



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



In the matter of:)	
)	
)	ISCR Case No. 10-00094
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

November 21, 2011

Decision

LAZZARO, Henry, Administrative Judge

Applicant has a history of criminal offenses which includes a suspended sentence of confinement at hard labor for illegal possession of stolen things in October 2000, that resulted in his physical confinement from September 2003 until August 2004. He has numerous delinquent debts he only relatively recently began to resolve. Applicant was aware his wife omitted his criminal history in the security clearance application she filled out on his behalf and with his input in August 2009. Clearance is denied.

On May 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an 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 security concerns under Guideline J, (criminal conduct), Guideline F (financial considerations), and Guideline E (personal conduct). Applicant submitted an undated response to the SOR in which he admitted SOR allegations 1.a - 1.l, 2.a, 2.e, 2.g, 2.h, 2.k, 2.l, 2.n, and 2.u. He denied all other SOR allegations and he requested a hearing.

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

The case was assigned to me on August 29, 2011. A notice of hearing was issued on October 5, 2011, scheduling the hearing for October 18, 2011.² The hearing was conducted as scheduled. The government submitted nine documents that were marked as Government Exhibits (GE) 1-9 and admitted into the record without objection. Applicant testified, called his wife to testify on his behalf, and submitted 14 documents that were marked as Applicant's Exhibit (AE) 1-14, and admitted into the record without objection.³ The transcript was received on November 2, 2011.

Findings of Fact

Applicant's admissions to the SOR allegations 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 33-year-old man who has been employed as a security guard by a defense contractor since July 2009. According to the security clearance application he submitted in August 2009, Applicant worked for a number of different non-government employers in construction trades from March 2000 to February 2009. There is an obvious discrepancy in Applicant's reported work history because his FBI Identification Record discloses he was incarcerated from September 2003 until August 2004. Applicant worked as a stocker in a grocery store from February 2009 until July 2009.

Applicant graduated from high school in May 1995. He has been married since November 1999. Neither he nor his wife have any children.

Applicant was convicted of Drawing and Displaying in June 1996. He was fined \$150 and sentenced to serve 60 days in jail. He was charged with Criminal Damage to Property in October 1996. That charge was nolle prosequed. Applicant was charged with Theft by Shoplifting in July 1999. He apparently was convicted of a less serious offense (see: entry for this offense in GE 7). Applicant was sentenced to six months supervised probation and given the alternative of paying a \$500 fine, or serving a 30-day suspended sentence and paying an \$80 fine. He was convicted of Disturbing the Peace (loud & profane) in October 2000, for which he was ordered to pay a \$75 fine or, in the event of a default, to serve 5 days in jail.

Applicant was charged with three counts of Forgery in June 1999, and Simple Burglary in October 1999. Apparently as part of a plea bargain, the Forgery charges were dismissed and the Burglary charge was reduced to a charge of Illegal Possession of Stolen Things on October 16, 2000. He was sentenced to serve three years confinement at hard labor (suspended), three years supervised probation, and fined \$500, or in the event of a default, to serve 60 days confinement.

² Applicant waived on the record the 15-day notice requirement. (Tr. 16-17)

³ AE 1 is a list of 21 character witnesses and their telephone numbers. I explained to Applicant that neither I nor Department Counsel would contact those witnesses, and I offered to leave the record open to provide him the opportunity to submit written statements from those witnesses (Tr. 28-29). Applicant declined that offer (Tr. 89-90).

Although it is not alleged in the SOR, Applicant's arrest record (GE 7) discloses an additional conviction for Unauthorized Use of a Movable on October 18, 2000. Applicant was placed on supervised probation for one year, and fined \$400 or, alternatively, ordered to serve 60 days (30 days suspended) and pay a fine of \$60. He was also ordered to pay restitution in the amount of \$150.

Applicant failed to report to a probation officer as ordered, and a warrant charging him with Violation of Probation was issued. He was arrested on that warrant in June 2003, and his probation based on the conviction for Illegal Possession of Stolen Things was revoked in August 2003. He was ordered to serve the three year sentence of confinement at hard labor. Applicant was incarcerated in September 2003, and paroled beginning on August 18, 2004, and ending on August 18, 2006. He was convicted of Contempt of Court for an unknown reason in November 2005, and ordered to pay a fine of \$50.

Applicant was charged with Simple Battery and Simple Criminal Damage to Property in August 2007, based on an altercation with an intoxicated driver who almost struck his wife. Those charges were dismissed. In an unrelated incident, Applicant was also charged with Issuing a Worthless Check in August 2007, and a warrant was issued for his arrest. Applicant made arrangements with the prosecutor's office to satisfy the check(s) involved and the warrant was recalled on October 12, 2010 (GE 3). He completed paying all fines and costs involved in getting that warrant recalled on March 15, 2011 (AE 11 & AE12).⁴

The SOR lists 10 delinquent medical bills, owed in the combined amount of \$5,408. Applicant and his wife testified these were the result of an injury he suffered at work, which they unsuccessfully attempted to get satisfied through a workman's compensation claim. Applicant's wife testified she has contacted some of those creditors and they are unable to locate any information about the alleged debts. She testified she has been unable to herself locate one of the creditors. Applicant submitted proof that in October 2010 he began making \$100 monthly payments on some consolidated medical debts that, as of October 11, 2011, had reduced the balance owed on those debts from \$8,438.87 to \$7,271.87(AE 10). The only SOR allegations that can be connected to that repayment agreement based on the evidence presented by Applicant (see: AE 5 & AE 6) are the debts alleged in SOR subparagraphs 1.i, and 1.j.

Applicant submitted verification that he has either fully or partially satisfied the delinquent debts listed in SOR subparagraphs 1.a and 1.h. Applicant's wife testified that several of the delinquent debts are the result of fraud and that she has notified the credit reporting agencies and posted a fraud alert. Applicant's credit reports confirm that a fraud alert was posted on his behalf.

The largest single debt alleged in the SOR, owed in the amount of \$6,264, resulted from an automobile repossession (SOR subparagraph 1.g). Applicant's wife testified she has been unsuccessful in her effort to establish a repayment plan with this creditor and the

⁴ Applicant denied knowledge of a number of the criminal incidents listed in the SOR when he was questioned in 2009, and during his testimony at the hearing. However, all incidents are confirmed by entries in his FBI Identification Record (GE 6) and his state arrest record (GE 7).

creditor continues to demand the full amount due. Applicant does not have the financial resources to pay this debt in full.

In the statement he provided on September 8, 2009 (GE 2), Applicant attributed his bad debts to “financial immaturity and irresponsibility on his part.” He is also repeatedly quoted as stating “he has absolutely no intentions of paying anything towards this debt at this time” even when he acknowledged the legitimacy of the debt.

At the hearing, Applicant’s wife attributed their financial problems, in part, to the need to provide care and financial support for her mother who died on July 22, 2011. However, a review of Applicant’s credit report discloses that a number of his accounts have been delinquent since 2007 and 2008.

Applicant’s wife informally consulted an attorney at a golf course where she works on how to deal with their continuing credit problems and several debts listed in the SOR which she contends are erroneous. However, the attorney requires payment of a \$5,000 retainer before he will begin to provide them with actual assistance in resolving their credit issues. Applicant’s wife testified she has saved about \$4,300 to apply toward the retainer.

Applicant’s wife testified she submitted an on-line application for the job Applicant has with his current defense contractor employer without his knowledge. According to her testimony, she thereafter filled out an Electronic Questionnaire for Investigations Processing (e-QIP) on his behalf in which she intentionally failed to list his criminal history or any delinquent debts because she didn’t believe he would actually get the job. She also testified he signed and submitted the e-QIP without reviewing the answers she had provided. Applicant provided a statement on September 8, 2009, in which he claimed he did not read through the financial questions that his wife had answered on his behalf in the e-QIP. However, he admitted he intentionally did not disclose his criminal history, particularly his felony charge because he thought it had been reduced to a misdemeanor.

Applicant submitted character reference letters from work supervisors and personal acquaintances. The letters establish those individuals believe Applicant is reliable, hard working, conscientious, credible, and a dependable employee.

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. Each clearance decision must be a fair and impartial 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 F (financial considerations) and Guideline E (personal conduct), with their disqualifying and mitigating conditions, are 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.⁵ The Government has the burden of proving controverted facts.⁶ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁷ although the Government is required to present substantial evidence to meet its burden of proof.⁸ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁹ 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.¹⁰ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹

No one has a right to a security clearance¹² and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹³ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹⁴

Analysis

Guideline J, Criminal Conduct

Criminal activity creates 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. (Adjudicative Guideline [AG] 30)

Applicant has a lengthy history of criminal conduct. While many of his offenses were relatively minor, he committed at least two felony offenses, Forgery and Simple Burglary. He was ultimately convicted of a reduced charge of Illegal Possession of Stolen Things and sentenced to a suspended sentence of three years confinement at hard labor. He failed to comply with the terms of the supervised probation he was placed on and was remanded to serve the sentence of confinement. He was actually imprisoned from September 2003

⁵ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁶ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁷ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁸ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁹ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

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

¹¹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹² *Egan*, 484 U.S. at 528, 531.

¹³ *Id.* at 531.

¹⁴ *Egan*, Executive Order 10865, and the Directive.

until August 2004. His most recent criminal conduct which occurred in August 2007, Issuing a Worthless Check, was not resolved until he agreed to pay restitution, fines, and costs in October 2010. Disqualifying Conditions (DC) 31(a): *a single serious crime or multiple lesser offenses*; DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*; and DC 31(e): *violation of parole or probation, or failure to complete a court-mandated rehabilitation program* apply.

_____Applicant's last alleged criminal conduct occurred in 2007. However, he did not resolve those criminal allegations until he finished paying fines and costs in March 2011. Further, as will be discussed below, he intentionally falsified the e-QIP he submitted in 2009, and knowingly presented the false testimony of his wife at the hearing of this case. As a result, the following Mitigating Conditions (MC) do not apply: MC 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 MC 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*. The remaining mitigating conditions have no applicability to the facts of this case.

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. . . . (AG 18)

The SOR alleges numerous delinquent debts that have been charged off or submitted for collection. Many of those accounts have been delinquent since 2007 and 2008. While Applicant submitted proof he has satisfied a few small debts and begun making payments on some consolidated medical debts, other delinquent debts remain outstanding and unresolved. DC 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

In his 2009 statement, Applicant attributed his delinquent debts to financial immaturity and irresponsibility. He repeatedly asserted that he had no intention of paying even the debts for which he admitted he was legally responsible. At the hearing, his wife attributed, at least in part, their delinquent debts to the need to provide care and financial support for her recently deceased mother. However, many of the debts have been delinquent since 2008 and 2008. 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* does not apply.

Applicant has satisfied a few small debts. He has made consistent payments on the consolidated medical debts, only two of which can be concluded to apply to debts alleged

in the SOR. However, no payment has been made on the largest delinquent debt, owed in the amount of \$6,264, and no payment plan has been arrived at to satisfy that debt. Applicant's wife candidly admits that they do not have the money the creditor is demanding to satisfy that debt. Further, while Applicant has made consistent payments toward the consolidated medical debts, the balance owed is still over \$7,000. MC 20(a): *the behavior happened so long ago, was so infrequent, or 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* does not apply.

As noted, Applicant is entitled to credit for satisfying a few small debts and making consistent payments toward the consolidated medical debts. Accordingly, he is entitled to some consideration under MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. While his wife informally spoke with an attorney seeking advice in resolving their delinquent debt and is saving money to actually retain his services, there is insufficient evidence to conclude that Applicant's financial problems are currently under control. 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* does not apply.

The remaining mitigating conditions have no applicability to the facts of this case. Considering the length of time Applicant's debts have remained delinquent, his belated effort to begin to satisfy some of those debts, the amount of delinquent debt that remains outstanding, his wife's admission that they lack the financial resources to resolve the largest outstanding delinquent debt, and Applicant's assertions when he was interviewed in 2009 that he did not intend to pay any of his delinquent debt, I conclude that the mitigating condition that applies is insufficient to find that he has mitigated the financial considerations security concern.

Guideline E, Personal Conduct

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. (AG 15)

Applicant failed to disclose multiple arrests, including the felony arrests for which he eventually was remanded to serve a sentence of confinement at hard labor, in the e-QIP he submitted in August 2009. He acknowledged that he consciously chose not to disclose those arrests. His explanation for not disclosing the felonies, that he thought the felonies were reduced to misdemeanors and, therefore, did not have to be disclosed, is not credible considering his experience with the criminal justice system, the sentence originally imposed, the amount of time he actually served, and the period of parole he served following his release from confinement. His wife's testimony that she falsified the e-QIP without his knowledge is not credible considering the contents of the statement he provided in August 2009. DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or*

status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities applies.

Considering all relevant and material facts and circumstances present in this case, including Applicant's effort in at least beginning to resolve his delinquent debts and the character reference letters he submitted, 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 failed to mitigate the criminal conduct, financial considerations, and personal conduct security concerns. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline J, Guideline F, and Guideline E are decided against 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 J:	AGAINST APPLICANT
Subparagraphs 1.a-o:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b -g:	Against Applicant
Subparagraphs 2.h-j:	For Applicant
Subparagraphs 2.k-v:	Against Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraphs 3.a and b:	Against Applicant

Conclusion

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 Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

