

KEYWORD: Criminal Conduct; Financial; Personal Conduct

DIGEST: Applicant is 32 years old and has worked as a general maintenance technician for a federal contractor since 2002. He has outstanding bench warrants and a no bail bench warrant in a state he fled from where he also has a pending jail sentence and other pending charges. Applicant has unpaid delinquent debts and failed to list his criminal history and a repossession on his security clearance application. Applicant failed to mitigate security concerns under Guidelines J, F and E. Clearance is denied.

CASENO: 04-09241.h1

DATE: 04/28/2006

DATE: April 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09241

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 32 years old and has worked as a general maintenance technician for a federal contractor since 2002. He has outstanding bench warrants and a no bail bench warrant in a state he fled from where he also has a pending jail sentence and other pending charges. Applicant has unpaid delinquent debts and failed to list his criminal history and a repossession on his security clearance application. Applicant failed to mitigate security concerns under Guidelines J, F and E. Clearance is denied.

STATEMENT OF THE CASE

On July 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J (criminal conduct), Guideline F (financial considerations) and Guideline E, (personal conduct).

In a sworn statement, dated August 23, 2005, and resubmitted on October 25, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR response, Applicant admitted the allegations under Guideline J except SOR ¶¶ 1.o and 1.s. Under Guideline F, he admitted SOR ¶¶ 2.a and 2.e, and denied SOR ¶¶ 2.b, 2.c and 2.d. Under Guideline E, he admitted SOR ¶¶ 3.a, 3.b and 3.d, and denied ¶ 3.c. The case was originally assigned to another administrative judge on March 7, 2006. After discussions in February 2006 between Applicant and Department Counsel, a notice of hearing was issued on March 10, 2006, scheduling the hearing for March 28, 2006. The notice of hearing was subsequently returned unopened to DOHA by the facility security officer of Applicant's employer. On March 23, 2006, the administrative judge received a notification from Department Counsel that Applicant was requesting a continuance to prepare for the hearing and because he did not have 15 days notice of the hearing. The continuance was granted and the hearing was postponed until April 10, 2006. The case was subsequently transferred to me and a notice of hearing was issued on March 27, 2006, scheduling the hearing for April 10, 2006. The hearing was conducted as scheduled. The government submitted fifteen exhibits that were marked as Government Exhibits (GE) 1-15. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and did not submit any exhibits. DOHA received the hearing transcript (Tr.) on April 21, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 32 years old and has worked as a general maintenance technician for a federal contractor since 2002. He married in 1994 and has been legally separated from his wife since 1998. He has a child from the marriage for whom he pays child support. He served in the Marine Corps from 1993-1997, and received an honorable discharge.

Applicant was arrested on October 29, 1995, and charged with Inflict Corporal Injury on Spouse/Cohabitant. Applicant and his wife had an argument and were mutually combatant. She called the police and he was arrested. She did not pursue the charges and they were dismissed.

Applicant was arrested on November 6, 1998, and charged with Driving While Intoxicated Alcohol and/or Drugs (DUI). He and his girlfriend were in his car, and he lost control of the car and hit a jersey wall. She was injured and both were transported to the hospital by ambulance. Applicant's attorney negotiated a plea agreement, and he pleaded guilty to Negligent Driving First Degree. He was sentenced to 90 days confinement, that was suspended. He was ordered to pay a \$1,000 fine, of which \$700 was suspended, and court cost, of \$456.65. Applicant was also placed on probation for 24 months, and was required to attend a DUI victim's panel and complete one year of alcohol/drug treatment. The DUI offense was dismissed.

Applicant had warrants issued for his arrest on January 27, 2000; November 28, 2000; December 1, 2000; and June 11, 2001, for failing to appear in court as was ordered on the charges that occurred on November 6, 1998. He was subsequently arrested on August 27, 2001. Applicant again failed to appear and a warrant was issued for his arrest on September 11, 2001. Applicant's case was adjudicated on September 25, 2001, when he paid his delinquent fine.

Applicant claimed that he failed to appear in court because he did not have transportation. ⁽²⁾

Applicant was arrested on March 22, 2000, and charged with (1) Assault, Third Degree Felony, (2) Domestic Violence, (3) No Valid Operator's License, and (4) No identification. Applicant and his brother had an altercation with acquaintances and he was arrested. Applicant decided to plead guilty to a reduced charge of assault fourth degree, which is a misdemeanor and not face a felony assault charge. He was ordered to pay a fine of \$147 and court costs of \$500. He was also ordered to pay restitution of \$596. Counts (1) and (2) were dismissed.

Applicant was arrested on May 12, 2000, for contempt of court. On July 19, 2000, an arrest warrant was issued, and Applicant had a previous fine increased to \$375 because he had failed to pay the original fine. These two arrests pertain to the charges on March 22, 2000. The warrant was quashed on July 28, 2000, when Applicant's fine was paid in full.

