

DATE: November 27, 2007

In re:)	
)	
-----)	ISCR Case No. 06-08600
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 40-year-old employee of a defense contractor. His criminal history spans an eleven-year period and involves six alcohol-related charges. He still owes a significant number and amount of delinquent debts that resulted from unemployment and underemployment. Although he has stable employment and has resolved one debt and is paying off another, many of the debts remain unresolved. When he completed his security clearance application in August 2005, he did not disclose all of his past incidents of criminal conduct or delinquent debts. He mitigated the security concerns raised by his personal conduct, but failed to mitigate those concerns raised by his criminal conduct and financial considerations. Clearance is denied.

STATEMENT OF THE CASE

Applicant applied for a security clearance on August 25, 2005, in conjunction with his employment with a defense contractor. On June 14, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program (Directive)*, dated January 2, 1992, as amended. The SOR detailed reasons under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006, as to why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with national interest to grant a security clearance for Applicant. DOHA recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR in writing on or about August 3, 2007, and elected to have a hearing before an administrative judge. The case was initially assigned to another administrative judge on August 22, 2007, and reassigned to me on October 5, 2007. DOHA issued a Notice of Hearing on October 10, 2007, setting the case for hearing on October 25, 2007.

At the hearing, Department Counsel introduced Government Exhibits (GX) 1 through 11 into evidence without objections. Applicant testified and introduced Applicant Exhibits (AX) A through G into evidence without objections. The record was left open until November 9, 2007, to give Applicant additional time to submit documents. DOHA received the hearing transcript (Tr.) on November 2, 2007. I received additional documents from Applicant on November 8 and 9, 2007, which I marked as AX H and I. Department Counsel had no objection to the documents and they were admitted into the record on said date.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, I make the following findings of fact:

Applicant is 40-years-old and single. In 1991, he obtained an associate's degree in tool engineering technology. Since January 2003, he has worked as an installation master planner for a defense contractor, performing work for a military base. Before obtaining this position, he was unemployed for six months. Previously, he worked for a couple years as a project manager for a private company, and at various other jobs before that. In August 2005, he completed a security clearance application (SF-86). (GX 1).

According to Applicant's supervisor, who oversees the planning project at a military base, Applicant impressed the chief of staff with his thorough and detailed master plan briefing in November 2006. (AX C & F). In June 2006, another supervisor complemented him for his excellent work. (AX D). Applicant enjoys his job and is committed to it and his co-workers. (Tr. 78).
Guideline J (Criminal Conduct)

In his Response to the SOR, Applicant admitted the eight criminal allegations in Subparagraphs 1.a through 1.h. Those admissions are incorporated herein.

In 1993 and 1997, Applicant was arrested and charged with Passing Bad Checks, both misdemeanors. He made restitution and the charges were dismissed. (Tr.17-18; 21).

From 1994 through 2004, Applicant was arrested and charged with six crimes involving alcohol. In February 1994, the court found him guilty of Driving While Intoxicated (DWI), a misdemeanor. It sentenced him to three days in jail (suspended), and fined him \$350 (\$150 suspended). The court placed him on probation for six months, ordered him to attend an alcohol awareness class, and suspended his driver's license for 180 days. He was 27 years old. (Tr. 18; 49).

Eight months later, in November 1994, the court found Applicant guilty of Physical Control while Under the Influence, a misdemeanor, sentenced him to 30 days in jail (suspended), and fined him \$500. His driver's license was suspended for 180 days. He again attended alcohol awareness classes and lived in a residential treatment center for six days. At the time of the arrest, his license was active, having been reinstated after the previous suspension. (Tr. 19-20; 51).

In August 1998, the court found Applicant guilty of Operating a Motor Vehicle While Intoxicated (OWI), a misdemeanor. It sentenced him to 180 days (suspended), fined him \$25, and placed him on probation for six months, during which time he attended alcohol awareness classes twice a week for four weeks. His driver's license was suspended for 180 days. (Tr. 21).

The following year, in June 1999, Applicant fell asleep in his car after drinking at a bar and was arrested in the parking lot. The court found him guilty of Public Intoxication, sentenced him to 180 days in jail (160 suspended), and fined him \$25. (Tr. 21-22; 53-54).

Two months later, in August 1999, the police arrested and charged Applicant with (1) Driving While Suspended, a felony; (2) Operating a Vehicle While Intoxicated, a misdemeanor; (3) Operating a Motor Vehicle w/10% + by Wt. of Alc/blood, a misdemeanor; and (4) Operating While Intoxicated (OWI) with a prior OWI within five years, a felony. In May 2000, the court found him guilty on Count 4, and sentenced him to three years at a correctional center (all but 180 days suspended), and fined him \$100. He served 30 days in prison, 30 days in a felony diagnostic center, and 30 days in a minimum security facility. After his release, he was placed on probation for 30 months and his driver's license was suspended for 730 days (two years). The probation terminated in February 2003. (Tr. 22-23; 54-57).

