and was found guilty. *Id.* The court sentenced her to serve 30 days' confinement, but because she was married and had children at home, the court allowed her to serve the time over successive weekends. *Id.* at 2-3.

In 1997, Applicant worked as the manager of an apartment complex, and she and her family lived in a apartment in the complex rent-free. Tr. at 18. Applicant had a continuing dispute with another tenant, and suspected the tenant had damaged her property in the past. Ex. 2 at 3. In about April 1997, Applicant discovered that a vehicle's windshield was broken. Ex. 2 at 3. She called the police and related her suspicions about the tenant. *Id.* The officer told her to wait while he questioned the tenant. Applicant declined to wait, and instead went to the tenant's apartment and began arguing with her. Ex. 2 at 3. The officer warned her to return to her vehicle but she did not obey. *Id.* at 4. The officer arrested her for resisting arrest and vandalism. Ex. 3 at 1; Tr. at 18. Applicant spent three days in jail. Tr. at 19-20. At her preliminary hearing, she pled not guilty. She was released on her own recognizance and ordered to appear for trial on May 13, 1997.

At about the same time, the owners of the apartment complex filed a lawsuit alleging Applicant and her husband owed six months unpaid rent. Applicant contested the suit but had no documentation supporting their agreement. Ex. 2 at 4. The owner won the case and was awarded a judgment for over \$4,000.00.

After the lawsuit, Applicant and her family were evicted and moved to another state. Applicant did not appear for trial on the pending criminal charges. Tr. at 20. The court issued a bench warrant for her arrest on May 13, 1997. Ex. 3 at 2. The warrant is still open.

Applicant worked in several different jobs in the new state, including self-employment as a house painter. Ex. 1 at 5. In September 1998, she tried to cash a check she received for a painting job at the drive-up window of the drawer's bank on a Saturday morning. Ex. 2 at 1. The cashier would not cash the check at the drive-up window because Applicant did not have an account there. *Id.* Applicant became angry and refused to leave until she cashed the check. The bank employee called the police, who cited Applicant for disturbing the peace. *Id.* at 1-2. She was fined \$100.00.

Applicant incurred some debts for medical expenses for her children. Tr. at 32-33. The expenses were incurred for relatively minor injuries common in childhood. *Id.* at 33. Her employment did not offer medical insurance coverage and she was unable to pay the bills. *Id.* at 32-33.

In May 1999, Applicant and her husband were driving in a community where they had lived for a few months. Ex. 2 at 2. A local police officer pulled them over and cited Applicant's husband for driving with expired license plates. *Id.* Applicant tried to explain that they had not had the opportunity to register the vehicle in the new state, but the officer refused to accept the explanation. Rather than allow them to drive the vehicle home, he issued a citation and had the car towed, incurring additional expense. *Id.* Applicant began arguing with the officer, who placed her under arrest for disturbing the peace. Applicant was found guilty of the misdemeanor offense and paid a \$100.00 fine. *Id.*

In 2001, Applicant began serving as an officer and working as a dispatcher in a family-owned corporation operating a trucking business. Ex. 1 at 3; Tr. at 30, 34. The business moved to its present location to take advantage of more promising business opportunities. Ex. 2 at 5. According to Appellant, she drew a small salary and reinvested most of the profits into the fledgling business. During this time, she was unable to pay her outstanding debts. She was reluctant to enter into a formal debt repayment program because her salary was not steady. Tr. at 29.

Applicant was not aware of the debts listed in ¶¶ 2.a and 2.c of the SOR. Tr. at 24. She acknowledged the debts listed in ¶¶ 2.b, 2.d, and 2.e of the SOR. Tr. at 24-25; Ex. 2 at 5. She planned to begin repaying them, from the smallest to the largest, as soon as possible. Answer to SOR, *supra*, at 2-3; Tr. at 29. Applicant acknowledged the judgment described in ¶ 2.f of the SOR but indicated her intent to appeal the decision. She has not sought or obtained financial counseling as of yet, but intends to do so in the future. Tr. at 32.

