

KEYWORD: Criminal Conduct; Financial; Personal Conduct

DIGEST: Security concerns of criminal conduct, financial considerations, and personal conduct were identified during Applicant's background investigation for a security clearance. These concerns surfaced following the uncovering of several misdemeanor arrests, 15 unpaid debts, and the belief Applicant had failed to disclose misdemeanor arrests. Applicant has successfully mitigated all these concerns. Clearance is granted.

CASENO: 05-11343.h1

DATE: 06/21/2007

DATE: June 21, 2007

In Re:)	
)	
)	
-----)	ISCR Case No. 05-11343
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

_____ Security concerns of criminal conduct, financial considerations, and personal conduct were identified during Applicant's background investigation for a security clearance. These concerns surfaced following the uncovering of several misdemeanor arrests, 15 unpaid debts, and the belief Applicant had failed to disclose misdemeanor arrests. Applicant has successfully mitigated all these concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 11, 2006, DOHA issued a Statement of Reasons (SOR)¹ detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on November 3, 2006, and elected to have a hearing before an administrative judge.

The case was assigned to me on December 15, 2006. On January 5, 2007, DOHA issued a notice of hearing scheduling a hearing for January 22, 2007. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered 15 documents, which were admitted without objection as Government Exhibits (GE) 1 through 15. The Applicant offered 4 documents, which were admitted without objection as Applicant Exhibits (AE) A through D. The Applicant timely submitted four post-hearing documents, which admitted without objection as AE E through H. DOHA received the transcript on January 31, 2007.

FINDINGS OF FACT

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

Applicant testified at his hearing and I found his testimony credible.

Applicant is a 33-year-old sensor systems engineer employed by a defense contractor since

¹Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified. Concerning the security guidelines, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information approved by the President on December 29, 2005. The revised guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006 or thereafter, and they apply to this case because the SOR is dated October 11, 2006. Both the Directive and the Regulation are pending final amendment.

November 2003. He seeks a security clearance as a requirement of his employment. He is unmarried with no dependents. He served on active duty in the Navy from January 1996 to January 2001, and was honorably discharged as a Sonar Technician Second Class, pay grade E-5. He previously held a security clearance at the secret level while in the Navy.

While Applicant was in the Navy, he was arrested in December 1999 for driving under the influence (DUI), a misdemeanor under applicable state law. His case was continued because he was forward deployed and when he appeared in court in December 2000, he was found guilty, and sentenced to 30 days in jail, suspended for 30 days, fined \$250.00 and ordered to pay court costs of \$40.00. Additionally, his driver's license was suspended², and he was ordered to complete an alcohol education program (SOR ¶ 1.a.). Tr. 20-23, 32-35, 41-43.

In December 2000, Applicant was charged with show cause, a misdemeanor under applicable state law (SOR ¶ 1.b.). There was apparently some confusion regarding the court date when Applicant was to appear for his December 1999 DUI charge and on June 2002, he was found guilty of this charge and sentenced in absentia. Applicant is of the belief this was ultimately "dropped." Tr. 23. Source documents offer two dispositions – "Dismissed" and "Guilty in Absentia." GE 6. The government was unable to clarify this point. Tr. 43-47.

In March 2001, after Applicant was discharged from the Navy, he along with fellow employees were attending off-site job-related training. The driver of the company-rented mini van was pulled over and charged with DUI and the passengers to include Applicant in the mini van were all cited for open container in a vehicle after the arresting officer noticed empty beer cans in the vehicle (SOR ¶ 1.c.). Following this citation, Applicant paid a \$200.00 fine. The government's evidence indicated this citation was a vehicle infraction versus a criminal offense under applicable state law. Tr. 17-18, 23-25, 40.

In November 2003 Applicant attended a bachelor party and was tasked during a scavenger hunt to obtain "the coolest license plate [he] could find." When he located a license plate meeting the specifications of his tasking, he was caught by the police removing a license plate from a vehicle and charged with petit larceny, a misdemeanor under applicable state law (SOR ¶ 1.d.) He was sentenced to ten days in jail, suspended for ten days, fined \$100.00 and ordered to pay court costs of \$64.00. Tr. 25, 38-40, GE 7.

In December 2003, Applicant was charged with driving on suspended license, a misdemeanor under applicable state law (SOR ¶ 1.e.). This charged stemmed from the suspension he received from his December 2000 conviction for his December 1999 DUI arrest. He pled guilty to the charge and was sentenced to ten days in jail, suspended for ten days, fined \$100.00 and ordered to pay court costs of \$64.00. Tr. 25-26, GE 8.

In March 2005, Applicant was charged with driving on suspended license, a misdemeanor under applicable state law (SOR ¶ 1.f.). Apparently, Applicant had some confusion regarding his driver license suspension stemming from his December 1999 DUI charge. He was charged with show cause for failure to appear on May 10, 2005. On the day of his court date, he was admitted to the emergency room for chest pain, headaches, and dizziness and submitted documentation from the

²The court record did not specify the length of time his license was suspended. GE 4.

hospital verifying he was admitted. Tr. 25-26, 28-31, Answer to SOR. Applicant reported all problems with his driver's license had been "cleared up" and that his license was no longer under suspension adding that he used his valid driver's license to gain access to the building where his DOHA hearing was being conducted. Tr. 26, 35-38.

