DATE: January 26, 2007

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 05-07211

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

After Applicant's divorce in January 1994, he was ordered to pay child support to his ex-wife for their newborn child. His ex-wife and child then disappeared. After six years, his ex-wife reappeared and sought enforcement of the child support order. Applicant responded by setting up an automatic payroll deduction to pay the monthly child support and pay off the arrearage. He refuted allegations of a child support arrearage for a second child, a weapons offense, and falsifying his security clearance application (SF 86). He mitigated the security concerns based on the child support arrearage and four other delinquent debts, a conviction of reckless driving in 1996, and a driving while intoxicated (DWI) conviction in 2004. Clearance is granted.

STATEMENT OF THE CASE

On February 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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 (Directive). The SOR alleged security concerns raised under Guidelines F (Financial Considerations), J (Criminal Conduct), and E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing in an undated document, admitted some allegations and denied some, and elected to have a hearing before an administrative judge. The case was assigned to me on November 9, 2006, and heard on December 12, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on December 29, 2006.

PROCEDURAL RULING

At the hearing, I granted Department Counsel's motion to amend the SOR pursuant to the Directive ¶ E3.1.17, by adding the following subparagraph under Guideline J (Criminal Conduct):

2.d. You were arrested and charged with Driving While Intoxicated in about February 2004 in (redacted city and state). You pleaded guilty and your license was restricted for six months.

The amendment was based on Applicant's hearing testimony. He did not object to the amendment. I kept the record open to permit Applicant to submit additional evidence concerning SOR ¶ 2.d (Tr. 98). I received his additional evidence on December 29, 2006, and it has been admitted as Applicant's Exhibit (AX) M.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 39-year-old employee of a defense contractor who trains U.S. Army soldiers in communications (Tr. 39). He has worked for his current employer since January 2000. He served as tank mechanic in the U.S. Army from June 1988 to February 1993. He had two years of college and received an associate's degree (Tr. 6). He has never held a security clearance (Tr. 7).

In June 1992, while Applicant was on active duty, his commander discovered an unregistered pistol in the glove compartment of his car during an unannounced inspection. Applicant had just purchased the pistol. His commander notified the military police, who seized the pistol and took Applicant to the military police station, where he was "processed" and then released to his unit (GX 8). He was never charged with an offense, and no disciplinary action was taken, apparently because the applicable local regulation allowed him 72 hours after acquiring the weapon to register it (AX L at 5; Tr. 74).

In October 1996, Applicant was arrested and charged with driving under the influence (DUI) and refusing a breathalyzer test. He testified he took the breathalyzer, but the police were unable to obtain a reading (Tr. 44). The DUI charge was reduced to reckless driving and the breathalyzer refusal was dismissed. He pleaded guilty to the reduced charge and was sentenced to 25 hours of community service, which he served by giving piano lessons in a community center (GX 6 at 3; GX 7; Tr. 50). The judge told him his conviction of reckless driving would be removed from his record within a year (Tr. 47).

In February 2004, Applicant was arrested and charged with DWI. He pleaded guilty, and his license was suspended for six months. This offense was not initially alleged in the SOR. At the hearing, the SOR was amended to add this allegation (Tr. 98), after Applicant disclosed the arrest in response to an open-ended question from department counsel, asking, "Since 1996, have you had any other alcohol-related arrests?" (Tr. 51.)

Applicant stopped consuming alcohol regularly after the DWI arrest in 2004. He testified his wife does not allow drinking and driving (Tr. 91). He now limits his consumption to an occasional glass of wine on special occasions (AX M at 2; Tr. 92).

Applicant was married in September 1992 and divorced in January 1994. He remarried in November 2001. He and his first wife were on active duty at the same time, but she was in the Navy (Tr. 55). They had a child shortly before their divorce, and Applicant was ordered to pay child support. His ex-wife left the state, they had no contact for six years, and Applicant did not know where she was living. His ex-wife eventually contacted him, seeking child support payments for the previous six years. His credit report dated December 29, 2005, reflected an arrearage of $11,714 (GX 5 at 2). Applicant's lawyer advised him to set up an automatic deduction from his pay, sufficient to pay the monthly amount ordered plus an additional amount to pay the arrearage. Applicant followed this advice. In addition, his tax refunds are being used to pay the arrearage (AX G, H, I, J, and K). The arrearage on this account has been reduced to about $1,598 (AX A at 1).

Applicant also pays child support for a second child born in September 1989 by another woman. His credit report reflected an arrearage of $1,553 on this account (GX 5 at 2). In a statement to a security investigator in September 2004, he asserted he had overpaid the child support for this child (GX 2 at 3-4). Government records reflect an overpayment of $3,942.90 (AX B at 2).

Applicant's credit reports also reflected a delinquent electric bill for $277, turned over for collection in January 2000; a delinquent credit card account for $3,707, turned over for collection in October 2001; a delinquent gas bill for $999, turned over for collection in July 2002; and a delinquent telephone bill for $975, turned over for collection in November 2002 (GX 3 at 2-4; GX 5 at 1-2). He believes that his ex-wife incurred the credit card debt and telephone bill. He was unaware of the delinquent electric bill and gas bill, left unpaid after he moved in 1999, until his background investigation revealed them (Tr. 73). In August 2006, he paid all four debts in full (AX A at 4; AX D; AX E; AX F).

