



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 07-09048

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro Se*

September 29, 2008

Decision

LOKEY-ANDERSON, Darlene, Administrative Judge:

Applicant submitted his Security Clearance Application (SF-86) dated January 19, 2006. On March 10, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant acknowledged receipt of the SOR on March 24, 2008. He answered the SOR in writing on April 21, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on June 19, 2008. It was transferred to the undersigned Administrative Judge on July 2, 2008. A notice of hearing was issued on July 8, 2008, and the matter was scheduled for hearing on August 19, 2008. The Government presented ten exhibits, referred to as Government Exhibits 1 through 10, which were received without objection. The Applicant called one witness, and presented eleven exhibits, referred to as Applicant's Exhibits A through K which were received without objection. The Applicant also testified on his own behalf. The record remained open until close of business on September 2, 2008, to allow the Applicant to submit additional documentation. The Applicant submitted two Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits A and B. DOHA

received the transcript of the hearing (Tr.) on August 27, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 41 years old, unmarried, and has a high school diploma and some college. He is employed by a defense contractor as a Chemical Crib Technician, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

On February 15, 2001, the Applicant was charged with (1) Inflicting Corporal Injury Spouse, a felony; (2) Prevent Witness Force Threat, a felony; (3) Inflicting Corporal Injury Spouse, a felony; (4) Prevent Dissuade Witness Force Threat, a felony; (5) False Imprisonment, a felony; (6) Assault with Deadly Weapon/Instrument, a felony; and (7) Assault with Deadly Weapon/Instrument, a felony. The Applicant explained that he and his wife were living apart for a while under the premise that they were trying to work on their relationship. His wife was supposed to be out of town at her parents house. The Applicant claims that he walked into her apartment and found her in bed with another man. (Tr. p. 43). The police report of the incident is quite different. It mentions nothing about another man being present in bed with the Applicant's wife at the time of the incident. The report states that the Applicant came into her apartment, uninvited, and into her bedroom while she was sleeping, and asked her who she had slept with. She tried to call 911, but he prevented her from doing so by ripping the telephone cord out of the wall. He pushed her around, grabbed her thumb hyper-extending it, and grabbed her by her wrist causing it to bruise. He punched wholes in a wall, a hallway closet door, and a picture hanging on the wall, and then left the location. (See Government Exhibit 3). The Applicant pled guilty to Charge (1) and nolo contendere to Charge (2). He was found guilty of Charges (1) and (2). Charges (3) through (7) were dismissed. The Applicant was sentenced to supervised probation for three years and to serve 365 days in jail. He was also required to complete one year of domestic violence counseling and pay restitution. The Applicant has satisfied all of the court's sentencing requirements and actually served four months and fifteen days in jail before he was released early under county parole probation in August 2002.

On January 4, 2005, the Applicant was charged with Battery Against Former Spouse/Fiancee, a misdemeanor. The Applicant explained that he and his girlfriend had gotten into an argument after having consumed alcohol. She wanted to drive the Applicant home, however, the Applicant believed that she was too intoxicated to drive and he obstructed her from getting into her car. He then began walking home. The Applicant pled nolo contendere to the charge and was found guilty. He was sentenced to 15 days in jail and was placed on probation for three years. He was required to perform 12 hours of community service and to attend domestic violence counseling. The Applicant has satisfied all of the courts sentencing requirements including paying his restitution of \$520.00 on August 15, 2006. (See Applicant's Exhibit F and G). He

was released from summary probation on May 12, 2008. (See Government Exhibit 5, and Applicant's Post-Hearing Exhibits A and B).

The Applicant testified that his domestic violence counseling has been very helpful to him. He believes that his poor choices in the past will not be repeated because he has learned to control his impulses. (Tr. p. 79).

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

The Applicant's financial affairs of the past include a Chapter 7 Bankruptcy that he filed on February 25, 1997. (See Government Exhibit 1). He was over-extended in credit card debt and was laid off from his job for about two months in 1995. Following his layoff, he found work, but the pay was not good, and even with his wife working he was unable to keep up with their monthly expenses. In addition to the credit card debt, the Applicant owed State and Federal taxes for miscalculating he and his wife's withholding deductions. His debts were discharged on June 19, 1997.

The Applicant remained indebted to ten separate creditors totaling approximately \$10,000.00. The debt included a federal tax lien in the amount of \$3,700.00, telephone bills in the amount of \$241.00, credit card debt in the amount of \$1,620.00, \$773.00, \$167.00, \$119.00, \$1,771.00, and \$1,679.00. (See Government Exhibits 7, 8 and 9). He attributes his indebtedness to a period of unemployment, his ex-wife's habit of living beyond her means, and the cost of the divorce.