Applicant was arrested on July 10, 2001, and charged with DUI for an incident that occurred on March 10, 2001. Applicant agreed to accept a deferred prosecution for this offense under certain conditions, one of which was that he had to attend alcohol treatment. He was placed on probation for 24 months on the condition that he pay a \$125 fine and fees, attend a victim's panel, and have an ignition interlock device installed on his vehicle. He admitted he had a drinking problem so he could be referred for deferred prosecution. Applicant did not really believe he had a drinking problem.⁽³⁾ He was advised by the judge that there was "zero tolerance" for missing any of the required counseling sessions, and if he did he would be found guilty of DUI. Applicant had injured his thumb and needed surgery. He failed to notify the alcohol treatment facility of his medical needs and missed two sessions. He did not contact his counselor regarding the extenuating circumstances. Applicant left the treatment against the advice of the treatment facility. He owes \$1,852 for services to the treatment facility that remains unpaid.

On August 27, 2001, Applicant was arrested on a Negligent Driving, First Degree warrant, and for Driving While License Suspended or Revoked, Third Degree. He was found guilty and sentenced to 90 days in jail that was suspended.⁽⁴⁾ He was ordered to pay a fine of \$1,000 with \$750 suspended, and he was placed on probation for 12 months. A final review of this case revealed a new violation, which prompted a bench warrant for Applicant's arrest on February 13, 2003, for Failure to Appear. This warrant is still active. No additional information was provided regarding the new violation.

A warrant was issued on September 4, 2001, for failure to appear. It was quashed on September 21, 2001, and Applicant received a deferred adjudication and was placed on 24 months probation on the condition that he pay a \$125 fine and fees, attend a victim's panel, and have an ignition interlock device installed on his car. No other information was provided regarding these charges.

On May 30, 2002, Applicant's deferred adjudication was revoked for a violation that occurred on April 19, 2002. Applicant was sentenced to 365 days in jail, of which 275 days were suspended.⁽⁵⁾ He was ordered to pay a fine of \$5,000, of which \$4,500 was suspended. He was to pay court fees of \$520 and was placed on probation for 60 months and was to have an ignition interlock device installed on his car for 12 months. In addition, he was to attend Alcoholics Anonymous and a victim's panel. He was supposed to start serving his sentence but failed to show.⁽⁶⁾

On the same day, May 30, 2002, in a different city, Applicant was charged with (1) Hit and Run Attended Vehicle, for an accident that occurred on February 14, 2002; (2) Failure to Yield Right of Way and a Failure to Appear warrant was served. Applicant was present at the preliminary hearing, but failed to return to court as ordered.⁽⁷⁾ The warrant was quashed on June 18, 2002, and a second warrant for failure to appear was issued on September 17, 2002, that is still in effect.

On August 9, 2002, Applicant notified the court by email that he had moved to State B. He did not request permission from the court before doing so.⁽⁸⁾ The court did not have Applicant's new address so he was ordered by email to appear for his commitment hearing in person on August 21, 2002 or a No Bail Bench Warrant would be issued. Applicant failed to appear as ordered and a No Bail Bench Warrant was issued for his arrest on September 5, 2002. The bench warrant is still in effect.

Applicant has several outstanding warrants in another state, including a No Bail Bench Warrant. He also has outstanding fines and sentences that he has not served, including jail time for 365 days. He has not returned to the state to resolve his criminal activities. He claims he would like to resolve his criminal issues in State A, but can not take the time off from work in State B.⁽⁹⁾ He also claims that he was told by his father, a police officer, that if he waited long enough his warrants would expire.⁽¹⁰⁾

Applicant has paid the delinquent debt alleged in SOR ¶ 2.a.⁽¹¹⁾ He claims he paid the debts listed in SOR ¶¶ 2.b, 2.c, and 2.d, but provided no documentation to support his claim.⁽¹²⁾ He has not paid the debt in SOR ¶ 2.e.⁽¹³⁾ He acknowledges there is a debt listed on his credit report that is not part of the SOR allegations for \$830.40 owed to the District Court for a fine he has not paid.⁽¹⁴⁾

Applicant claims he continued alcohol counseling when he moved to State B, but provided no proof that this complied with the orders from the court.

Applicant did not list on Question 21 of his security clearance application (SCA) that he had been arrested and charged with a felony on March 22, 2000. He claimed he was "unaware of exactly what was suppose to be put in there."⁽¹⁵⁾ He then admitted that he should have listed the felony.⁽¹⁶⁾ He did not list the offenses he was arrested for in November 6, 1998; May 12, 2000; July 10, 2001; and August 27, 2001, as was required in Question 26. He did not list that he had received alcohol treatment from September 21, 2001 to May 6, 2002, and September 2002 to September 2003, as was required in Question 30. Applicant failed to list that he had a car repossessed, as was required in Question 35. He claims he forgot the offense where his girlfriend was injured. He did not list the repossession because it was past seven years when it was in fact only four years. He did not list his felony charge because it was reduced to a misdemeanor, and he did not list the hit and run charge because he was still going to court for it.⁽¹⁷⁾ His explanations for his failure to list the required information, some of which were for charges that are still pending were not credible. Applicant deliberately failed to provide accurate and truthful information on his SCA, in violation of Title 18 U.S.C. § 1001, a felony.

