



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



In the matter of:)	
)	
)	ISCR Case No. 10-02915
)	
Applicant for Security Clearance)	

Appearances

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

July 5, 2011

Decision

LAZZARO, Henry, Administrative Judge

Applicant’s criminal conduct, financial problems, and the incorrect answers he provided in a security clearance application are all the result of a frequently tumultuous marriage. Applicant and his wife testified they have each sought counseling, resolved their differences, made a 25-year marriage vow renewal, and put their marital problems behind them. Clearance is granted.

On December 14, 2010, 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 security concerns under Guideline J (criminal conduct), Guideline F (financial considerations), and Guideline E (personal conduct). Applicant’s response to the SOR was received by DOHA on March 9, 2011. He admitted all SOR allegations except those contained in subparagraphs 2.f, 2.l, 2.o, 2.p, 2.r, 2.t, 3.b, and 3.c, 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 April 13, 2011. A notice of hearing was issued on April 19, 2011, scheduling the hearing for May 5, 2011. An amended notice of hearing was issued on April 21, 2011, changing the location of the hearing but not the date or time of the hearing.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, and he submitted 16 documents that were marked as Applicant Exhibits (AE) 1-16, and admitted into the record without objection. The transcript was received on May 17, 2011.

Findings of Fact

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

Applicant is a 50-year-old man who has been employed as a field service engineer by a defense contractor since either April 2004 or June 2007.³ His duties require him to deploy to a combat zone to work with United States military forces on a rotational schedule that places him in the combat zone for 90 days and at home for 30 days. His annual salary is \$73,700. He is also paid 40% of his base bi-monthly pay plus \$330 per day for every day that he is deployed to the combat zone.

Applicant's duties require him to have access to sensitive information on a daily basis. His field site manager attests that Applicant ensures that all proper procedures for handling sensitive items and information are accomplished in accordance with applicable regulations, and that Applicant can be trusted to conduct all tasks pertaining to sensitive materials professionally and correctly every time. (AE 13) Applicant has possessed a secret level security clearance since March 2003. No previous adverse action has been taken to revoke or downgrade that clearance. There has not been any accusation made that Applicant has ever compromised or risked the compromise of classified information.

Applicant graduated from high school in 1979. He attended one year of college. He was continuously employed as a mechanical designer by a succession of four different employers from November 1993 until April 2004. Applicant has been married since September 1984. He and his wife have two sons, ages 25 and 22, and four daughters, ages 18, 10, 9, and 6.

Applicant was charged with battery in December 1995; assault and violation of an order of protection in August 2004; assault and violation of an order of protection in July 2006; and two counts of assault and violation of an order of protection in January 2009. Applicant was placed on six months probation after he pled guilty to the 1995 charge. The

² Applicant waived on the record any technical defect that may be deemed to exist due to the amended notice of hearing being issued less than 15 days prior to the hearing. (Tr. p. 16-17)

³ Applicant listed his start date with his current employer as April 2004 in the security clearance application he submitted in June 2009. (GE 1) However, the letter he submitted from his employer's human resource department stated he began his employment on June 1, 2007. (AE 12)

2004 and 2009 charges were placed on the STET docket for one year.⁴ Applicant was found not guilty of the 2006 charges.

Applicant and his wife testified that all charges arose from heated arguments they had during which Applicant would grab his wife by her arms leaving red marks. Both emphatically insist he never struck her, and there was no physical abuse other than him grabbing her arms. The second assault charge filed in 2009 was based on Applicant pushing one of his daughters out of his way as he exited their residence following an argument with his wife.

Applicant and his wife separated from about June 2004 to February 2005, from about June 2006 to March 2007, and from about June 2008 to April 2009. Applicant's wife testified she obtained the orders of protection during these separations in an effort to stop arguments from occurring in the presence of their children. The assaults and violations of orders of protection occurred when Applicant would return their children after a visitation period and then get into an argument with his wife.

