



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-02024
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

November 22, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated September 17, 2008. (Government Exhibit 1.) On February 24, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 a clearance should be denied or revoked.

The Applicant responded to the SOR on March 15, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on March 31, 2010. A notice of hearing was issued on April 6, 2010, scheduling the hearing for May 14, 2010. At the hearing the Government presented eleven exhibits, referred to Government Exhibits 1 to 11, which were admitted without objection. The Applicant presented 14 exhibits, referred to as Applicant's Exhibits A through N, which were admitted without objection, and testified

on his own behalf. The record remained open until June 14, 2010, to allow the Applicant the opportunity to submit additional documentation. The Applicant submitted five Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits 1 through 5, which were admitted without objection. The official transcript (Tr.) was received on May 21, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 45 years old and married. He has a high school diploma and a certification as an Electronic Test Technician. He is employed by a defense contractor as an Environmental Test Technician III and is seeking to obtain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

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

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to protect classified information.

The Applicant has worked for his current employer since October 1997. The Applicant joined the United States Marines in October 1981, at the age of seventeen, and served honorably for seven years until April 1989.¹ In 1991, he and his second wife were in a volatile relationship. On November 15, 1991, the Applicant was arrested for Wilful Infliction of Injury upon Spouse, and Possession of a Dangerous Weapon. The Applicant testified that he and his wife got into a verbal argument and she accused him of having an affair. He became so angry, he lost self control and he punched and kicked her in the ribs during course of the argument. On November 19, 1991, the Applicant was convicted of Wilful Infliction of Injury Upon Spouse and imposition of his sentence was suspended for three years on the conditions that he participate in a public service program for 15 days and attend domestic violence classes for one year. (Government Exhibit 5, 6,8 and Tr. pp 37-38.)

¹ Although not alleged in the SOR, the Applicant was under investigation for larceny in the United States Marine Corps in June 1984. (Government Exhibit 7.)

In October 1992, the Applicant was arrested for Wilful Infliction of Injury upon Spouse, False Imprisonment, and Dissuade Witness. He explained that he got home late from work and an argument ensued between he and his wife. The Applicant lost control, threw his wife to the ground and choked her. She called the police. The Applicant states that he did not try to suffocate her as the police report indicates. On November 10, 1992, he was convicted of Wilful Infliction of Injury Upon Spouse and sentenced to 35 days in jail with 6 days credit. (Government Exhibit 6.)

In January 1995, the Applicant was arrested for Wilful Threats and Battery. He testified that he got home from work late, and got into a verbal argument with his wife. He broke a dish and went to sleep. She accused him of threatening to kill her. The Applicant denies making a direct threat, but admits that he stated among other things to her that, "You know, if I were to kill you, chop you up into pieces, and throw you up on this hill and have the coyotes take your carcass away, I said, you'd never be missed." (Tr. pp. 46). The Applicant was convicted of Battery and sentenced to a \$235.00 fine, 8 days in custody with credit for time serviced, 20 days of work service, one year of domestic violence therapy, and 3 years of unsupervised probation. (Tr. pp. 42-46 and Government Exhibit 6.)

In July 1996, the Applicant was arrested for Driving Under the Influence of Alcohol and Driving With a Blood Alcohol Content of .08% or More. The Applicant explained that he had been consuming alcohol at a local pub near his house when he drove to the store to get dog food in the middle of the night and was arrested. He admits to consuming between 4 and 5 beers prior to the arrest. He was fined \$1,000.00, his drivers license was suspended for 6 months, and he was ordered to attend a substance abuse assessment program. (Tr. p. 49-51 and Government Exhibit 6.)

In February 1997, the Applicant was arrested for Driving With a Suspended or Revoked Driver's License. He explained that he was a single father at the time, and was driving back from dropping off his daughter. (Tr. p. 52.) For this misconduct, he was fined \$400.00 and placed on unsupervised probation for three years. (Tr. p. 51-52.)