Applicant claimed he has not been in any criminal trouble since leaving State A and moving to State B.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁸⁾ The government has the burden of proving controverted facts.⁽¹⁹⁾ The burden of proof is something less than a preponderance of evidence.⁽²⁰⁾ 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.⁽²¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²²⁾

No one has a right to a security clearance⁽²³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁵⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁶⁾ 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.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

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.

Guideline F-Financial Considerations-a security concern exists when a person has significant delinquent 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.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines J, F and E.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*), apply. Applicant has a history of criminal arrests, charges and convictions. He is a fugitive with outstanding warrants including a No Bail Bench warrant for his arrest and an outstanding jail sentence he has yet to serve. In addition, Applicant's falsifications on his SCA were violations of 18 U.S.C. 1001, felonies.

I have considered all the mitigating conditions and conclude none apply. Applicant is a fugitive, wanted on bench warrants, including a No Bail Bench Warrant in State A. He fled State A knowing he was going to serve jail time after having the suspended sentence revoked for failure to comply with the terms of the suspension. Applicant has a history of disregarding the law and court orders. He continued his criminal conduct by deliberately falsifying his SCA. Although he claims he has not been in any trouble since leaving State A, he fails to grasp the gravity and consequences of his fleeing from a state where he is wanted by the law, has pending charges, and the seriousness of lying on his SCA, a felony offense. Applicant has failed to mitigate Guideline J, criminal conduct.

Based on all the evidence, Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*), apply in this case. Applicant has delinquent debts dating back to 1999, that he has not paid.

I have considered all the Financial Considerations Mitigating Conditions (FC MC), and especially considered FC MC E2.A6.1.3.1 (*The behavior was not recent*), FC MC E2.A6.1.3.2 (*It was an isolated incident*), FC MC 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)*), FC MC E2.A6.1.3.4 (*The 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*), and FC MC E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

Applicant's debts are recent because he has failed to pay them and they are still owed. Applicant has numerous creditors and therefore his delinquencies are not isolated. Although Applicant has paid one of his creditors, he failed to provide documented proof that he paid others. He still owes over approximately \$1,800 to the alcohol treatment center he attended and although not part of the SOR he owes outstanding fines to State A. Applicant's criminal problems have caused him to pay fines, attorneys fees, court costs, all affecting his financial stability and all caused by behavior within his control. I have considered all the circumstances surrounding Applicant's financial situation and conclude none of the mitigating conditions apply. I find Applicant failed to mitigate the financial considerations with regard to his financial consideration.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*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*), applies. Applicant deliberately failed to divulge his past arrests and charges, some of which that are still pending. Applicant has a significant criminal history, including a felony arrest that he was aware of. He attended alcohol counseling during two periods of time, including since his move to State B, but failed to reveal that information. It is obvious that Applicant's intent was to prevent the government from being fully aware of the negative aspects of his background.

The deliberate omission of relevant and material facts from a trustworthy determination application is a concern and may be disqualifying. PC DC E2A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background.⁽²⁷⁾ An applicant's criminal and financial histories are matters that could affect a final agency decision on whether to grant the applicant a clearance, and his failure to disclose it would impede a thorough investigation of his background.

I considered all the mitigating conditions and specifically considered Personal Conduct Mitigating Condition (PC MC)

E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), PC MC E2.A5.1.3.4 (*Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*) and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. The SCA is clear in requiring Applicant to list his criminal offenses, alcohol treatment and repossessions. The evidence supports that Applicant intentionally meant to hide his complete past including criminal, alcohol and financial. Applicant's explanations were not credible. Applicant did not offer any information to show any steps he may have taken to reduce his vulnerability to coercion or exploitation. The falsifications are recent because they are a part of his SCA. One objective of the security clearance process is to determine all relevant and material information concerning an applicant. The process requires full and open disclosure by the applicant of all requested information. Any intentional misrepresentation or omission by an applicant materially obstructs the investigation of Applicant's security worthiness and raises serious concerns about the character and overall integrity of the individual. I find Applicant deliberately failed to provide the information required by the SCA. His lack of candor raises serious security concerns about his honesty, trustworthiness and judgment. I find Applicant failed to mitigate Guideline E.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person and I find Applicant failed to mitigate the security concerns regarding Guideline J, criminal conduct, Guideline F, financial considerations, and Guideline E, personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline J, F and E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a-s: Against Applicant

Paragraph 2. Guideline F: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b-e: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a-d: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

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 and modified (Directive).
2. Tr. 16.
3. GE 12 at 1.

4. Tr. 32-33.
5. GE 5.
6. Tr. 30.
7. Tr.34.
8. Tr. 57.
9. Tr. 19.
10. Tr. 19-20.
11. GE 13.
12. Tr. 35-37.
13. Tr. 37.
14. Tr. 38. This debt is not considered for disqualifying purposes, but will be considered in the context of the "whole person" analysis.
15. Tr. 41 and 44.
16. Tr. 42.
17. Tr. 42-46.
18. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
19. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
20. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
21. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
22. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
23. *Egan*, 484 U.S. at 531.
24. *Id.*
25. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
26. Executive Order 10865 § 7.
27. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002).