Applicant and his wife both undertook individual counseling and joint marriage counseling. Applicant's counseling included anger management. Before the 2009 incident, Applicant and his wife were pursuing a divorce. Concerning the current state of their marriage and the likelihood of repeat criminal activity, Applicant's wife testified as follows:

The last incident in January of 2009 was sort of an end all to end all. We were actually in the process of getting a divorce and we decided to stop the divorce proceedings and do a 25-year vow renewal. We moved to (omitted) in 2009 and we've never been happier. We've started a new life together and have put these past events behind us. I feel confident in (Applicant) and his commitment to the family and our relationship. (Tr. p. 28-29)

Applicant filed for Chapter 13 bankruptcy protection in August 2003. The petition was converted to a Chapter 7 bankruptcy in February 2004, and Applicant obtained a Chapter 7 bankruptcy discharge in May 2004. In a statement he provided in August 2009, Applicant explained he and his wife decided to seek Chapter 7 bankruptcy protection to avoid paying a judgment entered against them by a home remodeler they employed and whose charges they disputed. Applicant's wife testified they filed for bankruptcy protection because after she quit working full-time in about April 2002, due to the birth of their fifth child, they experienced a problem with the septic system in their house that the health department mandated be corrected that caused their finances to get out of control.

The bankruptcy petition discloses that Applicant's annual gross income was \$100,000 in 2001, \$73,000 in 2002, and \$20,000 as of August 2003. Applicant's wife's income was \$7,000 in 2001, and \$600 in 2003. She did not have any income in 2002. The total amount owed on the unsecured nonpriority claims listed in the bankruptcy schedules was \$15,576. Included in that amount was \$2,743 owed to the home remodeler Applicant mentioned in his August 2009 statement.

⁴ Cases placed on a STET docket are essentially continued without adjudication for a period of time and then dismissed if the defendant does not commit any other offense during the continuance period.

Applicant submitted proof he paid the delinquent debts alleged in SOR subparagraphs 2.b-d, 2.g, 2.j, 2.m, and 2.q. He testified the account listed as charged off in the amount of \$7,582 in subparagraph 2.h was paid in full. He relied on the entries reflecting a zero balance as past due in his May 24, 2011 credit report (AE 8) in support of that testimony. While that report and the other credit reports in the record are less than clear on the status of the account, there is one entry in the report he relies that reads: "Paid: 01/2011" that corroborates his testimony.

The accounts listed in subparagraphs 1.k and 1.n were discharged in the 2003 bankruptcy. Applicant credibly testified he paid the two small bills listed in subparagraphs 1.i and 1.s, owed in the amounts of \$15 and \$83 respectively, although he did not submit any verification in support of that testimony. He testified he contacted the creditor listed in subparagraph 1.r, owed in the amount of \$485, a day or two before the hearing to determine the origin of the debt, and he has determined he is responsible for this debt and will satisfy the debt.

Applicant credibly testified the creditor listed in subparagraph 1.l, owed \$785, is his current utility provider, that he has never been notified of a lack of payment, and that he contacted the creditor which was unable to find he was delinquent on his account. Applicant testified he does not recognize the creditor listed in subparagraph 1.o, but that he has contacted the creditor and they do not have record on him. He testified he does not recognize the creditors listed in subparagraphs 1.p and 1.t, but will continue to investigate these accounts and pay them if they are his responsibility, or seek to have them removed from his credit report if they do not belong to him.

Applicant credibly testified he contacted both the creditor and a credit reporting agency in an effort to determine if the debt listed in subparagraph 1.f, owed in the amount of \$535, belongs to him. Based on those contacts, he has determined this account does not belong to him. Applicant did not provide any testimony concerning the account listed in subparagraph 1.e, owed in the amount of \$101. This account originated with the same cellular telephone provider listed in subparagraph 1.d, although under a different account number, that Applicant satisfied in the amount of \$583.

Applicant and his wife testified the delinquent debts listed in his credit reports were due to the various separations they went through. She did not work and they had to maintain two residences. He would have money deposited in an account for her to provide for payment of their debts and support of their family. Additionally, Applicant was at times deployed overseas, even when he and his wife were not separated, and he had to rely solely on her to handle the family finances. His wife testified that she "paid the necessary things" and that many of the bills that went to collection "were slipping through the cracks." (Tr. p. 77) She also testified that she received notices and telephone calls from collection agencies, but did not inform her husband about the calls and notices and did not disclose to her husband that they were delinquent on the debts. (Tr. p. 79)

Applicant and his wife purchased a new home in April 2011. They were able to obtain a mortgage in the amount of \$311,790 to purchase the home. On May 2, 2011, they had \$4,668.48 in checking accounts, and \$11,626.52 in a money market savings account.

They also had a credit card issued by their mortgage company that had a balance owed in the amount of \$794.62 on May 2, 2011.

