

KEYWORD: Criminal Conduct; Financial; Alcohol; Personal Conduct

DIGEST: Between 1988 and 2004, Applicant was charged with or convicted of seven criminal offenses, most of them alcohol related. As a result of a 1994 conviction, he was sentenced to 10 years confinement, and actually served 18 months in prison. Since 1996, he has a history of not meeting his financial obligations and is financially overextended. He failed to mitigate security concerns raised by his criminal conduct, financial considerations, and alcohol consumption. Additionally, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

CASE NO: 05-00808.h1

DATE: 05/23/2006

DATE: May 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00808

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Between 1988 and 2004, Applicant was charged with or convicted of seven criminal offenses, most of them alcohol related. As a result of a 1994 conviction, he was sentenced to 10 years confinement, and actually served 18 months in prison. Since 1996, he has a history of not meeting his financial obligations and is financially overextended. He failed to mitigate security concerns raised by his criminal conduct, financial considerations, and alcohol consumption. Additionally, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On October 11, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted. The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information.⁽¹⁾

Applicant answered the SOR (Answer) and requested a hearing. His answer is not dated. It was received by DOHA on November 5, 2005. The case was assigned to me on February 2, 2006. On March 21, 2006, I convened a hearing at which the government presented eight exhibits, marked GE 1-8, to support the SOR.⁽²⁾ Applicant testified and presented four exhibits that were admitted without objection and marked AE 1-4. DOHA received the transcript (Tr.) on March 30, 2006.

FINDINGS OF FACT

In his answer to the SOR, Applicant admitted SOR allegations 1.a - 1.g, 2.c, 2.e, 2.i, 2.k, 2.l, 2.m, 2.o, 2.t, 2.y, 2.aa, 2.bb, 2.cc, 2.ee, and 3.a. He failed to address SOR allegation 1.h, and I considered it denied. He denied allegations 2.a, 2.b, 2.d, 2.f, 2.g, 2.h, 2.j, 2.n, 2.p - 2.s, 2.u - 2.x, 2.z, and 2.dd. Although he admitted the underlying facts alleged in subparagraphs 4.a and 4.b, he claimed his failure to disclose the information on his 2003 security clearance application (SF 86) was a mistake, and that he had no intention to falsify the document or to mislead the government. I considered SOR allegations 4.a and 4.b denied. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's statement, and the evidence, I make the following additional findings of fact:

Applicant is 35 years old and has never been married. He met his 15-year-old daughter for the first time in 2001, and has been providing financial support for her since 2004. While in school, during the summers, Applicant worked the tobacco fields to earn money to purchase clothes and materials to be able to attend school. He stopped attending high school after 10th grade. Later, he obtained a GED through the Job Corps Program and learned to be a welder. He has worked as a welder for the last 16 years. In January 2003, Applicant began working for a company doing business with the Department of Defense (DOD) and requires access to classified information to retain his job.

At his hearing, Applicant introduced two character reference letters: one from a previous employer for whom he has worked twice, and the second from his current employer. Both employers characterized Applicant as being an extraordinary, hard-working person, who is honest and trustworthy. Applicant is also highly regarded by his employers for his dependability, professionalism, dedication, and enthusiasm. Both employers endorsed Applicant's suitability for access to classified information.

Applicant's criminal conduct concerns began at an early age. In May 1988, at age 14, Applicant was charged with assault with a deadly weapon. Although he admitted the allegation, he does not remember the incident or whether alcohol was a factor. The charge was dismissed. After becoming a welder, Applicant moved from a farming environment to the city, and began earning more money. The money changed his lifestyle. He began drinking alcoholic beverages and spending time with the wrong crowd. He explained that his ignorance and bad influences led to many of his problems.

In the early 1990s, Applicant moved in with an older woman. He claims the combination of his alcohol consumption, her jealousy, and his immaturity led to a difficult and contentious relationship. In December 1993 and May 1994, he was charged with assaulting the woman. He explained that alcohol was probably a factor in these incidents. In October 1994, Applicant and the woman were drinking and became involved in an altercation. Applicant testified she attacked him with a knife, and after taking the knife away from her, he cut her with the knife. The woman required medical attention, and he was charged with assault and malicious wounding, a felony. Applicant was convicted of malicious wounding and sentenced to 10 years confinement. He actually served 18 months in prison and was placed on five years probation. He completed his probation in December 2001. [\(3\)](#)

After pleading guilty to malicious wounding in November 1994, Applicant remained free on bail until June 1995, when he was required to surrender himself to authorities to begin serving his sentence to prison. Applicant explained he was young and immature (23 years old), and knowing he was going to jail for a long period of time, he threw caution to the wind and decided to enjoy his remaining freedom as much as possible by drinking and partying until he had to report to serve his sentence. His reckless behavior resulted in his involvement in two additional criminal incidents. In March 1995, he was convicted for brandishing a weapon (a misdemeanor), and in May 1995, he was convicted of driving while intoxicated (DWI). Regarding the first incident, he explained that while partying, he was involved in an altercation with several folks. Concerned for his safety, and to avoid a fight, he flashed a weapon. As to the second incident, he explained he was too drunk to drive and pulled over to the side of the road to sleep. A policeman found him sleeping on the front seat of the car and he was charged with DWI.

While serving probation, Applicant attended substance abuse counseling/rehabilitative treatment twice a week. He now realizes he had a problem with alcohol given that every one of his incidents of misconduct was alcohol related. Applicant testified he has matured and has learned from his past mistakes. He testified he no longer consumes alcohol to excess and does not drink and drive. Applicant was not arrested or accused of any criminal or alcohol related offense from 1995 to 2004.