POLICIES

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Guideline F, Financial Considerations. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. 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 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline J, Criminal Conduct

Under the Directive, ¶ E2.A10.1.2.1, "admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant was convicted of four relatively minor offenses between 1992 and 1999. She still faces charges for vandalism and resisting arrest from 1997, and a bench warrant is still pending for her failure to appear for trial. I conclude the available evidence raises these potentially disqualifying conditions.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated in certain circumstances. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." Applicant's criminal conduct resulting in charges and convictions was not recent, each having occurred over five years ago. I find this potentially mitigating condition applies to that conduct. However, Applicant still has charges pending from 1997 and an open bench warrant for her failure to appear. I conclude this mitigating condition does not apply to that allegation.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." Applicant was convicted of two separate incidents of shoplifting and two separate incidents of disturbing the peace. Considering her history I do not find her criminal conduct was an isolated incident. I conclude this mitigating condition does not apply.

Under, ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant's offenses occurred between 1992 and 1999; since then she has assumed greater responsibilities and held steady employment in her family-owned business. She recognizes the mistakes she made and is resolved not to offend in the future. I considered carefully her demeanor during the hearing and find that she has matured and is unlikely to commit criminal acts in the future. I conclude this mitigating factor applies.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person" concept. The offenses that resulted in convictions occurred many years ago when Applicant was younger, and were relatively minor. Since then, Applicant has matured and accepted greater responsibilities. If those were the only acts giving rise to security concerns, one could readily find they have been mitigated. Unfortunately, Applicant has not been able to resolve the charges that are still pending against her. Indeed, she still faces a bench warrant for her failure to appear for trial. Balancing the disqualifying and mitigating factors in light of the "whole person" concept, I conclude Applicant has not mitigated the security concerns arising from her history of criminal conduct.

Guideline F, Financial Considerations

Paragraph E2.A6.1.2.1 of the Directive provides that it may be a disqualifying condition if the evidence reveals "[a] history of not meeting financial obligations." Similarly, ¶ E2.A6.1.2.3 indicates that an "[i]nability or unwillingness to satisfy debts" may be disqualifying. Applicant has a history of not meeting her financial obligations. She has debts totaling over \$14,000.00 that have remained unpaid for many years. Although the financial circumstances of her new business are improving, she is not yet in a position to resolve her delinquent debts. I find Applicant has shown both a history of failing to meet her financial obligations and an inability to satisfy her debts. I conclude both these potentially disqualifying conditions apply.

The security concerns arising from Applicant's financial difficulties can be mitigated under certain circumstances. Under the Directive, ¶ E2.A6.1.3.1, it may be mitigating where "the behavior was not recent." The bulk of Applicant's delinquent debts arose after she began building her new business in 2001, and they remain unpaid. I find most of the unpaid obligations are recent. This mitigating condition does not apply.

Paragraph E2.A6.1.3.2 of the Directive provides that it may be mitigating where the financial difficulty "was an isolated incident." Applicant's numerous delinquent debts arose over many years because of a variety of reasons. I conclude this mitigating condition does not apply.

Under ¶ E2.A6.1.3.3, it may be mitigating where, "[t]he 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)." An unexpected loss of employment may be a circumstance beyond an individual's control and could mitigate the security concerns arising from financial difficulties. However, I note Applicant's employment history was sporadic for some years. Additionally, she knowingly undertook to leave regular employment to launch the new business, so the loss of income was not unexpected. I am not persuaded by Applicant's evidence that this mitigating condition applies.

Proof that "[t]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control," may be mitigating, under ¶ E2.A6.1.3.4 of the Directive. Applicant has not sought or received financial counseling, nor has she begun a formal plan to repay or resolve her delinquent debts. I cannot find that her debt problem is under control or is being resolved. I conclude this mitigating condition does not apply.

Finally, it may be mitigating where "[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Directive, ¶ E2.A6.1.3.6. As noted above, Applicant has not begun repaying the delinquent debts listed in the SOR because of the uncertain income from her employment. I conclude this mitigating condition does not apply.

I considered the potentially disqualifying and mitigating circumstances in light of the "whole person" concept. After four and one-half years of concerted effort, Applicant's business seems poised to become lucrative. At this time, however, Applicant is unable to resolve the delinquent debts that have existed for such a long time. I conclude Applicant has not mitigated the security concerns arising from her history of failing to meet her financial obligations and her inability to pay her debts.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2, Guideline F: 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

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.

Michael J. Breslin

Administrative Judge