Applicant executed a security clearance application (SF 86) on October 7, 2003. He answered "no" to question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs (GX 1 at 6). He did not disclose his arrest for DUI in October 1996. He testified that he thought the question had nothing to do with his arrest and conviction because he ultimately was charged only with reckless driving, and the judge told him it would be removed from his record within a year (Tr. 75-76).

Applicant answered "no" to question 38 of his SF 86, asking if he had been more than 180 days delinquent on any debt during the last seven years and question 39, asking if he was currently more than 90 days delinquent on any debt (GX 1 at 7). He disclosed his child support arrearage in the response to question 43 on the application (GX 1 at 8). He did not disclose the delinquent electric bill, credit card account, telephone bill, and gas bill, because he was unaware of them until his background investigation was initiated (Tr. 73).

Applicant earns about $59,000 per year in his primary job, and he earns about $2,000 per month as a musician. His wife is a computer programer and earns about $60,000 per year. His home mortgage payment is about $800 per month (Tr. 67) He and his wife have about $2,000 in their checking account and between $4,000 and $5,000 in savings. They have three credit card accounts, which are current (Tr. 68-69). He leases his car for $641 per month, and his wife's car payments are $427 per month (AX A at 3).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions 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. "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). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996.)

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. DC 1 is raised by Applicant's history of delinquent debts. DC 3 is not raised, because Applicant is not financially overextended, has a good income, and has demonstrated that he is able and willing to pay his financial obligations.

Since the government produced substantial evidence to raise DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or were isolated incidents (MC 2). Directive ¶¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant had multiple delinquent debts that were only recently resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially arose due to circumstances beyond control, it is appropriate to consider whether he acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003). Applicant's ex-wife and second child disappeared after their divorce. His ex-wife reappeared six years later and sought payment of the child support. Applicant responded by initiating a payment plan to pay the child support and arrearage, and he has complied with that plan. As soon as he discovered that his credit report reflected old debts, some incurred by his ex-wife, he resolved them. I conclude that Applicant's divorce and the disappearance of his ex-wife and child were circumstances beyond his control, but he responded reasonably to the financial problems attributable to the breakup of his family. Accordingly, I conclude MC 3 is established.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant took reasonable steps to discharge his child support obligations for his younger child, and he overpaid the child support for his older child. He paid off the old credit card debt and utility bills as soon as he discovered them. I conclude MC 6 is established.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses

may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2.

The 1992 weapons incident did not result in an arrest or charges. The military police report reflects only that he was "processed." He was not arrested or charged. His possession of a recently-purchased pistol did not violate the pertinent local regulation. In short, no crime occurred. I conclude he has refuted the allegation in SOR ¶ 2.b, and I resolve it in his favor.

For the reasons set out below under Guideline E, I conclude Applicant did not intentionally falsify his SF 86. Thus, I resolve SOR ¶ 2.c in his favor.

Applicant's DUI arrest in 1996 and DWI conviction in 2004 (SOR ¶¶ 2.a and 2.d) are sufficient to raise DC 1 and shift the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Criminal conduct can be mitigated by showing it was not recent (MC 1), it was an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1., E2.A10.1.3.2., E2.A10.1.3.6.

Applicant's two arrests were eight years apart. The evidence of intoxication was insufficient to warrant prosecution for DUI in 1996. Applicant admitted his guilt of DWI in 2004, but there is no evidence of a pattern of alcohol-related misconduct. Applicant's DWI conviction occurred after he submitted his SF 86, and the incident appears to have been atypical behavior and an isolated incident of bad judgment. Under all the circumstances, I conclude the two arrests were "isolated" within the meaning of MC 2.

The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's DWI arrest was in February 2004, almost three years ago. Applicant stopped drinking and driving after that incident, and he now limits his consumption to an occasional glass of wine on special occasions. His wife strongly disapproves of drinking and driving. There is no evidence of any alcohol-related misconduct since February 2004. Applicant impressed me as sincerely remorseful about the incident. I conclude MC 1 and MC 6 are established.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline also may be established by "deliberate omission, concealment, or falsification of relevant and material 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." Directive ¶ E2.A5.1.2.2.

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. Proof of an omission, standing alone, does not 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 of the omission. *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 denied intentionally falsifying his SF 86. He disclosed his child support arrearage on his SF 86. At the hearing, he candidly disclosed the February 2004 DWI conviction, even though department counsel was unaware of it. He did not believe that the question about alcohol-related arrest in 1996 applied to him, because he believed the DUI

charge was dismissed for lack of evidence, and because the judge told him his conviction would not appear on his record. I found his explanation plausible and credible, especially in light of his candor about the February 2004 DWI. Similarly, I found his explanation about the undisclosed debts plausible and credible. I conclude that Applicant has refuted the allegations of falsification in SOR ¶¶ 3.a, 3.b, and 3.c, and I resolve those allegations in his favor.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9. Several of these factors are addressed under the specific guidelines above, but some merit additional comment.

Applicant is a mature adult who has served his country for many years, first as a soldier and then as a contractor training soldiers. I was impressed by his candor and sincerity at the hearing. He has learned from his mistakes. He has resolved his financial problems and is no longer vulnerable to pressure, coercion, exploitation, or duress. I am satisfied that recurrence of his financial problems or criminal conduct is very unlikely. After weighing the disqualifying and mitigating conditions under Guidelines F, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on based on financial considerations and criminal conduct, and he has refuted the allegations regarding personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline F (Financial): 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

Paragraph 2. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Paragraph 3. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: For Applicant

Subparagraph 3.c For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

LeRoy F. Foreman

Administrative Judge