

DATE: October 15, 2007

In re:)
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 -----) ISCR Case No. 07-00502
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Britt Cauthen, Esq.,

SYNOPSIS

Applicant has mitigated security concerns arising from the criminal conduct incidents of domestic violence through the passage of time and rehabilitation. Applicant also mitigated the alcohol consumption security concerns. Applicant's eligibility for a security clearance is granted.

STATEMENT OF THE CASE

On November 10, 2004, Applicant completed his security clearance (SF 86) application.¹ On July 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant.² The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. The SOR detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 25, 2007, Applicant submitted a notarized response to the SOR allegations, and elected to have his case decided at a hearing. On August 29, 2007, the case was assigned to me. A Notice of Hearing was issued on September 14, 2007.³ At the scheduled hearing, conducted by video teleconference, on September 20, 2007, the Government introduced five Government Exhibits (GX) 1-5 into evidence without objections. Applicant testified and introduced Applicant Exhibits (AX) A-E into evidence without objections from Department Counsel. DOHA received the transcript (Tr.) on September 28, 2007.

FINDINGS OF FACT

Applicant admitted allegations in subparagraphs 1.a -h, and subparagraphs 2.a-b in his SOR response under Guideline J and Guideline G with explanation.⁴ After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact:

Applicant is a 36-year-old employee of a defense contractor. After receiving his GED in 1977, he worked for various companies. He has worked for his current employer since November 2002.⁵ He is twice divorced with two children.⁶

¹GX 1(Application of Security Clearance (SF 86), dated November 10, 2004).

²This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

³Applicant, through his counsel, waived the 15 day notice requirement.

⁴Applicant's Answer to SOR, dated July 25, 2007.

⁵GX 1 (Application for Security Clearance (SF 86), dated November 10, 2004).

⁶*Id.*

Applicant started drinking when he was approximately 18 years old. In 1988, Applicant was driving a motorcycle and was pulled over by the police. He was charged with driving under the influence of liquor. He was found guilty, and sentenced to pay a fine and court costs.⁷

In 1989, Applicant was charged with larceny of property 2nd degree. He was found guilty, sentenced to two years confinement (suspended), with two years probation. This incident occurred when he walked into a stereo store intending to shoplift. He took a radio/cd changer and hid it under his jacket. On his way out of the store, he decided to put it back. When he pled guilty, he did not have a lawyer and was not aware of the youthful offender act. Nonetheless, Applicant admits the incident and was convicted.⁸

On July 1, 1990, Applicant was charged with driving under the influence of liquor. He was found guilty, sentenced to pay a fine, and court costs. This incident occurred during the July 4th weekend. Applicant was driving in a campground when his friend almost fell out of the car after leaning on the door. Applicant reached out to grab him and the car swerved. A police officer stopped Applicant and after smelling alcohol on his breath gave him the alcohol test which he failed.⁹

Applicant married his second wife in 1999. His second marriage was a deeply troubled one. He traveled a great deal of time for work and his wife did not work. His wife often left the home and used drugs. She was addicted to various drugs and her behavior was often erratic. Applicant acknowledged smoking marijuana with his wife on a regular basis. They also drank heavily and often frequented bars. During this marriage, Applicant was involved in following domestic violence incidents.¹⁰

In 2001, Applicant was charged with assault 2nd degree. This incident occurred in a nightclub. Applicant's wife complained to him that someone was bothering her on the dance floor. Applicant advised his wife to remain with him, however, she did not. She pointed out the male who was harassing her to her husband (Applicant). When Applicant walked over the man and tapped him on the shoulder, the man pushed Applicant three times. Applicant had a beer in his hand and swung it at the man. When Applicant left the bar, he was approached by the police. Applicant explained the situation and both men agreed not to press charges. About a month later, Applicant was charged with assault. At that time he had a marijuana joint in his pocket. He was later charged with smuggling contraband and promoting prison contraband. He was convicted, sentenced to six months confinement, six years six months suspended, three years probation and fined. The smuggling contraband charges were nolle prossed.¹¹

On March 28, 2002, Applicant was charged with domestic violence 3rd harassment. This case was nolle prossed with conditions. This incident occurred when Applicant's wife left home to get

⁷GX 2 (Criminal History Printout).