The Applicant's drivers license has now been reinstated, and he completed Domestic Violence Recovery program in March 1996. (Applicant's Exhibit E and L.)

In 1997, the Applicant was working at a casino as a Technician Manager and had the authority to order maintenance cleaning and other supplies for the casino. A criminal investigation ensued and the Applicant became the target of a grand jury investigation for a violation of Title 18, United States Code, Section 1341. (Applicant's Exhibit H.) The Applicant was accused of accepting gratuities in the mail, secret bribes and kickbacks in the amount of \$33,900.00, in exchange for doing business with a company in the business of providing high priced cleaning supplies to the casino. The Applicant testified that he had never personally met the vendor but had established a relationship with him over the telephone. The Applicant admits to accepting gifts of money, a fishing pole, a VCR, and a man's and woman's watch set from him through

the mail. The Applicant contends that the money he accepted from the vendor was a loan for \$1,000 dollars. (Tr. p.111).

On April 9, 2002, the Applicant was indicted in federal court on two counts of mail fraud. On November 13, 2003, he pled guilty to one felony count of mail fraud and was sentenced to probation for three years, including four months of home confinement, to pay restitution in the amount of \$227,029.00, at a rate of \$178.00 monthly for three years, and to pay a criminal monetary penalty of \$100.00. (Government Exhibit 3.) The Applicant has satisfied the court's sentencing requirements including paying restitution and the criminal monetary penalty.

Paragraph 3 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for a security clearance because he is financially overextended and at risk to engage in illegal acts to generate funds.

The SOR sets forth a number of delinquent debts totaling in excess of \$20,000. The Applicant admits allegations 1(a) and 1(d), and denies the others. Several of the debts he denies he claims may be his wife's debt from her previous marriage, but has failed to provide evidence to support his assertions. (Applicant's Answer to SOR.) Credit reports of the Applicant dated October 15, 2008, December 7, 2009, March 29, 2010; collectively reflect each of the outstanding debts. (Government Exhibits 9, 10, 11.) The Applicant testified that he has contacted his creditors to set up payments but they were not cooperative, as they wanted payment in full and he cannot afford to pay them at this time. (Tr. p. 94). His wife is currently not employed. He has no disposable income at the end of the month to pay his delinquent debts.

Each of the delinquent debts in the SOR, except one, remain owing. (Tr. p. 61.) Allegation 3(a). A delinquent debt owed to a creditor in the amount of \$50.00 remains owing. Allegation 3(b). A delinquent debt owed to a creditor in the amount of \$793.00 remains owing. Allegation 3(c). A delinquent debt owed to a creditor in the amount of \$654.00 remains owing. Allegation 3(d). A delinquent debt owed to a creditor in the amount of \$13,936.00 remains owing. Allegation 3(e). A delinquent debt owed to a creditor in the amount of \$1,186.00 remains owing. Allegation 3(g). A delinquent debt owed to a creditor in the amount of \$3,197.00 remains owing. Allegation 3(f). A delinquent debt owed to a creditor in the amount of \$3,920.00 was paid through garnishment. (Applicant's Exhibit A.)

The Applicant also failed to timely file his federal income tax returns for tax years 1994 through 2005. In September 2006, he was assessed approximately \$32,299.00 by the Internal Revenue Service for overdue taxes for tax years 1994 through 1997 and 2002 through 2005 (Applicant's Exhibit B and Government Exhibits 4 and 5.) He borrowed \$35,000 from his mother-in-law and paid these overdue taxes in October 2007. He is currently paying his mother-in-law back for the money she loaned him.

The Applicant has recently hired an attorney and started the process of filing for bankruptcy. The bankruptcy petition has not yet been filed. (Applicant's Post-Hearing Exhibits 2, 3 and 4.)

Applicant's performance appraisals for the periods from January 1997 to 1998 reflect excellent ratings in every category. (Applicant's Exhibit J.)