In March 2004, the police arrested Applicant and charged him with a 3rd OWI and Operating with a BAC.10 or more (2nd), both misdemeanors. In September 2005, the court found him guilty of the OWI and sentenced him to 65 days in jail, of which he served twelve. He was fined \$1,186 and ordered to complete a twelve-week alcohol assessment program, consisting of weekly two-hour meetings. His driver's license was revoked for two years, although he was allowed to drive to work the second year of probation. His license was reinstated in April 2007. (Tr. 23-24; 57-59).

Applicant does not believe he has an alcohol problem. Although he has been evaluated for alcoholism, he never received a diagnosis of either alcohol abuse or dependence. Rather, he has a predisposition toward alcoholism. (Tr. 27; 62). Until the March 2004 arrest, none of the alcohol education programs impacted his drinking habits. Now, he confines his drinking to Friday night and

Sunday afternoon at a local bar. He usually consumes six to eight drinks and takes a taxi home after drinking. (Tr. 60). Since this incident, he has asked his friends to help him “not re offend.” (Tr. 26).

Guideline F (Financial Considerations)

Applicant admitted the twenty-one factual allegations set forth in Subparagraphs 2.a through 2.u of the SOR pertaining to financial considerations.

The twenty-one delinquent debts total \$54,985. In July 2007, Applicant completed his payments to the IRS, owed on a \$21,977 tax levy for the years of 1991, 1992 and 1993, through a garnishment (¶ 2.a). (AX A). He is paying \$400 per month on a \$26,000 student loan through a garnishment (¶ 2.b). (AX I, Tr. 33-34). He paid the \$136 delinquent debt noted in ¶ 2.c. (Tr. 34). He disputed the \$822 debt listed in ¶ 2.e. He has not addressed or resolved the remaining 18 debts, which totals approximately \$8,000 due to “procrastination.” (Tr. 75). Although a friend gave him the name of a credit counselor, he prefers to handle the problems himself. (Tr. 77).

According to several credit bureau reports, Applicant’s financial problems began in 2000 and continued to the present. (GX 9, 10 & 11). Applicant attributes some of the problems to a period of unemployment from July 2002 to January 2003, and underemployment periods before that. (GX 1; Tr. 75). Prior to his current job, he was “not making very much money and living paycheck to paycheck.” (Tr. 63). Now, his financial situation is improving. (Tr. 63). His current annual salary is \$49,400. After taxes and the student loan garnishment are deducted, his net monthly income is about \$2,000. His expenses are about \$1,800, leaving a remainder of about \$200 per month. (Tr. 70).

Guideline E (Personal Conduct)

In response to Question 23 (Your Police Record) on the SF-86, Applicant disclosed two criminal charges: the August 1999 arrest (May 2000 conviction) alleged in ¶ 1.g of the SOR, and the March 2004 charge alleged in ¶ 1.h. He did not disclose the two 1994 alcohol related incidents listed in ¶ 1.b and ¶ 1.c, or the 1999 charge listed in ¶ 1.f. He was not required to list the 1997 bad check charge, as it occurred outside the seven-year limitation included in the question.

In response to Question 27 (Your Financial Record) on the SF-86, Applicant disclosed the Internal Revenue Service’s garnishment of \$400 per month for a tax levy, but not the civil judgments entered in 1998 and 2002.

Under Question 28 (Your Financial Delinquencies), Applicant disclosed an outstanding automobile loan that was delinquent more than 90 and 180 days. He did not list other delinquent debts.

Applicant knew his history contained many criminal and financial problems, but could not remember all of the details. He decided to mention the “worst stuff.” (Tr. 44). He did not attempt to defraud or deceive the government by leaving off the other information because he knew it had access to all his information. He was not aware of the Additional Comments section on the SF-86, that provides space for further explanation or information. (Tr. 44-46; 72)

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative Guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These Guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these Guidelines in conjunction with the factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Guideline ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 2(a): "(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 individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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."

In the decision-making process, facts must be established by "substantial evidence."¹ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove mitigation. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the Government. ²

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship

¹ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

² "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” Guideline ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 determination as to Applicant’s allegiance, loyalty, or patriotism. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

CONCLUSIONS

Upon consideration of all facts in evidence and application of the appropriate adjudicative factors and legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J - Criminal Conduct

Guideline ¶ 30 articulates the Government’s concern with 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.”

Based on the evidence, including Applicant’s admissions, the Government raised a security concern under a Criminal Conduct Disqualifying Condition: “a single serious crime or multiple lesser offenses.” Guideline ¶ 31(a). Applicant was arrested and charged with criminal conduct, including two felonies, on eight separate occasions from 1993 to 2004.

After the Government raised a security concern, the burden shifted to Applicant to mitigate or rebut the allegations. There are five Criminal Conduct Mitigating Conditions under Guideline ¶ 32. I considered two of them. Guideline ¶ 32(a) provides mitigation when “so much time has 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.” Applicant’s last arrest occurred in March 2004. He was sentenced in September 2005, which included the revocation of his driver’s license for 24 months. Given his criminal history and the recent reinstatement of his license, about six months ago, sufficient time has not elapsed since the last charge and this Guideline is not applicable.