Since his divorce in 2002, he had been able to pay off all but two of the accounts set forth in the SOR. (See Applicant's Exhibits E, I, J and K). The two remaining debts set forth in allegations 1(c), and 1(h), of the SOR total approximately \$3,000.00. With regard to these two debts, the Applicant has set up payment plans and is paying the debts on a monthly basis. (See Applicant's Exhibit C and D).

Applicant's current financial report indicates that he can pay his monthly expenses without difficulty. He is scheduled to earn approximately \$66,000.00 this year. He is also current with all of his other monthly obligations including his child support that is \$625.00 monthly for two children that is automatically deducted out of his payroll account.

The Applicant's supervisor, who has known the Applicant for five years testified that he supervises about sixteen people and the Applicant falls within the top one-third as far as job performance goes. He does not know the particulars of the criminal matters, but is aware of two altercations involving the Applicant's wife on one occasion, and his fiancé on another. He states that the Applicant has put his financial problems behind him, as he has recently purchased a house, and the truck he had been driving was not economical so he turned it in for a more economic car. He is recommended for a position of trust as it would open up more opportunities for the Applicant. (Tr. pp. 24 - 40).

The Applicant also received a commendation form his company on February 5, 2008 for high level of professionalism on the job and his contributions to the company. (See Applicant's Exhibit B).

A letter from the Applicant dated August 19, 2008 indicates that he has always been involved in his children extra-curricular activities and has volunteered in the community for a number of posts including, but not limited to Boy Scout Pack Leader 2002, Super Science Saturday School Competition Judge, Soccer Coach for eight years, Little League Board of Directors , Girls Softball Coach and T-ball coach for two years to name a few. (See Applicant's Exhibit A).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Condition that could mitigate security concerns:

None.

Guideline F (Financial Considerations)

18. *The Concern.* Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts;

19.(c) a history of not meeting financial obligation;

Conditions that could mitigate security concerns:

20.(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

20.(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

20.(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative

Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct and financial difficulties that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J) and financial considerations (Guideline F). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct and been financially irresponsible. This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The Applicant's criminal history involves two felony convictions for Spousal Abuse in 2001. Four years later, in 2005, he was convicted of Battery upon a Spouse, a misdemeanor. Admittedly, he has undergone counseling for domestic abuse, spent four months and fifteen days of a year sentence in jail for one offense, fifteen days in jail for the other, and paid restitution in both cases. His last conviction occurred only three years ago. In May 2008, just three months before the hearing, he completed his three years of summary probation for his second offense. Given the serious nature of the offenses, and their recency, more time is needed in rehabilitation and without incident, to prove that he will not revert to his old criminal ways. At this time, the Applicant does not meet the eligibility for access to classified information.

Under Guideline J, Criminal Conduct, disqualifying conditions, *31.(a) a single serious crime or multiple offenses* and *31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* applies. None of the mitigating Conditions are applicable.

With regard to the Applicant's poor financial history, it appears that it was not entirely his fault. His ex-wife's excessive spending, his period of unemployment and their divorce caused most of their financial problems. Presently, the Applicant has paid off all but two of the debts and has made payment arrangements with the creditors and is making payments to pay them off. He plans to continue paying the debts until they are paid in full. He understands the importance of paying his bills on time and he is not living beyond his means. Under the circumstances, he has made a good faith effort to resolve his indebtedness, and there is sufficient evidence of financial rehabilitation.

Under Guideline F (Financial Considerations), Disqualifying Conditions *19.(a) inability or unwillingness to satisfy debts; 19.(c) a history of not meeting financial obligation; and 19.(e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis* apply. Mitigating Conditions *20.(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances; 20.(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control and 20.(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply.

The Applicant has demonstrated that he can properly handle his financial affairs. In the event that the Applicant does not continue to pay his delinquent debts according to the payment plan or sooner if possible, his security clearance will be in immediate jeopardy. This Applicant has paid or is currently paying his delinquent debts. In this regard, he has demonstrated that he is trustworthy, and that he meets the eligibility requirements for access to classified information. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

On balance, it is concluded that the Applicant has not overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 for the Government's Statement of Reasons. Paragraph 2 is found for the Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Paragraph 2 For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Subpara. 1.f.: For the Applicant.

Subpara. 1.g.: For the Applicant.

Subpara. 1.h.: For the Applicant.

Subpara. 1.i.: For the Applicant.

Subpara. 1.j.: For the 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 or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge