



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 11-02698 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

11/02/2012

Decision

LAZZARO, Henry, Administrative Judge

Applicant and his ex-wife chose to abandon their marital residence and a luxury motor home, and ignore other large debts, for which they were jointly responsible, when they decided to divorce in 2008. Before and after the divorce they each had a gross annual income well in excess of \$100,000, and after the divorce they received combined monthly pay-outs from Applicant's retirement account of approximately \$17,000. Clearance is denied.

On July 16, 2012, 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 submitted a response to the SOR, dated August 9, 2010 [sic]. It was unclear from

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

Applicant's response if he intended to admit or deny any of the SOR allegations. Applicant was questioned on the record about his responses to the SOR allegations (Tr. 13-15), at which time he clarified that he admitted all SOR allegations except subparagraphs 1.f and 1.g.

It was also unclear from Applicant's SOR response if he was requesting a hearing or a determination of the case on the written record without a hearing. A conference call was conducted with Applicant and Department Counsel about one week prior to the hearing during which it was determined that Applicant requested a hearing. (Tr. 16-17)

The case was assigned to me on September 6, 2012. A notice of hearing was issued on September 14, 2012, scheduling the hearing for October 10, 2012. During the conference call with Applicant and Department Counsel mentioned above, it was agreed to reschedule the hearing to October 11, 2012. An amended notice of hearing was then issued on October 3, 2012, rescheduling the hearing for October 11, 2012. The hearing was conducted as rescheduled. The Government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6 and admitted into the record without objection. Applicant testified and submitted six documentary exhibits that were marked as Applicant Exhibits (AE) 1-6 and admitted into the record without objection. The transcript was received on October 19, 2012.

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 59-year-old man who was employed as a senior principle engineer by a defense contractor from December 1980 until he retired from that employment in about August 2008. Applicant accepted employment as an engineer with a different defense contractor in a different state in January 2009, He worked for that employer until he relocated to yet another state to be near his son in September 2009, where he again worked as an engineer from September 2009 until September 2010. Applicant moved back to his second state of residence and was rehired by his defense contractor employer as an engineer by whom he has been employed since September 2010.

Applicant's annual salary at the time he retired was approximately \$120,000. He had approximately \$950,000 invested in a pension plan at the time of his retirement. Under the terms of a separation agreement he entered into with his ex-wife, she received \$130,000 from that pension. Applicant has been receiving monthly payments of approximately \$13,800 from that pension since his retirement. Those payments will continue until early-to mid-2013. Applicant's current annual salary is approximately \$110,000.

As of the date of the hearing, Applicant had approximately \$15,000 in a savings account and \$1,600 in a checking account. He also had about \$110,000 divided among

three individual retirement accounts, in addition to the balance remaining in his retirement account which, according to the totality of his testimony, should be about \$100,000. Applicant could not fully explain what happened to the almost \$700,000 in payments he has received from his retirement account, other than to assert that it has been applied to paying divorce expenses, \$30,000 in past-due taxes, helping his children with school, and helping his ex-wife pay off her debts.

Applicant served as an enlisted member of the United States Air Force from January 1974 until January 1980. He served in the Air Force Reserve from 1981 until 1982. He was honorably discharged. Applicant obtained a bachelor of science degree in business administration in June 1985.

Applicant was married in June 1980. He and his wife separated in December 2008, and they obtained a divorce in June 2010. Applicant has four adult children from this marriage, none of whom are dependent upon Applicant for support. Applicant's wife owns an assisted living facility from which she reported an annual income of about \$125,000 at the time of their divorce. Applicant does not pay his ex-wife maintenance, and, other than pension payments that are being made directly to her through a qualified domestic relation order, he does not have any continuing financial responsibility toward her.

Applicant and his ex-wife owned a marital residence at the time of their divorce which had an outstanding mortgage owed in the amount of \$380,000 (SOR subparagraph 1.g). They also had a home equity loan owed in the amount of \$70,278 (SOR subparagraph 1.b). Additionally, they owed \$107,000 for a luxury motor home they had purchased (SOR subparagraph 1.e). Rather than attempting to liquidate these assets or otherwise satisfy the debts, Applicant and his ex-wife chose to stop making payments on these debts and allowed the house to be foreclosed on, the home equity loan to be charged off as a bad debt, and the motor home to be repossessed.

