

KEYWORD: Criminal Conduct; Personal Conduct; Financial

DIGEST: Applicant has a history of domestic violence that resulted in a general court-martial conviction and administrative discharge from the U.S. Marine Corps (USMC). He lied to a criminal investigator on one occasion by denying he threatened to kill his wife. During his marriage, he incurred substantial debts, of which three have been resolved and one is disputed. He has mitigated security concerns based on personal conduct and financial considerations, but he has not mitigated the security concern based on criminal conduct. Clearance is denied.

CASENO: 04-12911.h1

DATE: 02/21/2006

DATE: February 21, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12911

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of domestic violence that resulted in a general court-martial conviction and administrative discharge from the U.S. Marine Corps (USMC). He lied to a criminal investigator on one occasion by denying he threatened to kill his wife. During his marriage, he incurred substantial debts, of which three have been resolved and one is disputed. He has mitigated security concerns based on personal conduct and financial considerations, but he has not mitigated the security concern based on criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 26, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken 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 (Directive). The SOR alleges security concerns under Guidelines J (Criminal Conduct), E (Personal Conduct), and F (Financial Considerations). Under Guideline J, it alleges four incidents of domestic violence and the two instances of deliberately omitting relevant and material facts during questioning by criminal and security investigators. Under Guideline E, it alleges the same two instances of deliberately omitting relevant and material information alleged under Guideline J. Under Guideline F, it alleges four delinquent debts totaling about \$76,250.

In an undated document, Applicant answered the SOR. He admitted the allegations of domestic violence and offered explanations. He denied deliberately omitting relevant and material facts during the two interviews. He admitted three of the four delinquent debts and described his actions to resolve them. He requested a hearing. The case was assigned to me on December 12, 2005 and heard on January 11, 2006. DOHA received the transcript (Tr.) on January 20, 2006.

PROCEDURAL RULINGS

During the hearing, I granted Department Counsel's motion to amend SOR ¶ 1.b. to conform to the evidence. The amendment deletes the allegation Appellant was charged with certain offenses and substitutes an allegation he admitted the offenses. As amended, the first sentence of ¶ 1.b. alleges: "You admitted on or about August 4, 2000, in an interview with the U.S. Marine Corps Military Police . . . to (1) domestic assault, (2) communicating a threat, and (3) providing a false statement." I directed the amendment be reduced to writing, and it is included in the record as Hearing Exhibit I. ⁽¹⁾ Later in the hearing, I also granted Department Counsel's motion to amend line five of SOR ¶ 1.d. by striking the words, "with means and force likely to produce death or grievous bodily harm." ⁽²⁾

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 29-year-old communications technician for a federal contractor. He has worked for his current employer since November 2002. He served in the USMC from October 1994 until September 2002. He received a security clearance in June 1998, while on active duty in the USMC. ⁽³⁾

Applicant was married in August 1998. The marriage was tumultuous from the beginning. Shortly after they were married, they began arguing about household finances and other domestic issues. They went from verbal arguments to pushing and shoving and then to progressively more violent behavior.

In October 1999, Applicant's wife was sitting on him and refused to get off. At the hearing, he testified his wife insisted on having sex after he returned home from a 12-hour shift and was exhausted. ⁽⁴⁾ Although he was about eight inches taller than his wife, she outweighed him. She weighed about 220 pounds, and he weighed about 160 pounds. ⁽⁵⁾ When she refused to get off him, he struck her in the head with a glass candle holder, inflicting a cut requiring several stitches. ⁽⁶⁾ She falsely told military authorities she accidentally bumped her head. ⁽⁷⁾

Applicant admitted the assault in two sworn statements to criminal investigators in August 2000, but he did not mention his wife's insistence on sexual activity until he answered the SOR. In his answer to the SOR, Applicant stated, "I apologized and admitted what I did was wrong but it would not have happened if my then wife would have showed some understanding with my situation with working 12 hour days, 7 days straight."⁽⁸⁾

In March 2000, Applicant became romantically involved with an Army enlisted woman. His wife learned of the relationship and repeatedly accused him of adultery, leading to further domestic discord.