Guideline ¶ 32(d) requires a showing that “there is clear 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.” Applicant provided some evidence of rehabilitation. He submitted documents attesting to his good employment record and expressed remorse about his criminal history and financial problems. However, that evidence of rehabilitation is insufficient to outweigh the recency of the last charge or the number of charges and convictions over the last ten years. Nor did he provide independent objective evidence to corroborate his assertions that similar alcohol related incidents will not recur in the future.

Guideline F - Financial Considerations

Guideline ¶ 18 articulates the Government’s concern regarding financial problems. “The 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.”

Based on Applicant’s admissions and credit bureau reports, the Government raised disqualifications under two Financial Considerations Disqualifying Conditions: “inability or unwillingness to satisfy debts,” and “a history of not meeting financial obligations.”. Guidelines ¶ 19(a) and ¶ 19(c). Applicant has been unable to manage his debts from approximately 2000 to the present.

The Government raised a security concern and the burden shifted to Applicant to mitigate or rebut the allegations. Six Financial Considerations Mitigating Conditions can mitigate security concerns arising from financial difficulties. After reviewing them, I conclude he presented evidence to support the limited application of two of them.

Guideline ¶ 20(b) applies when “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.” Applicant encountered periods of unemployment and underemployment that affected his level of income. However, there is no evidence that he contacted his creditors or sought credit counseling during those times of limited income, which is the type of evidence necessary to establish the second prong under this condition.

According to the August 2007 credit report, Applicant disputed the debt listed in SOR ¶ 2.e, which is sufficient evidence to apply Guideline ¶ 20(e) to said debt. It states “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.”

I considered Guidelines ¶ 20(c) and ¶ 20(d) and determined they do not apply. Applicant did not obtain any counseling or produce sufficient evidence to prove that his problems are being resolved, which is necessary to trigger the application of ¶ 20(c). It requires proof that “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. To the contrary, he has not contacted numerous creditors to date. Although he paid the IRS and is repaying his student loan, both resolutions are the result of garnishments, and not voluntary actions on his part. Thus, there is no proof that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” as required under Guideline ¶ 20(d).

Guideline E - Personal Conduct

Guideline ¶ 15 articulates the Government’s concern regarding personal conduct. “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can 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.”

One Personal Conduct Disqualifying Condition is particularly relevant and potentially disqualifying in this case. Guideline ¶ 16(a) provides that the “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities” may raise a security concern. Applicant’s SF-86 had incorrect answers to questions, 23, 27 and 28. Applicant denied that he intentionally falsified his answers.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant disclosed the two most recent and egregious criminal charges, a garnishment, and one of his debts. He knew that his criminal history was significant and that his financial background included numerous delinquent debts. Because he could not remember all of the pertinent details, he decided to alert the government to those issues he believed were most egregious. He knew the government had access to all matters and had no intention to withhold information. Based on those disclosures and others within the SF-86, I find his explanation for not listing all of the adverse information plausible. I find his presentation and demeanor while testifying on these issues lend credibility to his denial of any intention to falsify information to the Government. Hence, the evidence does not establish deliberate falsification, as alleged in ¶ 3.a, ¶ 3.b and ¶ 3.c.

“Whole Person” Analysis

I considered the totality of the evidence in view of the “whole person” concept, including Applicant’s middle age, employment history, and success in his present position. I carefully observed his demeanor while testifying, and listened to his candid disclosure about his history of criminal conduct and financial problems. I took into account the fact that the tax lien is resolved and he is repaying his student loan (albeit through garnishments), and that he had limited income for several years. However, the totality of the evidence in this record supports his disqualification from having

access to classified information. He has been involved in eight criminal incidents, six involving alcohol, and several resulting in incarceration and the suspension of his driver's license for extended periods of time. I am aware of his assertion that he does not have an alcohol problem, only a predisposition toward one. He acknowledges his procrastination in resolving an extensive list of delinquent debts, including small ones. Although he appears to appreciate the gravity of these problems and their effect on his career potential, he has not gained insight into his actions that continuously raise questions about his reliability and trustworthiness. Until he takes additional steps to insure that his life is not speckled with additional encounters with legal matters resulting from the consumption of alcohol, and establishes a track record demonstrating financial responsibility, I suspect similar events may recur in the future and are not likely to be tempered through the aging process alone.

After weighing the disqualifying and mitigating conditions and all facts and circumstances in the context of the whole person, I concluded Applicant failed to mitigate the security concerns raised by his criminal conduct and financial considerations. He mitigated those raised by personal conduct. The evidence leaves me with doubts as to his security eligibility and suitability. Accordingly, Guideline E is concluded for him, and Guidelines J and F are found against him.

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 as follows:

Paragraph 1: Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 1.a to 1.h:	Against Applicant
Paragraph 2: Guideline F (Financial Considerations)	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Subparagraphs 2.f through 2.u:	Against Applicant
Paragraph 3: Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraphs 3.a to 3.c:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

Shari Dam
Administrative Judge