Applicant submitted a security clearance application on June 27, 2009, in which he provided numerous incorrect answers. He failed to disclose he had a vehicle repossessed because the vehicle was voluntarily returned during the course of the 2003 bankruptcy and he did not consider it to have been repossessed. He failed to disclose a tax lien that had been satisfied in May 2004, because he paid the amount due when he received the notice and did not realize a lien had been filed against him.⁵ Applicant disclosed the judgment entered against him that was discharged in the bankruptcy, but he answered five other questions pertaining to his finances incorrectly, because, as his wife's testimony substantiated, he was unaware of the various delinquencies at the time he submitted the security clearance application.

In response to a question inquiring about arrests in the preceding seven years, Applicant disclosed his June 2009 arrest, but failed to disclose the arrests that occurred in 2004 and 2006. He credibly testified that he submitted the security clearance application while he was deployed overseas and he believed he had entered the other arrests.

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 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 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.⁶ The Government has the burden of proving controverted facts.⁷ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁸ although the government is required to present substantial evidence to meet its burden of proof.⁹ "Substantial evidence is more than a scintilla, but less than a preponderance of the

⁵ The SOR alleges three liens that he failed to disclose. Applicant submitted verification (AE 4 and AE 6) that two of the liens alleged did not belong to him.

⁶ ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁷ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁸ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁹ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

evidence.”¹⁰ 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.¹¹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹²

No one has a right to a security clearance¹³ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁴ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹⁵

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. (AG 30)

Applicant was charged with battery in December 1995; assault and violation of an order of protection in August 2004; assault and violation of an order of protection in July 2006; and two counts of assault and violation of an order of protection in January 2009. He was placed on six months probation after he pled guilty to the 1995 charge. The 2004 and 2009 charges were placed on the STET docket for one year. Applicant was found not guilty of the 2006 charges. Disqualifying Conditions (DC) 31(a): *a single serious crime or multiple lesser offenses*; and DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply.

Applicant and his wife testified the charges all arose from heated arguments they engaged in during which Applicant would grab his wife by the arms leaving marks. They have each obtained counseling for the issues that led to these arguments, including anger management counseling on the part of Applicant. They are confident they have resolved their differences, and Applicant’s criminal conduct will not recur. They renewed their marriage vows in 2009, after 25 years of marriage, and, as Applicant’s wife testified, are more happy now than they have ever been. Accordingly, the following mitigating conditions 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*

¹⁰ ISCR Case No. 98-0761 (December 27, 1999) at 2.

¹¹ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

¹² ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

¹³ *Egan*, 484 U.S. at 528, 531.

¹⁴ *Id.* at 531.

¹⁵ *Egan*, Executive Order 10865, and the Directive.

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 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 and his wife obtained a Chapter 7 bankruptcy discharge in 2004. They thereafter acquired substantial delinquent debt that has only partially been resolved. DC 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

Applicant attributes the 2004 bankruptcy primarily to his desire to discharge a judgment obtained against him by a contractor with whose charges he was dissatisfied. His wife expounded on the reasons for the bankruptcy explaining the loss of income the family experienced and the unexpected home repair work that placed them in an untenable financial posture. The bankruptcy pleadings corroborate the substantial decline in family income, partly due to her need to stay home and care for their five children.

Applicant has satisfied many of his delinquent creditors. He has contacted others to determine the legitimacy and his responsibility for the debt. Considering his wife's testimony that much, if not all, the delinquent debt was acquired while she and Applicant were separated, either because of deployments or marital discord, it is understandable why Applicant would be unaware of the legitimacy of some debts and need to investigate them before making payments. His testimony about his efforts to verify the debts is credible and provides adequate evidence of the actions he has taken to resolve that debt. His wife's testimony also establishes why much, if not all, the listed debt became delinquent.

Applicant and his wife were just recently able to acquire a substantial mortgage to purchase a new home. They have a reasonable amount of savings that is sufficient to pay their remaining delinquent creditors when and if Applicant is able to verify his responsibility for those debts. He has contacted some of the listed creditors who were unable to substantiate his liability for the debts.

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*; 20(b): *the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, . . . or a death, divorce or separation) and the individual acted responsibly under the circumstances*; MC 20(c): *. . . there are clear indications that the problem is being resolved or is under control*; MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*; and MC 20(e): *the individual has a reasonable basis*

to dispute the legitimacy of the past-due debt which is the cause of the problem and . . . provides evidence of actions to resolve the issue.

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness 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 provided incorrect answers to numerous questions in the security clearance application he submitted in June 2009. His testimony and that of his wife explaining each of the erroneous responses is credible. No personal conduct disqualifying condition applies.

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 mitigated the criminal conduct, financial considerations, and personal conduct security concerns. 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. Guidelines J, F, and E are 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 J:	FOR APPLICANT
Subparagraphs 1.a-d	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-t	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-h	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