The SOR alleges Applicant is in arrears on 15 debts (SOR ¶¶ 2.a. through 2.o.). These debts are in various stages of repayment or being challenged and all of them are being addressed. Applicant submitted a letter to the cognizant credit reporting agency and is disputing the following five debts listed in SOR ¶¶ - 2.a. (collection account \$239.00), 2.c. (collection account \$102.00), 2.d. (returned check charge \$2.00), SOR ¶ 2.e. (collection account \$102.00), 2.f. (collection account \$387.00), and 2.k. (collection account \$23.00). Answer to SOR, Tr. 47-54, 61, 64-69, 83-84, 86-87, AE E. His reasons for disputing the debts include that certain accounts are not his, he was unable to contact creditor, and the account has been paid. Applicant's evidence supports the notion these disputes with creditors are made in good faith.

The debts listed in SOR ¶¶ 2.h. (\$386.00 to pay court fine in SOR ¶ 1.d.) and 2.j.(\$288.00 medical bill) were resolved through garnishment in 2004 and 2005 respectively. Applicant did not have the funds to pay these bills when due given his state of underemployment and underemployment at the time. Answer to SOR, Tr. 54, 56-58, 73-75, 88.

Applicant has sought the services of a credit counseling service and set up payment plans to address debts listed in SOR ¶¶ 2.b. (charged off account \$2,484.00), 2.g. (collection account \$5,966.00), 2.i. (collection account \$165.00), 2.n. (collection account \$419.00), and 2.o. (collection account \$253.00). He had paid debts listed in SOR ¶¶ 2.f. (collection account \$387.00), 2.l. (delinquent account \$2,297.00), and 2.m. (delinquent account \$1,315.00). Answer to SOR, Tr. 48, 59-61, 64, 68-71, 84, 87-90, AE B, AE F, AE G.

Applicant attributes his financial problems to a periods of underemployment and unemployment after he was discharged from the Navy in 2001. Until he secured his present position in November 2003, he held several low paying jobs to include front desk motel clerk and bartender, plus two periods of unemployment. GE 1. Tr. 60, 88-89.

In August 2004, Applicant submitted a security clearance application and was cited in SOR ¶¶ 3.a., and 3.b. for failing to list his March 2001 citation for open container (SOR ¶ 1.c. Alcohol/Drug Offenses), and for failing to list his November 2003 arrest for petit larceny (SOR ¶ 1.d.), and his December 2003 charge of driving on suspended license (SOR ¶ 1.e.) (Police Record/Other Offenses). In response to Alcohol/Drug Offenses, he did list a more serious 2001 charge of driving under the influence.

Applicant concedes the information he failed to list on his security clearance application as alleged was not listed. He explained when he was initially hired in November 2003, he completed a security clearance application at that time and the underlying petit larceny arrest and driving on suspended license charge had not occurred. He added for some reason, his employer wanted to resubmit his security clearance application in August 2004 (GE 1). When that occurred, he signed an application in August 2004 and apparently failed to review and check the form he previously completed when hired for accuracy. Regarding his failure to list the March 2001 citation for open container, he stated, "It was just simply a citation that I paid that I had honestly forgotten about. . .

I wasn't trying to - I mean admitted to the DUI, the other things on my SF-86. It's just simply one that I did not remember."

Applicant did submit post-hearing a copy of the security clearance application he submitted when hired bearing the date of December 4, 2003, which approximates the time he was initially hired. AE H. Although unsigned, I do not view the absence of a signature as unusual given the fact it is his file copy. I did find Applicant's testimony on this point to be credible. Tr. 93-97, 103-107. Applicant readily clarified this discrepancy when later interviewed the Office of Personnel Management (OPM) investigator. Tr. 96-97, GE 2.

Applicant submitted two letters of reference. The first letter is from a former Navy supervisor who served with him on board his ship. This supervisor spoke of Applicant's dependability especially during emergencies. He described him as the "first to volunteer, whenever we were short a man, or needed an extra watch stander, he was always willing to give of himself." AE C. The second letter is from his current supervisor. She stated Applicant "always displayed a high degree of integrity, responsibility and ambition." She considers Applicant to be a "valuable resource" and a "dependable team player." AE D.

POLICIES

The adjudicative guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant adjudicative guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, 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." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for

coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.” Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when “it is clearly consistent with the national interest to do so.” *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive ¶ E2.2.2 “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline J – Criminal Conduct

Under Guideline J for criminal conduct, a security concern arises by:

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.

The government established its case under Guideline J to SOR ¶¶ 1.a., 1.d., and 1.e. The government’s evidence relating to the December 2000 show cause charge alleged in SOR ¶ 1.b. is conflicting inasmuch as source documents reflect two separate dispositions, i.e. dismissed and guilty in absentia. Applicant is of the belief the charge was “dropped.” The government was unable to resolve this discrepancy following Applicant’s constructive denial. As such I resolve SOR ¶ 1.b. in Applicant’s favor. The government’s evidence relating to SOR ¶ 1.c. indicates this allegation was a traffic offense under applicable state law versus a criminal offense, and the March 2005 charge of driving on suspended license (SOR ¶ 1.f) was apparently dismissed. Applicant submitted competent evidence that he was in the emergency room for his May 2005 show cause/failure to appear hearing (SOR ¶ 1.f.), and Applicant has demonstrated his problems with the state licensing authority have been resolved. I find in Applicant’s favor for SOR ¶¶ 1.c. and 1.f.

The remaining allegations relate to his December 1999 arrest for DUI (SOR ¶1.a.), his November 2003 arrest for petit larceny (SOR ¶ 1.d.), and his December 2003 charge for driving on a suspended license (SOR ¶ 1.e.). These charges are all misdemeanors under the applicable state statute. Collectively, they raise potential disqualifying conditions under Criminal Conduct Disqualifying Condition (CC DC) 31(a) *a single serious crime or multiple lesser offenses*. Seven years have elapsed since Applicant's DUI charge in December 1999. Although his citation for open container in March 2001 is an alcohol-related offense, it does not rise to the level of a DUI. These remaining charges do not reflect a repetitive nature and his driving on suspended license problems all stem from his December 1999 DUI arrest.

Applicant acknowledges his November 2003 petit larceny arrest was a "very stupid mistake." He did not unjustly gain from this "larceny" and understands his sophomoric act is unacceptable behavior. He has fully complied with all sentencing requirements. I do not believe from his demeanor that he is likely to repeat any similar acts and given his current status and realizing such behavior has lasting consequences. Under these facts, I am unable to apply to SOR ¶ 1.a. Criminal Conduct Mitigating Conditions (CC MC) 32(a) *so much time has elapsed since the criminal behavior happened, . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*. To the allegations in SOR ¶¶ 1.d. and 1.e. CC MD 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, not training or higher education, good employment record, or constructive community involvement*.

Guideline F – Financial Considerations

Under Guideline F for financial considerations, a security concern arises by:

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.

The government established its case under Guideline F to SOR ¶¶ 1.a. through 1.o. by evidence submitted as well as Applicant's admissions. These facts give rise to Financial Considerations Disqualifying Condition (FC DC) 18(a) *inability or unwillingness to satisfy debts*; and FC DC 18(c) *a history of not meeting financial obligations*.

After five years of active duty in the Navy, Applicant found the transition to civilian life to be challenging. He struggled and during that time, he found himself underemployed and unemployed. It took him almost three years to find a career field that is compatible with his skill set and pays him a competitive salary. Now that he is making a living wage, he is able to pay his bills and remain current. He has successfully mitigated all debts alleged by either disputing them, making payment arrangements, or paying them off.

Additionally, Applicant has secured the services of a credit counseling service to address the majority of his debts and with their assistance established a budget. Applicant's budget reflects he

is living within his means, paying down his past debts, and managing his finances in a responsible manner.

Under the facts presented, I have reviewed the mitigating conditions under Guideline F and am able to apply MC 20(b) *the conditions that resulted in the financial problem were largely beyond the person's control (e.g., . . . los of employment, a business downturn, unexpected medical emergency, . . .) 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, MC(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.*

Guideline E - Personal Conduct

Under Guideline E for Personal Conduct, a security concern arises by:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations 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.

Posing potential security concerns are Applicant's documented omission of past criminal conduct by failing to disclose his March 2001 citation for open container, which was determined to be a traffic offense versus a criminal offense under applicable state law, and his November 2003 arrest for petit larceny and December 2003 charge for driving on suspended license.

Applicant testified credibly these omissions were an honest mistake. His testimony is further bolstered by the fact he disclosed the more serious offense of his December 1999 DUI arrest and his having credibly testified and established by documentary evidence that the later two offenses occurred after he submitted the first draft of his security clearance application when initially hired. Applicant's failure in this regard appears to have failed to carefully review his security clearance application when it was resubmitted in August 2004. While Applicant could reasonably have been expected to be more diligent in ensuring his application was complete in all respects, his judgment lapses are not enough to impute knowing and wilful falsification under Guideline E.

In reaching my decision I have applied the facts and circumstances presented in this case using the "whole person" concept as required by the Directive. I have specifically considered Applicant's five years of honorable service in the Navy forward deployed, the fact he successfully held a security clearance at the secret level while in the Navy, and the fact he is making all reasonable efforts to achieve financial stability. His apparent success in his new career field is further evidence of rehabilitation.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraphs 1.a.-1.f. For Applicant

Paragraph 2. Guideline F: FOR APPLICANT

Subparagraphs 2.a.-2.o.: For Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraphs 3.a.-1.b.: For Applicant

DECISION

In light of all of 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.

Robert J. Tuidor
Administrative Judge