Letters of recommendation from his direct supervisor, the company security officer, a close friend and police officer, the Applicant's daughter, his ex-wife, his present wife, and a friend reflect that they hold the Applicant in high esteem. He is considered to be reliable, honest and trustworthy. In their opinion, he has demonstrated a strong moral character and his conduct has been exemplary. (Applicant's Exhibit K.)

Applicant's military accomplishments include Certificates of Good Conduct from March 2, 1982, to March 1, 1985, and April 25, 1985, to April 24, 1988; the completion of Instructor Orientation Course, Terrorism Counteraction for Marines; and a letter of appreciation for community service. (Applicant's Exhibit D.)

POLICIES

Enclosure 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 lesser offenses;

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

Conditions that could mitigate security concerns:

32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness; or good judgment;

32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Guideline E (Personal Conduct)

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16.(d) credible adverse-information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive--corporate or other government protected information;

(3) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns:

17.(c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

17.(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

17.(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

Conditions that could raise a security concern:

- 19.(a) inability or unwillingness to satisfy debts;
- 19.(c) a history of not meeting financial obligations.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- 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 extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- 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 predicated 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, a security clearance 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 such access may be involved in instances of criminal conduct, personal conduct, and financial considerations which 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 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 been engaged in criminal conduct (Guideline J), has demonstrated poor personal conduct (Guideline E) and has been financially irresponsible (Guideline F). 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 multiple criminal offenses and related personal conduct over the years is despicable. His pattern of domestic violence, from 1991 to 1996, his DUI in 1996, driving with a suspended or revoked license in 1997, and felony mail fraud in 1997, and the conviction in 2003, demonstrate extreme poor judgment and unreliability. Admittedly, his most recent offense occurred in 1997, over thirteen years ago. His conviction occurred in 2003, just seven years ago, and he remained on probation for the offense until just four years ago. Since 1997, the Applicant has not engaged in any

criminal misconduct of any sort. He has completed the courts sentencing requirements, including a counseling program for domestic violence. For the past thirteen years, he has demonstrated that he is not a criminal. In fact, he is well respected and comes highly recommended for a position of trust among his supervisors, professional colleagues and friends who know him well.

Under Guideline J, Criminal Conduct, Disqualifying Conditions, 31.(a) *a single serious crime or multiple lesser offenses* and 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. I have also considered Mitigation Conditions 32.(a) *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*, and 32.(d) *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*. Accordingly, I find for the Applicant under Guideline J.

Under Guideline E, Personal Conduct, Disqualifying Conditions:

16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources* apply.

However, under the particular facts of this case, Mitigating Conditions 17.(c) *The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; 17.(d) *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur* and 17.(e) *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress* also apply. Accordingly, I find for the Applicant under Guideline E.

In regard to his financial situation, the Applicant is excessively indebted. He owes in excess of \$20,000 in delinquent debt. After paying his regular monthly expenses, he has no money available to pay his delinquent debts. He has only recently hired an attorney who is planning on filing bankruptcy to discharge the Applicant's debts. The Applicant has only started the process of resolving his debts and there is a long way to go. At this time, there is insufficient evidence in the record to demonstrate a track record of financial responsibility, or that he has resolved his financial indebtedness. 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.

There is insufficient evidence of financial rehabilitation at this time. Under Guideline F (Financial Considerations), Disqualifying Conditions 19(a) *inability or unwillingness to satisfy debts*, and, 19(c) a *history of not meeting financial obligations* apply. None of the mitigating conditions are applicable. Accordingly, I find against 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, including the favorable performance evaluations and letters of recommendation. 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 poor judgement, untrustworthiness, unreliability, lack of candor, an unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 3 of the Government's Statement of Reasons. Paragraphs 1 and 2 are 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: 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.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara. 3.c.: Against the Applicant.

Subpara. 3.d.: Against the Applicant.

Subpara. 3.e.: Against the Applicant.

Subpara. 3.f.: For the Applicant.

Subpara. 3.g.: Against the Applicant.

Subpara. 3.h.: Against the Applicant.

Subpara. 3.i.: Against the Applicant.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge