



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



In the matter of:)	
)	
)	ISCR Case No. 11-06002
)	
Applicant for Security Clearance)	

Appearances

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

01/29/2013

Decision

LAZZARO, Henry, Administrative Judge

Applicant’s financial problems are primarily the result of his ex-wife’s vexatious litigation during their divorce proceedings and her failure to obey court orders, including making payments on their home mortgage, making payments toward Applicant’s legal fees, and paying child support. There is insufficient evidence to substantiate that Applicant was under the influence of alcohol when he was charged with Driving Under the Influence (DUI). Clearance is granted.

On April 13, 2012, the Department of Defense 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 G (alcohol consumption). Applicant submitted a response to the SOR, dated June 25, 2012, in which he admitted all SOR allegations, and requested a decision based on the written record without a hearing. However, by letter, dated July 27, 2012, Applicant 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 December 5, 2012. A notice of hearing was issued on December 21, 2012, scheduling the hearing for January 9, 2013. The hearing was conducted as scheduled. 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 two documentary exhibits that were marked as Applicant Exhibits (AE) 1 and 2 and admitted into the record without objection. The transcript was received on January 17, 2013.

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 52-year-old man who has been employed by a defense contractor since January 1996. He was initially employed as a senior buyer, but he has worked as a subcontract administrator since November 2003. He has a master's degree that was awarded to him in August 2005. The performance reviews and certificates Applicant submitted indicate his work performance exceeds expectations and he has demonstrated that he possesses integrity and a very high ethical standard.

Applicant was married in August 1997. That marriage ended by divorce in January 2008. Two children were born of the marriage, ages 13 and 10. Applicant has been awarded custody of the children.

Applicant separated from his wife in August 2007, and she was awarded possession of the marital residence and ordered to pay the mortgage on that residence. She failed to make the mortgage payments and foreclosure proceedings were begun. Applicant sought relief from the divorce court. His wife was ordered to vacate the residence and, in May 2008, Applicant was awarded possession of the home. He has renegotiated the loan with the lender on several occasions, most recently under a program in which he commenced making payments in November 2012 (AE 2).²

In addition to their principal residence, Applicant and his ex-wife owned a second residence that they intended to use as a rental property. They purchased that residence in June 2000, and they resided in it until they purchased their marital residence in January 2002. The rental property was severely damaged by a hurricane in 2004, and, despite some repairs having been made on it, remains uninhabitable. The divorce court ordered Applicant to pay the mortgage on that residence, which he has done.

Applicant has had to repeatedly return to the divorce court to seek relief from his ex-wife's failure to follow court orders. The court entered a modified final judgment on February 17, 2010, in which it found Applicant's ex-wife had behaved in an erratic and irrational manner throughout the course of the divorce proceedings. The court found she

² Applicant testified he actually began making payments in August 2012 as a precondition to modification of the loan as required by the lender.

had voluntarily remained either unemployed or underemployed, despite having the ability to be gainfully employed. It further found that she had prevented the litigation to be concluded in a timely fashion by filing vexatious pleadings and failing to comply with the court's orders, and, as a result, Applicant had incurred in excess of \$23,000 in legal fees. The court ordered her to pay child support to Applicant in the amount of \$1,102, retroactive to September 1, 2009. To satisfy the retroactive support, she was ordered to pay an additional \$200 per month to Applicant. Additionally, she was ordered to pay \$5,000, at the rate of \$250 per month, to compensate Applicant for a portion of his legal fees.

Applicant's wife has failed to pay any amount toward Applicant's legal fees as ordered by the court. She did not begin making any payment toward the child support until a wage deduction ordered was enforced in August 2011. By that time, she had accumulated \$36,700 in delinquent support. The amount of support that has been deducted from her wages since August 2011 has varied from a low of \$610.15 bi-weekly to the current amount of \$730.79 bi-weekly.

In addition to the \$23,000 in legal fees the court noted in its February 2010 modified judgment, Applicant testified he has incurred an additional \$23,000 in legal fees because he has had to return to court concerning child custody issues. Applicant has paid all his legal fees. Additionally, Applicant was required to pay his wife what he termed a "buy out" of her interest in their marital property. He sent a portion of that money directly to her attorney to have a lien removed from his residence that was filed when she did not pay her attorney fees.

Applicant submitted proof he has satisfied the delinquent debts alleged in SOR subparagraphs 1.a, 1.e, 1.f, and 1.g. The debt alleged in SOR subparagraph 1.d is the mortgage that his wife allowed to go into foreclosure that is now the subject of the loan modification noted in AE 2.

The two loans alleged in subparagraphs 1.b and 1.c remain delinquent and no payment has been made toward either of those debts. Applicant testified the debt alleged in subparagraph 1.b is based on a checking account his wife had on which he was a co-signer. His credit report, dated October 28, 2010, confirms that he is a "co-maker" on that account. The last reported action on that account is July 2006.

In a statement Applicant provided in November 2010, he explained the account alleged in subparagraph 1.c was used to help support living expenses while his wife was unemployed and attending nursing school. He testified the account was opened because his wife wanted additional money for expenses. Applicant's October 28, 2010 credit report indicates that account was charged off in April 2006, and recorded as a profit and loss write off in July 2008.

Applicant and his wife had similar incomes before they separated in 2007. As noted above, she failed to pay the mortgages on the primary residence as ordered while she resided in it, and thereafter failed to make child support payments as ordered. Applicant's testimony that the account alleged in subparagraph 1.b belongs to his ex-wife is at least partially confirmed by the entry in his credit report, and it is clear that she failed to make any payment on that account even before they separated. The account listed in

subparagraph 1.c apparently was opened to accommodate Applicant's ex-wife's expenses before they separated and she has failed to make any payment to satisfy that account before or after they separated. Applicant acknowledges he will have to satisfy those accounts himself and testified he has attempted to negotiate repayment plans and will continue to do so in the future until the accounts are satisfied.

