

KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant has mitigated the security concerns that arose from criminal and financial conduct that is not recent. Clearance is granted.

CASE NO: 05-02603

DATE: 05/31/2006

DATE: May 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02603

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Sabrina E. Redd, Esquire, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has mitigated the security concerns that arose from criminal and financial conduct that is not recent. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations. Applicant submitted an answer to the SOR that was received by DOHA on September 12, 2005, admitted the allegations contained in SOR subparagraphs 1.c, 1.d, 1.e, 3.a, and 3.b, denied the remaining allegations, and requested a hearing.

The case was assigned to another administrative judge on October 25, 2005, and reassigned to me on November 28, 2005, due to upcoming regional reassignments. A notice of hearing was issued on February 13, 2006, scheduling the hearing for March 2, 2006. The hearing was conducted as scheduled. The government submitted 14 documentary exhibits that were marked as Government Exhibits (GE) 1-14, and admitted into the record without objection. Applicant testified and submitted one documentary exhibit that was marked as Applicant's Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on March 21, 2006.

### **FINDINGS OF FACT**

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

Applicant is 44 years old and has been employed as a training and doctrine specialist by a defense contractor since December 2002. He was previously employed as a loss prevention officer from September 2002 until December 2002, and served on active duty in the United States Army from June 1980 until he retired as a Master Sergeant (paygrade E-8) in September 2002. Applicant was awarded an associate of arts degree in August 2001, and a bachelor of arts degree in 2002. He is presently pursuing studies toward a master of arts degree.

While in the Army, Applicant served in infantry, mechanized infantry, and airborne infantry commands, and as a drill sergeant and range instructor. He was qualified in air assault, and as a pathfinder and airborne ranger. Applicant was awarded a Bronze Star for his performance during the first Gulf War. He also was awarded two Meritorious Service Medals, three Army Commendation Medals, five Army Achievement Medals, and six Good Conduct Medals during his Army career. Applicant possessed a security clearance throughout his service in the Army, and no complaints were ever made that allege he mishandled or otherwise risked the compromise of classified information.

Applicant was married in December 1981, separated from his wife in June 1995, and obtained a divorce from her in 2005. He has five children from the marriage, ranging in age from 12 to 24 years old. Applicant's ex-wife was and is a violent person as evidenced by Applicant's medical records (AE 1, encl. B) which disclose that she stabbed him in the chest in August 1983, stabbed him in the chest and threw bleach in his eyes in January 1984, struck him in the arm with a hammer in August 1986, and stabbed him in the arm in June 1991. More recently, she was arrested for stabbing another man in the shoulder in April 2002. Applicant was charged with an assault directed against his wife in March 1993. That charge was dismissed.

Applicant either punched or shoved another soldier in May 1987. The incident was administratively disposed of by issuance of an oral reprimand to Applicant. Nonjudicial punishment was not imposed (GE 10).

Applicant was charged with Battery with Physical Visible Harm in June 1999. The charging document (GE 14) alleges that Applicant grabbed a woman by the neck and dragged her across a driveway. Applicant testified the accusation was falsely made by an ex-paramour who became upset when she saw him with another woman the day after he ended his relationship with her. Applicant was arrested, released on a bond, and left the country the following day on a military assignment. Applicant never appeared in court to answer the charge and it was disposed of by being assigned to the "dead docket" on August 17, 2000 (AE 1, encl. E).

Applicant was charged with Driving While Intoxicated (DWI) in July 1993, and Driving While Under the Influence of Alcohol (DUI) in December 1999. He was enrolled in an adult probation department pre trial intervention program, referred to an alcohol awareness program, and voluntarily attended a driver improvement program following the 1993 arrest (GE 9). That charge was then dismissed in September 1994 (GE 2). In February 2000, Applicant pled guilty to the 1999 charge and was sentenced to six months probation and fined \$350.00 (GE 12). He again participated in an alcohol awareness program, including mandatory attendance at alcohol anonymous meeting for about two months (Tr. pp. 48-50). Applicant's probation was successfully terminated in August 2000 (GE 13).

Applicant disclosed both alcohol related arrests in a security clearance application (SF 86) he submitted in January 2003. However, he failed to disclose the 1999 battery charge in response to a question seeking information about any arrests that occurred in the preceding seven years. Applicant credibly testified he forgot about that arrest when he was filling out the SF 86 because the charge had been false and he had not committed any offense. He also did not disclose the arrest when he spoke with an investigator during the course of his security clearance

investigation. There is no documentary evidence dealing with that interview, and Applicant credibly testified the subject matter never arose during the interview.

Applicant explained that the debt alleged in SOR subparagraph 3.a became delinquent while he was deployed to the Persian Gulf in 1990 due to his spouse's failure to pay their bills. He described his financial situation as being near bankrupt when he returned home due to her irresponsible behavior. Applicant has never paid anything toward the debt and it is no longer listed in his credit report.

