

KEYWORD: Criminal Conduct; Financial Considerations

DIGEST: The remaining allegations under criminal conduct involved a misuse of the legal system costing Applicant a large sum of money he could have used to repay some of the overdue creditors. Even after losing two jobs and incurring large legal fees in January 2004, Applicant established repayment plans with three unlisted creditors even before he was notified his overdue debts were a government concern. Clearance is granted.

CASE NO: 05-08264.h1

DATE: 06/21/2006

DATE: June 21, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-08264

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The criminal conduct guideline has been mitigated because the conduct in June 2001 was extenuated by the passage of time. The remaining allegations under criminal conduct involved a misuse of the legal system costing Applicant a large sum of money he could have used to repay some of the overdue creditors. Even after losing two jobs and incurring large legal fees in January 2004, Applicant established repayment plans with three unlisted creditors even before he was notified his overdue debts were a government concern. Significantly, he has made regular payments under those plans for at least a year. Considering the good judgment utilized by Applicant in repaying the unlisted creditors, I am confident he will employ the same judgment to pay off the remaining creditors listed in the Statement of Reasons (SOR). Clearance is granted.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 7, 2005, under Executive Order 10865 and Department of Defense Directive 5200.6, DOHA issued a Statement of Reasons (SOR) detailing the reasons for its security concerns raised under the criminal conduct guideline (Guideline J) and the financial considerations guideline (Guideline F) of the Directive. In Applicant's answer dated December 14, 2005, he requested a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on March 15, 2006. Applicant received the FORM on March 21, 2006. Applicant's response was due on April 20, 2006. No response was received. The case was assigned to me for decision on May 17, 2006.

RULINGS ON PROCEDURE

The Government moved to amend the SOR on at least March 15, 2006⁽¹⁾ by replacing Guideline E with Guideline F. Amended paragraph 2 shall read as follows:

2. Guideline F: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable illegal acts.

Having evaluated all three factual allegations under paragraph 2, it is clear each allegation identifies delinquent indebtedness that is the security concern of Guideline F. Applicant's answers and supporting evidence demonstrate he understands the three allegations identify delinquent debts. His supporting evidence indicates his opinion of why they are delinquent and the measures he has taken to address the delinquencies. Applicant has had ample time to respond to the motion to Amend along with other evidentiary issues contained in the FORM. No objection has been registered. Pursuant to E3.1.17. of Enclosure 3 of the Directive, the Government's Motion to Amend is granted to make the SOR conform to the evidence presented.

FINDINGS OF FACT

Applicant admitted subparagraphs 1.a., 1.c., 1.d., and 1.e. of the SOR. He denied 1.b., 2.a., 2.b. but admitted 2.c. His admissions shall be incorporated into the following factual findings.

Criminal conduct. Subparagraph 1.a. refers to Applicant's arrest and charge on June 22, 2001, for (1) driving while under the influence of alcohol (DUI), (2) speeding, and (3) civil revocation of a license. Applicant was found guilty of counts two and three, but not guilty of count 1 (DUI). He was placed on probation for 10 days and fined \$25.00.

According to subparagraph 1.b., Applicant was the subject of a protective order on December 11, 2002. Applicant explained he and his wife argued the evening before she filed the protective order citing safety concerns. Applicant believes she filed the order to keep him away from their house to allow her and friends to remove items she wanted.

Subparagraph 1.c. alleges an arrest for assault and battery on January 4, 2004. The alleged assault resulted from another argument Applicant and his wife had over money issues. Before this arrest, Applicant and his wife had been separated for a while, and they were trying to reconcile and live together again. However, after he discovered she had not been paying the bills, he decided to pack his bags and return to live with his brother. During the ongoing argument, Applicant snatched a cell phone from his wife's hand. She did not want him to go. She drove to the magistrate's office and swore out a complaint for assault. Before Applicant completed packing his bags, the police arrived at their house and arrested him. He spent a night in jail.

Subparagraph 1.d. reveals that an emergency protective order (requiring him to remain a certain distance away from her) was also filed against him on January 4, 2004. When Applicant was released on January 5, 2004 for the assault and battery (subparagraph 1.c.), he returned to his wife's apartment to retrieve his truck and drive to work. His wife saw him, called the police, and he was arrested for violating the protective order (subparagraph 1.d.), even though he recalled his truck was in a community parking lot. He was found guilty and sentenced to 10 days in jail. Applicant's legal fees (attorney fees and bail costs) associated with subparagraphs 1.c., 1.d., and 1.e. amounted to approximately \$5,800.00. Applicant is separated from his wife and hopes to be divorced soon.

Financial Considerations. Applicant has tried to contact the three creditors identified in the SOR. Subparagraph 2.a. identifies a \$174.60 debt placed in collection about June 2003. The debt according to Applicant, was for services never rendered. Applicant explained in his answers to interrogatories on October 27-28, 2005, that he requested his cellular phone account be closed on several occasions. Applicant was never notified by the collection agency or the original creditor about the status of the debt.

Regarding subparagraph 2.b., a collection agency received the \$251.97 account from a utility company in November 2003. On October 27, 2005, Applicant notified the collection agency that the account belonged to his wife based on contact the original creditor made to his wife informing her she was responsible for the account.

