



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



In the matter of:)	
)	
)	ISCR Case No. 09-03518
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro Se*

December 31, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant mitigated the security concern that arose when he found it necessary to seek Chapter 13 bankruptcy protection. Clearance is granted.

On June 22, 2009, 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 alleges a security concern under Guideline F (financial considerations). Applicant's response to the SOR was received by DOHA on July 23, 2009. He admitted both SOR allegations, denied they created a security concern, and requested a hearing.

The case was assigned to me on September 9, 2009. A notice of hearing was issued on October 8, 2009, scheduling the hearing for October 27, 2009. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

marked as Government Exhibits (GE) 1-5 and admitted into the record without objection. Applicant testified but did not submit any documentary evidence. The transcript was received on November 12, 2009.

Findings of Fact

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

Applicant is a 39-year-old man who has been employed as a technical data designer by a defense contractor since April 2000. He graduated from high school in 1988, and he enlisted in the United States Navy in June 1988. He served on active duty in the Navy until March 2000. He served with the Army and Air National Guard from March 2000 until October 2003. He has been a member of the Navy Reserve since October 2003. Applicant is currently a petty officer first class. He has held a security clearance since about 1988, and no allegations have ever been made that he mishandled or risked the compromise of classified information.

Applicant has been married since November 1991. He has three children, ages 17, 12, and 2, who live with him and his wife. He also has a 20-year-old stepchild who no longer lives with them.

Applicant and his wife separated in late-2004. He resided with friends, paying them nominal rent, while his wife retained possession of the marital residence. Applicant and his wife each retained attorneys and they entered into a written separation agreement that required Applicant to pay his wife \$740 per month as child support. He was also required to sell a motorcycle he owned and provide her with the proceeds to apply to a joint debt. Applicant complied with the terms of the separation agreement.

Applicant was mobilized by the Navy in April 2005. He was deployed to the Middle East until April 2006. While deployed, Applicant increased the amount he paid his wife to \$1,300 per month to provide her the basic allowance for housing payment he received. Despite the increased payments she received, Applicant's wife failed to make the mortgage payments on their marital residence.

Applicant and his wife reconciled upon his return from the Navy deployment and she soon became pregnant with their third child. Applicant's wife is employed as a "per diem nurse" and she lost substantial income before and after the birth of their youngest child. Their combined gross income was \$94,881 in 2007. Their combined gross income was \$70,134 in 2008. Their annualized current monthly income is \$135,650.40, as listed on the Form 22C included in the Chapter 13 bankruptcy petition they filed on April 10, 2009.

Applicant and his wife accrued a substantial arrearage in mortgage payments due to her failure to make the payments while they were separated and he was deployed. She also incurred several large debts while they were separated. Additionally, when Applicant returned to his civilian employment following his deployment, his employer recouped money from his pay that had been provided to him for schooling he failed to complete.

Upon his return from deployment and following the reconciliation with his wife, Applicant attempted to arrange an agreement to satisfy the mortgage arrearage that had accrued. Unsuccessful in that endeavor, and with the expiration of the protection he was entitled to and had relied upon under the Soldiers' and Sailors' Civil Relief Act, Applicant sought Chapter 13 bankruptcy protection in August 2008. The petition was allowed, but the plan was dismissed in March 2009, because Applicant failed to make timely payments.

Applicant almost immediately refiled for Chapter 13 bankruptcy protection in April 2009. The plan as now approved requires Applicant and his wife to make combined monthly payments of \$2,500. Those payments are withheld directly from their wages by their respective employers. The plan is scheduled to continue for 60 months.

Applicant's credit reports disclose he was current on all payments until shortly before he and his wife separated in 2004. He and his wife obtained credit counseling as was required of them before they could obtain Chapter 13 bankruptcy protection.

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 and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions 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. Guideline F (financial considerations), with its disqualifying and mitigating conditions, is most relevant in this case.

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.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁶ 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

² ISCR Case No. 96-0277 (July 11, 1997) at 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at 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 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at 2.

him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline F, Financial Considerations

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. . . . (Adjudicative Guideline [AG] 18)

Applicant sought Chapter 13 bankruptcy protection in August 2008, because of the substantial arrearage that accrued due to his wife’s failure to make their mortgage payments while they were separated and he was serving with the Navy overseas. The repayment plan established for him under that bankruptcy was dismissed in March 2009, because he failed to make timely payments under the plan. Applicant refiled for Chapter 13 bankruptcy protection in April 2009, and he and his wife are currently making substantial payments under an approved plan that are withheld directly from their wages. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

Applicant’s credit reports disclose he was current on all debt payments until shortly before he and his wife separated. They each consulted attorneys and they entered into a written separation agreement under which he was required to pay her \$740 per month as child support. He voluntarily increased that payment to provide her the housing allowance he received from the military when he was recalled to active duty. Despite the increased payments, Applicant’s wife failed to make the mortgage payments and they incurred a substantial arrearage that they were unable to liquidate following his release from active duty and their reconciliation. Compounding Applicant’s financial problems were the loss of family income they experienced as a result of his wife’s pregnancy and the birth of their

⁷ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at 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.

child and his civilian employer's recoupment of educational benefits that had been paid to him before his recall to active duty.

Applicant unsuccessfully attempted to negotiate repayment plans to liquidate the arrearage with his mortgage company. He then sought Chapter 13 bankruptcy protection and he and his wife are currently making \$2,500 per month payments under an approved plan that will continue for the next four and one-half years. Those payments are withheld from their wages and there is every reason to expect that Applicant will successfully complete the plan. Additionally, Applicant and his wife have obtained credit counseling as part of their bankruptcy proceedings.

Based on the foregoing, the following Mitigating Conditions apply: MC 20(a): *the behavior . . . occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*; MC 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*; MC 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 MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the financial considerations security concern. 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. Guideline F is decided for Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a & 1.b: For Applicant

Conclusion

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