On August 3, 2000, during another domestic disturbance, Applicant threw a glass plate at his wife and threatened to kill her. The Military Police were summoned, and they removed him from the residence. His wife described the assault and threat to the Military Police.⁽⁹⁾

When Applicant was questioned by a criminal investigator, he admitted the assault but denied threatening to kill his wife.⁽¹⁰⁾ When the interrogation continued about five hours later, he admitted he had lied in his earlier statement, and he admitted threatening to kill his wife. He attributed his earlier falsification to being exhausted.⁽¹¹⁾ He also admitted that during their marriage, he struck his wife with a closed fist on ten or fifteen occasions; struck her with a glass plate, a candle holder, and a shoe; and kicked her on more than ten occasions, once so hard he sprained his foot.⁽¹²⁾ After the August 2000 incident, he was required to attend anger management and marriage counseling for six months.⁽¹³⁾

On August 10, 2001, another altercation occurred after Applicant's wife asked him for money to buy marijuana and he refused. His wife threatened to choke him with a coat hanger. They spat at each other, and he hit his wife in the face with a closed fist. When she grabbed him around his waist, he held her head down and rammed his knee into her face, breaking her nose.⁽¹⁴⁾ Military Police arrived and apprehended him.⁽¹⁵⁾ He was ordered to attend six more months of anger management and marriage counseling.⁽¹⁶⁾ In his answer to the SOR, he stated: "I made a mistake in judgment in allowing her to get me so frustrated enough to where I physically assaulted her. But I was faced with a threat of physical violence done to me when she threatened to choke me with the hanger."⁽¹⁷⁾

As a result of the August 2001 altercation, Applicant was tried by a general court-martial, pleaded guilty to striking his wife in the face with his fist and with his knee, and was sentenced to hard labor without confinement for 60 days, restriction for 60 days, and reduction from sergeant to private first class.⁽¹⁸⁾ Based on this conviction, he was administratively discharged from the USMC with a general discharge under honorable conditions in September 2002.⁽¹⁹⁾

Applicant and his wife lived apart after the August 2001 altercation until their divorce in August 2002.⁽²⁰⁾ There were no children born during the marriage. He has not remarried, and has not been involved in a committed relationship for more than a year.⁽²¹⁾

Applicant was questioned by a security investigator in January 2004 regarding the August 2001 altercation. He executed a signed, sworn statement describing the altercation, the results of his court-martial, and his discharge from the USMC. Contrary to the allegation in SOR ¶ 2.b., the statement does not reflect any questions about previous domestic violence, does not contain any denials of earlier assaults, and does not say the August 2001 altercation was a one-time incident.⁽²²⁾

Applicant's credit report dated January 30, 2004, reflected the four delinquent debts alleged in the SOR.⁽²³⁾ SOR ¶ 3.a. alleges a delinquent home mortgage debt of about \$72,443; ¶ 3.b. alleges a delinquent charge account debt of \$2,506; ¶ 3.c. alleges a delinquent cell phone bill of \$675; and ¶ 3.d. alleges a delinquent cable bill of \$626.

The home mortgage debt arose when Applicant cosigned a home mortgage for his wife's guardians in 1998. They abandoned the home in 1999, and the mortgage was foreclosed, leaving Applicant responsible for the deficiency. He and the lender agreed to settle the debt for \$7,500. He made a \$750 initial payment on the delinquent loan and is paying \$150 per month.⁽²⁴⁾ As of September 15, 2005, he owed a balance of \$4,343.49.⁽²⁵⁾ As of the date of the hearing, he owed \$3,743.49.⁽²⁶⁾

In his answer to the SOR, Applicant disclaimed any knowledge of the charge account debt.⁽²⁷⁾ He later learned the account was for furniture, and he made an agreement to pay \$100 per month.⁽²⁸⁾ He has reduced the balance from \$2,506 to \$1,058.03.⁽²⁹⁾

The cell phone bill and cable bill arose when Applicant discontinued service at the time of his divorce, but the service providers continued to bill him. He disputed these two debts.⁽³⁰⁾ The cell phone bill has been deleted from his credit record.⁽³¹⁾ In September 2005, he paid the cable bill in full.⁽³²⁾

Applicant has been recognized by his supervisors for hard work and dedication.⁽³³⁾ He has received two merit increases in pay, raising his annual salary to about \$50,325.⁽³⁴⁾

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 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), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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; *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

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. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2.