Subparagraph 2.c. identifies a collection agency that has taken over an account for \$21,000.00 in October 2005, originally belonging to a bank. Applicant admitted he was responsible for the debt and has been trying to establish a payment plan with the creditor. When he separated from his wife in 2004, his total debt was about \$50,000.00. He has not been able to address the 2.c. debt until now because he has set repayment schedules with three other creditors. He has also furnished documentation in 2004 and 2005 showing regular payments to these three creditors for past due debts. Additionally, he furnished documented requests of his desire to establish similar plans with the remaining creditors.

In his Security Clearance Application (SCA) dated June 18, 2004, Applicant provided delinquent debt information regarding four creditors, including the 2.c. debt. He explained he had been unable to pay each account because of his separation in January 2003 and unemployment. His answers to question 20 (Your Employment Record) reflect he was terminated in November 2003 for lack of experience, and on January 3, 2004, because of his arrests for subparagraphs 1.b., 1.c., 1.d., and 1.e., and the employer not knowing when Applicant was going to return because of the legal difficulties.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct (Guideline J)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Financial Considerations (Guideline F)

Being financially overextended or unable to pay debts on time places an individual at risk of having to engage in illegal acts to generate funds.

CONCLUSIONS

Criminal Conduct (CC). A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Applicant's criminal conduct in June 2001 falls within CC disqualifying condition (DC) E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*) However, the factual distinctions of the June 2001 conduct (1.a.) militate against considering it as apart of the alleged criminal activity that occurred thereafter. The primary distinction is that it involved the state traffic laws and not his estranged wife.

In deciding whether subparagraphs 1.b., 1.c., 1.d., and 1.e. establish a pattern of criminal activity, I must rely on my experience in similar cases as well as the interests of the parties. The primary objective of a protective order is to shield either the husband or the wife from suspected bodily harm for a finite period of time. Unfortunately, the protective order can be misused by the parties to achieve unjust results. There is insufficient evidence for me to find against Applicant under subparagraph 1.b. of the SOR.

Having weighed and balanced the circumstances of subparagraphs 1.c., 1.d., and 1.e., I do not find Applicant assaulted his wife on January 4, 2004. During one of many arguments they probably had in a troubled marriage, she may have misinterpreted his grabbing her cell phone as a threatening gesture directed at her body. Though I cannot ascribe a motive for his wife filing the emergency protective order later in the day on January 4, 2004, she knew at the time she filed the order he was under arrest. She also knew his parked truck would be within a certain distance of her apartment. When Applicant was released from jail on January 5, 2004, and proceeded to the parking lot where his truck was located, his wife called the police and he was rearrested. Considering the evidence as a whole, specifically that he is separated and hopes to soon be divorced, I find for Applicant under the CC guideline. *See*, CC mitigating condition (MC) E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*).

Financial Considerations (FC). When an individual does not have enough money to pay his bills, he is at risk of having to engage in illegal acts to generate funds. Applicant's financial problems fall within the scope of FC DC E2.A6.1.2.1. (*a history of not meeting financial obligations*) because he owes about \$21,325.00 to three creditors. His inability to pay off the three listed debts as well as three unlisted debts also raises security concerns under FC DC E2.A6.1.2.3. (*inability or unwillingness to satisfy debts*). Having considered the entire record, FC MC E2.A6.1.3.1. (*the behavior was not recent*) and FC MC E2.A6.1.3.2. (*the behavior was isolated*) do not apply given the recency in which the debts became delinquent, and the fact that six listed and unlisted debts are still delinquent.

However, FC MC E2.A6.1.3.1. and FC MC E2.A6.1.3.2. are clearly not dispositive of my ultimate finding under the FC guideline, considering the unanticipated reasons for his financial setbacks, and steps Applicant has taken to repay both the alleged and unalleged creditors/collection agencies. *See*, FC C E2.A6.1.3.3. (*the conditions that resulted in the behavior were largely beyond the person's 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 SCA reveals he lost two jobs while he was

attempting to reconcile with his former wife. The job loss obviously disrupted his ability to pay his bills as is evidenced by the credit report showing the three other overdue accounts that are not listed in the SOR. The \$5,800.00 in legal costs must also be considered unanticipated expense that prevented him from addressing the other past due indebtedness before he was able to. Though Appellant has yet to pay on the three listed accounts, he has been in repayment plans for at least a year with three unlisted creditors before he received the SOR. Given his track record of repaying the unalleged creditors, I am confident he will continue to pay off all his creditors, including the one listed in subparagraph 2.c.

In reaching my findings for Applicant under the CC and FC guidelines, I have also evaluated the circumstances of this case under the whole person concept. Even with the job problems, and the legal costs he had to absorb in the last two years, Applicant has continued to exercise good judgment by maintaining his repayment plan with three unlisted creditors. That track record of repayment convinces me Applicant will stick by his intentions and repay all remaining creditors.

FORMAL FINDINGS

Paragraph 1(Criminal Conduct, Guideline J): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.

Paragraph 2 (Financial Considerations, Guideline F): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the 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.

Paul J. Mason

Administrative Judge

1. Though the File of Relevant Material (FORM) is dated March 14, 2006, there is no certificate of service to conclusively show when the FORM was mailed to Applicant. Hence, the March 15, 2006 date, located in the "Assignment of Case for Administrative Determination" shall be considered the date the FORM was mailed.