The debt listed in subparagraph 3.b resulted from the repossession of Applicant's ex-wife's vehicle for which he had cosigned. He explained that when they separated in 1995, he left her with a good vehicle that she failed to take care of necessitating the purchase of another car. In an effort to help her he cosigned for the loan on which she quickly defaulted. Applicant submitted proof he sent a creditor a check in the amount of \$1,550.00 in September 2003 (AE 1, encl. F) as payment for the balance due on what he claimed was this automobile loan. However, a comparison of the various credit reports contained in the file seems to indicate the creditor listed in the SOR and the creditor Applicant paid are not the same entity. The creditor listed in the SOR is no longer listed in Applicant's credit report.

Applicant denies knowing anything about the creditors listed in subparagraphs 3.c and 3.e. The creditor listed in subparagraph 3.c appears to be a municipal taxi company. Applicant claims to never have been in that municipal area. The account listed in subparagraph 3.e is listed as a collection account in Applicant's December 23, 2003 credit report (GE 5), but does not appear to relate back to any entry in his February 11, 2003 credit report (GE 6), and is not listed in his January 5, 2005 credit report (GE 4). Neither of the creditors listed in subparagraphs 3.c and 3.e are listed in Applicant's most recent credit report.

Applicant admitted he owed the cellular phone debt listed in subparagraph 3.d. He explained this debt became delinquent while he was deployed overseas due to the failure of the person he had left in charge of finances to pay the bill. Applicant has never paid anything toward this debt and it is no longer listed in his credit report.

Applicant testified he has accumulated approximately \$12,000.00 in a 401(k) plan, a few hundred dollars in a checking account, and has sufficient income to pay all his monthly bills. His most recent credit report (AE 1, encl. F) discloses he has five open accounts, seven closed accounts, and eleven accounts listed as in good standing. Although no accounts are listed as past due or having a negative account history in the credit summary section of that report, the one account on which he tendered the \$1,550.00 payment in September 2003 is listed as having a balance due in the amount of \$1,550.00 as of December 1999, and an amount past due of \$856.00 as of November 2002. All other accounts are listed as "Pays as Agreed."

Applicant submitted letters of recommendation written by his employer's project manager and business unit manager (AE 1, encl. A). Those people attest to his reputation as a loyal, professional, trustworthy and dedicated employee. Applicant's fiancée also submitted a highly complimentary letter on his behalf (AE 1, encl. A).

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations, with their respective DC and MC, are most relevant in this case.

## **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> 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.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

## **CONCLUSIONS**

Under 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.

Applicant was charged with assaulting his extremely violent ex-wife in 1993. Understandably, that charge was dismissed. He credibly testified the battery charge filed against him in 1999 was a false allegation. However, he did commit an assault against a fellow soldier in 1987, and alcohol related driving offenses in 1993 and 1999. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant's last criminal conduct, a DUI, occurred six and one-half years ago. Since that time he has been honorably retired from the Army, worked

for the same civilian employer for three and one-half years, and earned a reputation as a trustworthy, loyal and dedicated employee. Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: . . . *the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply. Guideline J is decided for Applicant.

Under Guideline E personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's explanations for why he did not list the 1999 battery arrest in the SF 86 he submitted and or tell of it during the course of an interview with an investigator conducting his background investigation are credible, especially in view of the negative personal information he did list. No personal conduct disqualifying condition applies. Guideline E is decided for Applicant.

Under Guideline F, a security concern exists when a person has significant unpaid 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.

Applicant allowed at least two debts, those listed in subparagraphs 3.a and 3.d, to become delinquent during the 1990s that he failed to resolve. He credibly testified the debt listed in subparagraph 3.b was due to the repossession of a vehicle that belonged to his ex-wife on which he had cosigned for the loan. He also credibly denies knowledge of the debts listed in subparagraphs 3.c and 3.e. DC 1: *A history of not meeting financial obligations*: and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

With the exception of the account listed in subparagraph 3.e, all accounts listed in the SOR became delinquent in or before December 1998. Applicant denies knowledge of the account listed in subparagraph 3.e, and the fact that account appears only in his December 2003 credit report without being traceable to any earlier or later reports creates doubt about its origin and/or validity. Applicant's most recent credit report does not contain any negative entries with the exception of the cryptic entries pertaining to the account on which he paid \$1,550.00, the full amount shown owing as of March 2002. MC 1: *The behavior was not recent* applies.

Applicant failed to take any action to resolve the accounts that became delinquent in the 1990s. He has now chosen to rely upon the legitimate option available to him to take no action on those accounts that have become uncollectible due to their age. As such, those accounts no longer independently create a security concern. Still, his conduct in not promptly dealing with the accounts when they became delinquent does raise questions about his judgment at that time. However, since removing himself over ten years ago from what was obviously a turbulent marriage, Applicant has demonstrated through his more recent military, financial, work, and personal situations that he has become a stable and trustworthy individual. Guideline F is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, specifically including his long, successful and honorable military career, his steady and commendable civilian work history, and his education pursuits, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has mitigated the security concerns that existed in this case. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

## **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: For Applicant

Subparagraphs a-e: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraphs a-b: For Applicant

SOR ¶ 3-Guideline F: For Applicant

Subparagraphs a-e: For Applicant

## **DECISION**

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

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.