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security investigations and military criminal investigations are within the jurisdiction of the executive branch of the Government of the United States. A deliberately false answer in response to questions by an official investigator is a serious crime within the meaning of Guideline J. *See* Article 107, Uniform Code of Military Justice, 10 U.S.C. § 907. Applicant's history of domestic violence and his falsification establish DC 1 and DC 2.

Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is "clear evidence of successful rehabilitation" (MC 6). Directive ¶¶ E2.A10.1.3.1., E2.A10.1.3.2., E2.A10.1.3.6. The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows a significant period of time has passed without evidence of misconduct by an applicant, then the administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's last documented incident of domestic violence was in August 2001, more than four years ago. While he was married, he twice attended six-month counseling programs, but they did not prevent the third, final, and most serious incident. He and his wife separated after that incident, and Applicant has not remarried. He was involved in a relationship of unknown quality until about a year ago. There is no evidence he has learned to cope with the stresses of a close, committed relationship without reacting to that stress with impulsive, violent behavior. There is no evidence of further counseling after his separation from the USMC.

Significantly, Applicant has not expressed remorse for his conduct. Although he used the correct words of apology in his answer to the SOR and at the hearing, each apology was followed by an excuse blaming his spouse. His regrets appear to be based on the impact of his conduct on his life, not on the impact of his abuse on the victim or the wrongfulness of his conduct.

Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). I am not convinced sufficient time has passed to demonstrate his propensity for impulsive violence has changed. Accordingly, I conclude Applicant has not carried his burden of establishing MC 1 and MC 6.

A security concern based on criminal conduct also may be mitigated by showing the criminal behavior was "an isolated incident" (MC 2). Directive ¶ E2.A10.1.3.2. *See also* Directive ¶ E2.2.1.3. (frequency and recency of conduct). Applicant was involved in multiple incident of domestic violence during his marriage. I conclude MC 2 is not established.

In addition to the enumerated disqualifying and mitigating conditions, I have considered the serious nature of his extensive history of domestic violence. Directive ¶ E2.2.1.1 (nature, extent, and seriousness of conduct). I have considered that his wife was physically aggressive, demanding, and partly responsible for several of the incidents. Directive ¶ E2.2.1.2. (circumstances surrounding the conduct). I also have considered that Applicant is older and more mature than he was when the domestic violence occurred. Directive ¶ E2.2.1.4. (age and maturity at time of conduct).

With respect to Applicant's false statement to a criminal investigator, I have considered that it happened more than five years ago and there have been no other instances of falsification. I conclude it was not "recent," and was "an isolated incident." Accordingly, I conclude MC 1 and MC 2 are applicable to this conduct, and I resolve SOR ¶ 1.e. for Applicant. I have also considered, however, that the false statement was part of with his pattern of minimizing and rationalizing his behavior that was continued in his answer to the SOR and his testimony at the hearing.

After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole

person, I conclude Applicant has not mitigated the security concern based on the criminal conduct involving domestic violence.

Guideline E (Personal Conduct)

Under this guideline, 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.

A disqualifying condition (DC 3) applies when an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator or security official in connection with a personnel security or trustworthiness determination. Directive ¶ E2.A5.11.2.3. Applicant's statement alleged in SOR ¶ 2.a. was made to a criminal investigator, not a security investigator or official, and thus does not fall within the literal language of DC 3. Nevertheless, his false statement was a dishonest act. Accordingly, I consider it a disqualifying condition.