Applicant and his ex-wife entered into a separation agreement on June 9, 2010. (AE 4) Under the terms of that agreement, certain debts not alleged in the SOR were allocated to each of the parties. The debts discussed above, and the debts listed in SOR subparagraphs 1.a, 1.c, and 1.d, owed in the combined amount of \$54,901, were jointly and severally assigned to the parties. As to all these debts, Applicant and his ex-wife agreed that neither of them would have any claim against the other party for any amount they may individually be required to pay on any of the debts. Applicant explained in response to an interrogatory that "it was agreed by both parties that when or if creditors contacted either of us we would have to deal with the debt at our own end." (GE 4)

Applicant satisfied the debt alleged in SOR subparagraph 1.f that was owed in the amount of \$407. He has not received financial counseling, and he has not contacted any of the creditors listed in the SOR in an effort to resolve his delinquent debts.

Applicant submitted character letters from several people who know him well. They vouch for his reputation as an honest, trustworthy, and dependable individual.

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. Each clearance decision must be a fair and impartial decision based upon 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 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

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.

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.

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 allowed his house to be foreclosed on, a motor home to be repossessed, and a number of other large debts to become severely delinquent. With the exception of one comparatively small debt, no payment has been made on any of Applicant's delinquent debts, and no other action has been taken in an attempt to resolve any of those debts. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and 19(c): *a history of not meeting financial obligations* apply.

Applicant attributes his financial problems to his separation from his wife in 2008, and their divorce in 2010. However, at the time they separated, Applicant and his ex-wife had a combined annual income of about \$230,000. Applicant retired shortly after he separated from his wife, and he began receiving payments from his retirement fund of approximately \$13,800 a month. Those payments continue to this day. Applicant voluntarily chose to retire and remain unemployed for about four months. When he decided to return to work, he quickly found a job and he has maintained full-time employment since. His current annual income is approximately \$110,000, in addition to the monthly pension payments he receives.

Despite having the financial resources to maintain their joint property until it could be sold, Applicant and his wife freely chose to abandon their marital residence and motor home when they separated. They ignored their home equity loan and other large debts. Rather than act responsibly to liquidate assets and allocate and resolve debts, Applicant and his wife knowingly decided financial burdens arising from their marital discord should be borne by their creditors. Having done so, Applicant entered into a separation agreement with his wife in which he undertook joint and several liability for the debts listed in the SOR, with an understanding that he and his ex-wife would simply ignore those debts unless and until a creditor might take action against either of them, in which case they would each have to fend for themselves with no recourse against the other.

While Applicant's financial problems resulted from his separation and divorce, they were not beyond his control. Rather, he knowingly allowed the debts to become delinquent despite having avenues open to him and his ex-wife to resolve them. He did not act responsibly in acquiring the delinquent debt, and he has not acted responsibly by doing nothing to attempt to resolve those debts. Mitigating Condition 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's delinquent debts remain unresolved. Despite having a large income from his salary and pension plan payments since at least January 2009, he has done nothing to resolve the delinquent debts alleged in the SOR. It is apparent that Applicant has no intention of resolving the delinquent debts listed in the SOR unless a creditor takes action to force him into satisfying a debt. Applicant's handling of the financial ramifications of his divorce cast serious doubt on his reliability, trustworthiness, and good judgment. 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.

Applicant has not received financial counseling, he has only resolved one small debt that is listed in the SOR, and he has no basis to dispute any of the debts. To the contrary, he freely accepted joint and severable liability for the debts listed in the SOR with a complete understanding that left him no recourse against his ex-wife should he pay any of those debts. I have considered the following mitigating conditions and conclude they do not apply: 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*; 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 documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue*.

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

Formal Findings

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

| | |
|---------------------------|-------------------|
| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a-e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraph 1.g: | 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