



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



In the matter of:)	
)	
)	ISCR Case No. 10-10084
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: John S. Myers, Esq.

December 5, 2011

Decision

LAZZARO, Henry, Administrative Judge

Applicant’s financial problems are the result of his failed business. He has been making steady payments on many of his delinquent debts and credibly testified he will resolve all his delinquent debts by seeking Chapter 13 bankruptcy protection. His personal conduct issues, which for the most part occurred when he was a teenager, no longer create a security concern. Clearance is granted.

History of the Case

On June 7, 2011, 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 F (financial considerations) and Guideline E (personal conduct). Applicant’s response to the SOR was received by DOHA on June 30, 2011. He admitted all SOR allegations, except subparagraph 1.a, 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 September 28, 2011. A notice of hearing was issued on October 12, 2011, scheduling the hearing for October 25, 2011.² The hearing was conducted as scheduled. The Government submitted seven documents that were marked as Government Exhibits (GE) 1-7 and admitted into the record without objection. Applicant testified, called one witness, and submitted five documents or groups of documents that were marked as Applicant's Exhibits (AE) 1-5, and admitted into the record without objection. The transcript was received on November 10, 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 32-year-old man who has been employed as an electrician by a defense contractor since August 2009. Applicant worked as an electrician aboard the same military base, but for a different employer, from October 2008 until August 2009. He worked for a third non-defense contractor employer as an electrician from November 2007 until October 2008. Applicant was self-employed as an electrician from March 2003 until November 2007. He is single and he has no dependents.

Applicant's financial problems are the result of his electrical business failing. His credit report, dated August 13, 2010, discloses, with the exception of a judgment related to his business and a lien for unpaid payroll taxes, he paid all his debts "As agreed" before 2006. Applicant testified he was unable to remain current on his business debts because his customers failed to pay their bills in a timely fashion as the national economy began to decline. He was forced to close the business in November 2007, after an uninsured utility trailer containing most of his tools was stolen.

The state tax lien alleged in SOR subparagraph 1.a was filed against Applicant because his accountant failed to submit the payment for his business's payroll taxes. It has been satisfied. Likewise, the Internal Revenue Service (IRS) debt alleged in subparagraph 1.h was due to his accountant failing to file his 2006 tax return. Applicant has entered into a repayment agreement with the Government and is making \$50 monthly payments to satisfy this debt. The debts alleged in subparagraphs 1.c and 1.d are medical bills owed in the combined amount of \$571. Applicant testified these debts have been fully satisfied. He submitted copies of checks indicating four \$100 payments were made to this creditor.

Applicant has been making consistent \$20 monthly payments on the debts alleged in SOR subparagraphs 1.b and 1.e since 2007. He has been making consistent \$50 monthly payments on the debt alleged in subparagraph 1.g since December 2009. He began making \$100 monthly payments on the debt alleged in subparagraph 1.f in February 2011.

² Applicant waived the 15-day notice requirement on the record (Tr. 9-10).

Unfortunately, because the monthly interest accruing on some of these debts exceeds the amount Applicant has been paying on them, the balance he owes has increased despite his payments. Applicant has retained an attorney to file for bankruptcy protection on his behalf. Applicant has completed the required pre-filing counseling. His bankruptcy attorney is confident that if Applicant is allowed to continue with his present employment he will qualify for a Chapter 13 bankruptcy. However, he has delayed filing until a decision is made on Applicant's security clearance. In the event Applicant is denied a clearance and loses his job, his attorney intends to file a Chapter 7 bankruptcy petition on Applicant's behalf.

Applicant was convicted and fined for underage possession of alcohol in 1996. He was 17 years old at the time. He was convicted of driving under the influence of alcohol (DUI) in January 1999. He was 18 when this offense occurred. Applicant was charged with willful obstruction of law enforcement officers in September 2002. He credibly testified he was the passenger in an automobile when it was approached by two men with guns drawn. They were not in uniform and did not immediately identify themselves as police officers. He became somewhat hysterical and was taken into custody. The charge was dismissed.

Applicant was charged with DUI in April 2009 after his vehicle was struck by another car. Applicant testified he had only consumed two beers before he was arrested. He provided an earlier statement in which it is recorded that he stated he had consumed three or four beers before he was arrested. While he is certain he only consumed two beers and that is what he told the interviewer, he conceded at the hearing that he may have said three or four. Applicant credibly testified the breathalyzer machine which registered his blood alcohol concentration (BAC) level at 0.10 had malfunctioned several times before that reading was obtained. The charge was reduced to failure to maintain lane and a fine was imposed.

Applicant continues to consume beer in moderate amounts in social settings. He testified he never drives an automobile after he has consumed any amount of alcohol. Applicant's current work supervisor testified that he has been to Applicant's house to watch sporting events and he has socialized with Applicant elsewhere. He has not observed anything that would indicate Applicant has a problem with alcohol. On those occasions when Applicant has consumed alcohol while they were out together, Applicant always had someone else drive. Applicant's supervisor also described Applicant as a very good 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 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.³ The Government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁵ although the Government is required to present substantial evidence to meet its burden of proof.⁶ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁷ 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.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

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)

³ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id.* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

Applicant had a tax lien filed against him, a judgment entered against him, and a number of other debts that became delinquent as his business began to fail. While he has satisfied several of those debts, others remain delinquent despite Applicant's efforts to make payments on them. 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 report indicates he lived a financially responsible lifestyle until his business began to fail as the national economy declined. He satisfied the tax lien and he has entered into a repayment agreement with the IRS that should have that debt fully satisfied in the not too distant future. He has either fully satisfied the two delinquent medical debts he incurred or at least has made substantial payments toward those debts. He made consistent small payments on his other debts that, unfortunately, were insufficient to reduce the amount owed because of the interest rates that are being charged. Applicant completed the required pre-filing bankruptcy counseling and his bankruptcy attorney is confident Applicant will qualify for Chapter 13 bankruptcy protection if he is allowed to maintain his current employment. Based on Applicant's long-term history of making constant payments on his debts, it is reasonable to conclude that he will abide by whatever repayment plan a bankruptcy court might order and obtain a Chapter 13 bankruptcy discharge. Based on his history of living a financially responsible lifestyle before his business began to fail, it is also reasonable to conclude that Applicant will resume a financially secure and responsible lifestyle once a Chapter 13 bankruptcy plan is established.

The following Mitigating Conditions (MC) 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*; MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*.

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. . . . (AG 15)

Applicant was involved in two alcohol-related offenses as a teenager, including a DUI of which he was convicted. He was charged with obstructing a law enforcement officer in 2002. He provided a credible explanation about that offense which is corroborated by the fact that the charge was dismissed. Since those incidents, Applicant has maintained steady employment, including an attempt at operating his own business which appears to have failed only because of the national economic downturn. When his business completely collapsed as the result of the theft of his tools, Applicant immediately found replacement employment. He has worked for his current employer for over two years and he has earned a reputation for being a very good employee.

Applicant was charged with a DUI in 2009 after his vehicle was struck by another car. His testimony about the offense, the malfunctioning breathalyzer, and the amount of alcohol he consumed before he was arrested is credible and corroborated by the facts that the charge was reduced to a lane violation and a fine was imposed. Applicant's testimony about his current moderate alcohol consumption was credible and corroborated by his supervisor's observations and testimony.

I have considered all potential disqualifying conditions, specifically to include DC 16(c): *credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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*, and I conclude that none apply.

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 financial considerations and personal conduct security concerns. He has overcome the case against him, and he has satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline F and Guideline 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 F:	FOR APPLICANT
Subparagraphs 1.a-h:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-e:	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