SOR ¶ 2.b. alleges Applicant told a security investigator the August 2001 incident was a one-time incident and he had never struck his wife on any other occasion. The written statement documenting that interview discusses only the August 2001 incident. It does not reflect any questions about previous incidents, nor does it say the August 2001 incident was a one-time occurrence. I conclude Applicant has refuted this allegation and I resolve it in his favor.

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶ E2.A5.1.3.2. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3.

Neither condition is established for the falsification alleged in SOR ¶ 2.a. When an applicant makes disclosures correcting an earlier falsification, MC 3 rather than MC 2 is applicable. ISCR Case No. 97-0289 at 2, 1998 WL 317498 (App. Bd. Jan. 22, 1998). The record reflects that before Applicant was interrogated, his wife told investigators he had threatened to kill her. Although he denied threatening to kill her in his first statement, he "corrected" his statement five hours later, strongly suggesting he was confronted with his wife's accusation. I conclude Applicant has not carried his burden of establishing MC 2 or MC 3.

However, I have also considered that Applicant's falsification occurred more than five years ago and there have been no other instances of falsification. Directive ¶ E2.2.1.1.3. (frequency and recency of conduct). These circumstances mitigate his conduct. After weighing the disqualifying and mitigating conditions, I conclude Applicant has mitigated the

security concern based on personal conduct.

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history establishes DC 1 and DC 3.

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or an isolated incident (MC 2). Directive ¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant has multiple delinquent debts that are not yet fully resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions beyond the person's control (MC 3). Directive ¶ E2.A6.1.3.3. Even if an applicant's financial difficulties initially arose due to circumstances outside his or her control, an administrative judge should consider whether the applicant acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003).

Applicant's decision to cosign a mortgage obligation for his wife's guardians was financially foolish, but their abandonment of the home and default on the mortgage payments was a circumstance beyond his control. I conclude MC 3 is established for this debt.

The breakup of his marriage and his unexpected discharge from the Marine Corps also were circumstances beyond his control, but they appear to have had minimal impact on his financial situation. His wife was not gainfully employed during their marriage, and he found employment at higher pay shortly after his discharge.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

It appears Applicant was unaware of the extent of his financial delinquencies until he obtained a copy of his credit report in January 2004. The mortgage debt was by far his biggest financial problem. The SOR alleged a debt of \$72,443. He compromised it for \$7,500, and by the time of the hearing he had paid the balance down to about \$3,743. He also reduced the furniture debt from \$2,506 to \$1,058 and completely paid off the delinquent cable bill. He disputed the amount of the cell phone bill, and it has been removed from his credit report. Although his concern about his security clearance was a significant factor, I am satisfied his resolution of his financial problems was motivated primarily by a sense of financial duty and a desire to put his personal life in order. I conclude C 6 is established.

After weighing the disqualifying and mitigating factors and considering all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on financial considerations.

FORMAL FINDINGS

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

Paragraph 1. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Paragraph 3. Guideline F (Financial Considerations): FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Tr. 94-95.

2. Tr. 105.

3. Government Exhibit (GX) 1-5, 7.

4. Tr. 47.
5. Tr. 107; AX W at 36.
6. GX 4 at 3.
7. GX 5.
8. GX 3 at 4; GX 4 at 3; Answer to SOR at 1.
9. GX 2.
10. GX 3 at 3.
11. Answer to SOR at 2; Tr. 47, 90.
12. GX 4 at 4-5.
13. Tr. 53.
14. Tr. 55.
15. GX 7 at 2-3.
16. Tr. 55.
17. Answer to SOR at 2.
18. GX 8, 9, 10.
19. GX 11 at 2.
20. Tr. 96.
21. Tr. 110-11.
22. GX 12.
23. AX N.
24. GX 12 at 2-3.
25. AX O.
26. *Id.*; Tr. 84-85.
27. *Id. at 4.*
28. AX P.
29. Tr. 85.
30. *Id.* at 3.
31. AX A at 1.
32. AX K.

33. AX R, S.

34. AX T, U.