When Applicant regained custody of his children and occupancy of the marital residence he had about half the income that was available before the marital separation to provide for the support of his children and related living expenses. Within a few months, he removed the children from the private school they had been attending, thereby saving about seven or eight hundred dollars a month. His current living expenses are modest and within his means. Unfortunately, they do not leave him with sufficient discretionary income at present to satisfy the debts listed in subparagraphs 1.b and 1.c. Applicant testified he hopes to be able to sell one or both of the residences he owns to further reduce his living expenses and satisfy the remaining delinquent debts. However, the mortgages on each residence exceed the value of the residence due to the decline in the real estate market, so it is uncertain when or if he will be able to sell the residences.

Applicant was charged with DUI in November 2009.³ In a statement he provided in November 2010, Applicant explained he had met a woman in a hotel bar and returned with her to his home. Her parents apparently became concerned about her well-being and called the police. When Applicant returned to the hotel with her at about 3:00 AM he was taken into custody by a police woman who accused him of being intoxicated. Applicant claims he had only consumed three beers between 8:15 PM and 11:15 PM that evening. He claims to not have drank any alcohol after 11:15 PM.

Applicant informed the arresting officer he could not perform a field sobriety test because of medical problems. He submitted proof that he suffers from several neck and spine conditions that have been surgically treated. He also refused to take a breathalyzer because he did not trust the police woman.

A trial was begun in his case, but, in response to the prosecutor's offer during the trial to reduce the charge to reckless driving, he decided to plead guilty to that charge. Applicant was sentenced to six months probation and 30 hours community service. He was also required to attend a DUI class and two Alcoholic's Anonymous (AA) meetings. Before trial, a hearing officer considering the matter of a suspension of Applicant's driver's license found there was insufficient evidence to support a finding of probable cause that Applicant was driving a motor vehicle while under the influence of alcohol. The basis for the finding is apparently due to the arresting officer's failure to appear for the hearing.

³ Applicant was convicted of aggravated vehicular homicide in 1983, apparently based upon his operation of a motor vehicle while under the influence of alcohol. That offense is not alleged in the SOR and, due to its remoteness in time from this arrest, lacks a material basis for concluding Applicant committed the November 2009 offense.

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) and Guideline G (alcohol consumption) 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.⁴ The Government has the burden of proving controverted facts.⁵ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁶ although the Government is required to present substantial evidence to meet its burden of proof.⁷ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁸ 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 her.⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰

No one has a right to a security clearance¹¹ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹² Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹³

⁴ ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁵ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁶ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁸ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁹ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

¹⁰ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

¹¹ *Egan*, 484 U.S. at 528, 531.

¹² *Id.* at 531.

¹³ *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 has two relatively large debts that remain delinquent. Foreclosure proceedings were instituted against his residence which are being resolved through a loan modification process. He had several other debts that were delinquent, but have now been resolved. 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 financial problems are the result of a tumultuous divorce during which his wife failed to make mortgage payments as ordered by a court. She also engaged in vexatious litigation that caused Applicant to incur about \$46,000 in legal fees. He was granted custody of their two children and had to provide for them without support from his ex-wife until August 2011, despite court orders that required her to provide substantial support and payment of a portion of Applicant's legal fees. Additionally, Applicant's testimony that the debt alleged in SOR subparagraph 1.b belongs to his ex-wife is credible and corroborated by the entry in his credit report. The debt alleged in subparagraph 1.c was acquired to accommodate his ex-wife's desire for additional money while she attended nursing school and on which she has not made any payment.

Applicant has negotiated a resolution of the foreclosure, and he has satisfied several of his debts. He quickly reduced his living expenses as much as practical by removing his children from a private school once he was granted custody of them and the marital residence. He is currently living within his financial means and is attempting as best he can to resolve the two remaining delinquent debts.

Based on the above, Applicant is entitled to application of the following Mitigating Conditions (MC) 20(a): *the behavior happened . . . 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., . . . divorce or separation), and the individual acted responsibly under the circumstances*; and MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. The remaining mitigating conditions have no applicability to the facts of this case.

Guideline G, Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. AG ¶ 21

Applicant was charged with DUI in November 2009. He pled guilty to Reckless Driving and was sentenced to six months probation and 30 hours community service. He was also required to attend a DUI class and two AA meetings. Applicant admits he had consumed alcohol before the incident which resulted in his arrest, although he denies he was intoxicated. DC 22 (a): *alcohol-related incidents away from work, such as driving while under the influence . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent applies.*

There is no evidence to contradict Applicant's claim that he had only consumed three beers over the course of three hours before he was arrested; and that the last beer he consumed was almost four hours before he was arrested. The incident at issue is only marginally alcohol-related and there is no evidence from which to conclude that Applicant was actually intoxicated while operating a motor vehicle, Other than an alcohol-related offense that occurred over 26 years earlier that has minimal probative value, there is no evidence to indicate that Applicant has any problem with alcohol consumption. MC 23(a): *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment applies.*

The causes of Applicant's financial problems are not of his making. He has done the best he can under the circumstances with the resources available to him to resolve his financial problems. His past history in dealing with his financial problems, including aggressively pursuing his ex-wife to collect the support he needs to provide for their children, indicates that he will continue to pursue the resumption of a financially secure lifestyle in the future.

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 mitigated the financial considerations and alcohol consumption 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 F and G are decided for 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:	FOR APPLICANT
Subparagraphs 1.a-g:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 1.a:	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