⁸*Id.*

⁹Tr. 73.

¹⁰Tr. 31.

¹¹Tr. 40-43.

drugs and left the children alone. Applicant went to retrieve his wife. He decided to go home and get the children and leave with them. She returned to the home as they were leaving. Applicant's wife tried to stop the car that was backing out of the driveway. She jumped into the car and fought with Applicant to gain control of the steering wheel. A neighbor witnessed this and alerted the police. Applicant was stopped a short distance from home. He was pulled over and the officer told Applicant that he should leave the children with his wife. Applicant refused but the police officer gave an ultimatum. Applicant refused to do so and was put in jail.¹²

On April 11, 2002, Applicant was arrested and charged with domestic violence 3rd degree-assault-menacing. This case was nolle prossed with conditions. This incident occurred when he was separated from his wife. They had an altercation at a public place and a friend of his wife's threatened Applicant. Applicant followed his wife and her friend for the purpose of taking pictures of them. A little while after this, Applicant was stopped by a county sheriff. The sheriff had a report that Applicant had a gun and had threatened his wife and her male friend. Applicant did not have a gun and the charges were dismissed.¹³

On May 5, 2002, Applicant was charged with domestic violence. He and his second wife had gone to a concert. His wife was drinking and became belligerent. They got into a heated argument, and he learned that she was having an affair. She was in the car with him and attempted to use the cell phone. Applicant was angry and reached over to knock the phone out of her hand. He "busted" her nose."¹⁴ Before reaching home, they stopped at a public restroom and Applicant's wife went in the building. A security guard saw her and called the police. Applicant went to jail for 72 hours and was released. Applicant was sentenced to six months but was released early for good behavior.¹⁵

In 2003, Applicant divorced his second wife. He realized his wife was addicted to drugs and that she was having an affair. He loved her but realized he would not be able to change her. He made the choice to turn his life around.

On January 23, 2004, Applicant was charged with driving under the influence of alcohol. The charge was nolle prossed, with conditions, and Applicant was sentenced to pay court costs. This incident occurred after Applicant started his treatment program. However, Applicant explained his ex-wife was harassing him. He went to a bar and then took a taxi to his car. He then drove home.

From November 2003, until June 2004, Applicant received treatment for alcohol and drugs. He does not have a diagnosis for alcohol abuse or dependence. He also completed an anger management program. No further treatment was required. During this period, Applicant realized he needed to stop using marijuana. He then stopped drinking and smoking marijuana because he wanted to save himself and gain custody of his son.¹⁶

¹²Tr. 33-34.

¹³Tr. 36.

¹⁴Tr. 37.

¹⁵GX 5 (Answers to Interrogatories, dated May 2007).

¹⁶AX D and E (Certificate of Completion and Progress Notes from therapist, dated 2003-2004).

On June 24, 2005, Applicant married his third wife. They both attend church and are involved in community activities.¹⁷ Applicant received custody of his son. He acknowledges that he and his current wife occasionally drink on a special occasion. He does not drink and drive.¹⁸

Applicant works for a technology engineering service. The president of the company highly recommends Applicant for a security clearance.¹⁹ Applicant is a senior computer engineer. He is highly respected for his work. He is considered one of the foremost web developers in the country. His company president vouches for his character and reputation. In the years of employment, Applicant has never had any difficulty at work.²⁰

POLICIES

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.”²¹ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information and determining trustworthiness within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in ¶ 6.3 of the Directive, and AG ¶ 2(a).

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”²² An administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person.²³ An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the

¹⁷AX C (Letter from Church Pastor, dated September 18, 2007).

¹⁸Tr. 49.

¹⁹AX A (Letter from President of company, dated 2007).

²⁰Tr. 91.

²¹ *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

²² Directive, ¶ E2.2.1.

²³ Directive, Revised Adjudicative Guidelines (AG) 2(a)(1)-(9).

individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.²⁴

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.²⁵ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.²⁶ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."²⁷ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.²⁸

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determinations as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

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.

Criminal Conduct Disqualifying Condition (CC DC) AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and CC DC AG ¶ 31(c) (*allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) applies. Applicant admitted the domestic violence charges and his alcohol-related driving offenses. Despite the fact that some of the charges were dismissed, he either pled guilty or was convicted on others.

Mitigating Condition (MC CC) AG ¶ 32(a) (*so much time 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*) partially applies in this

²⁴ *Id.*

²⁵ Directive, ¶ E3.1.14.

²⁶ Directive, ¶ E3.1.15.

²⁷ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

²⁸ Directive, ¶ E2.2.2.

case. Applicant's convictions for domestic violence occurred when he was married to his second wife. His wife was addicted to drugs and the relationship was highly charged. The last incident was in 2002. However, his domestic situation has drastically improved since that time. Applicant is divorced from his second wife. He remarried in 2005 and the court gave him custody of his son.

Applicant's marriage was in crisis for a period of years. Applicant made bad choices during the marriage to keep the family together for his son. His wife put pressure on Applicant, which adversely affected his judgment and ability to adhere to the law. He now has custody of his son and his second wife is no longer part of his life. MC CC AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) partially applies.

MC DC AG ¶ 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*) applies. Applicant completed an anger management class and alcohol and drug psychological-educational program. He has persevered because he wants to provide a good, safe home for his son. He has been very successful in his work. He has not mishandled classified information or sensitive information and has garnered promotions and praise. He is active in his church and his community.

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.

In this matter, the government provided substantial evidence that Applicant was arrested in 1988, and 1989 for under age alcohol-related driving incidents. His last alcohol incident was in 2004. Consequently, Alcohol Consumption Disqualifying Condition (AC DC) AG ¶ 22(b) *alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies.

Applicant admitted consuming alcohol, at times to excess and to the point of intoxication, from approximately 1998 until at least May 2007. AC DC AG ¶ 22(c) *habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies.

With the government's case initially established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. I considered the Alcohol Consumption Mitigating Condition (AC MC) AG ¶ 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.*

Applicant's 1988 and 1989 under age drinking are very remote in time. Applicant asserted that his drinking no longer plays a major role in his life. He does acknowledge that he drinks on a special occasion but does not drink and drive. His driving incident involving alcohol was in 2004. He has since moderated his drinking and is no longer married to his second wife. He does not associate with

friends or associates who drink heavily. His current employer has traveled with Applicant and attests to the fact that Applicant has never had alcohol at work or on his travels with Applicant. Applicant's heaviest drinking occurred during his second marriage. He has completed an alcohol education program. Applicant's personal life has changed sufficiently that he is now less likely to find himself in the same circumstances that led to his alcohol use and related misconduct. I conclude this guideline for Applicant.

Whole Person

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's security clearance determination. Applicant had problems in his youth with alcohol. He married at an early age, divorced and then remarried in 1999. His second marriage was a disaster. During the course of that marriage, he was involved in a number of domestic violence incidents. His wife was addicted to drugs and Applicant remained married or in a relationship with his troubled spouse. He attempted to reduce the impact of his wife's erratic behavior on their family for the sake of his son. Applicant extricated himself from that marriage. Since the divorce in 2003, Applicant has not had any instances of domestic violence. He is now married to a woman who helps him take care of his son. The court awarded Applicant the custody of his son. Applicant has an exemplary record of employment. He is mature and responsible at work and has earned promotions and the praise of the company president who appeared and testified on his behalf. Applicant also successfully completed a rehabilitation program. He now has a good family and community support system. His third marriage is stable. His professional life is replete with commendations. His current employer of five years reports no attendance problems, irresponsibility or dishonesty. He is deemed trustworthy in his work. Applicant has overcome the doubts about his ability to exercise the requisite judgment and discretion expected of one who holds a security clearance.

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

Subparagraph 1.a: For Applicant
Subparagraph 1.b: For Applicant
Subparagraph 1.c: For Applicant
Subparagraph 1.d: For Applicant
Subparagraph 1.e: For Applicant
Subparagraph 1.f: For Applicant
Subparagraph 1.g: For Applicant
Subparagraph 1.h: For Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2.a: For Applicant
Subparagraph 2.b: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant's request for a security clearance. Clearance is granted.

Noreen A. Lynch
Administrative Judge