In March 2004, Applicant was convicted of assault and inflicting serious injury. He explained he was riding four-wheelers with his daughter, brother, and friends. They stopped to visit one of his old friends. His friend had been drinking and, after an argument, he assaulted Applicant's brother. Applicant intervened and was assaulted by his friend. Applicant averred he defended himself, and the ensuing fight led to the charges alleged in subparagraph 2.g. Applicant testified he had a couple of beers before stopping at his friend's home, and had a shot of alcohol, at the insistence of his friend, before the altercation. He claimed, however, he was not drunk and that his alcohol consumption did not contribute to the fight.

The SOR alleges 31 instances where Applicant may have demonstrated a lack of financial responsibility. He presented evidence to show that he is paying the debt alleged in subparagraph 2.b, and owes only \$375.⁽⁴⁾ He also settled or paid off the debts alleged in subparagraphs 2.o, 2.r, 2.s, 2.u, 2.w, 2.x, and 2.cc. With the exception of the above-mentioned eight accounts, Applicant presented no evidence to show that he has made any effort to pay, settle, or otherwise resolve any of the remaining 23 delinquencies alleged in the SOR. Although he has been approached by some creditors with settlement offers, he has refused the offers because he feels he does not make enough money to pay both his past debts and his current debts and living expenses.⁽⁵⁾

Applicant refuses to pay financial obligations he acquired prior to his confinement because he no longer has the property or someone else was supposed to pay the debt for him - i.e., his car was taken under a mechanic's lien;⁽⁶⁾ he gave his furniture to his brother with the understanding that his brother would pay off the debt;⁽⁷⁾ and he believes his friend paid off his bail debt. Although he received collection notices concerning these debts, Applicant has taken no action to resolve any of these delinquencies and does not intend to do so. Notwithstanding Applicant's numerous delinquencies and his claim that he does not make enough money to pay his debts, Applicant continues to accumulate significant debt on credit. He purchased jewelry for his daughter (and now refuses to pay the debt),⁽⁸⁾ four-wheelers for himself and his daughter,⁽⁹⁾ and presents for girlfriends.⁽¹⁰⁾ Additionally, Applicant seems to live from paycheck to paycheck, alternating payments to creditors in an effort to keep them happy until he can make some form of payment.

In February 2006, Applicant consulted with a financial company with a view toward filing for bankruptcy protection. [\(11\)](#) However, as of the day of the hearing, he had taken no action to file bankruptcy. There is no evidence Applicant participated in any financial counseling prior to February 2006.

In January 2003, Applicant submitted a security clearance application (SF 86) in which he failed to disclose he was dismissed from two jobs in January 1999 and May 2001. He answered "Yes" to question 20, which asked whether he had ever been fired, quit, or left a job by mutual agreement following allegations of misconduct. Applicant's response mistakenly indicated he was fired from company "A," when in fact, he was fired from companies "B" and "C."[\(12\)](#) Applicant credibly testified he had included his two dismissals in the draft SF 86 he provided his employer for typing. He failed to review his SF 86 after it was typed, and the secretary mistakenly indicated he had been fired from company "A" and failed to include all the information he disclosed. Applicant submitted a character reference letter provided by company "A" which indicates he left the company on good terms, and was considered a dependable and reliable employee. In his answer to SF 86 question 6, Applicant listed all his past employers, including the two employers that dismissed him for unsatisfactory performance. If he had been trying to mislead the government, Applicant would have likely omitted the two employers that fired him. In light of Applicant's demeanor, testimony, and available evidence, I find Applicant's omission was not deliberate or made with the intent to mislead.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.[\(13\)](#) Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct), Guideline F (Financial Considerations), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct), are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to

grant or continue an applicant's eligibility for access to classified information.⁽¹⁴⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish, by substantial evidence,⁽¹⁵⁾ a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁽¹⁶⁾ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽¹⁷⁾

CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.⁽¹⁸⁾ The government established its case under Guideline J by showing that Applicant was charged with or convicted of seven offenses between 1988 and 2004. Five of the offenses concerned assaults, and the other two were a DWI and brandishing a weapon. In 1994, Applicant was convicted of malicious wounding, sentenced to 10 years in prison, and actually served 18 months in prison before being paroled. Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽¹⁹⁾ and DC 2: *A single serious crime or multiple lesser offenses*⁽²⁰⁾ apply.

There is no evidence Applicant was involved in any alcohol related incidents or criminal misconduct between his 1994 conviction and his 2004 conviction. There is also no evidence he has been involved in any criminal misconduct after his 2004 conviction. Notwithstanding, Applicant's past behavior forms a pattern of disturbing criminal activity that cannot be ignored. Including his 2004 conviction, he has been involved in six assaults, two of which were serious enough for him to be sentenced to confinement. Applicant's 2004 criminal assault is disturbing in light of the fact that he completed probation in 2001, after serving 18 months confinement for a similar offense. Applicant's criminal behavior appears to be alcohol related, as he consumed alcohol prior to most of his offenses. Although he attended substance abuse counseling while serving parole, he continued to consume alcohol, and that likely contributed to his 2004 misconduct. In light of the totality of the circumstances, I find Applicant's behavior is relatively recent. He has failed to learn from his mistakes as shown by his repeated involvement in the same type of criminal behavior. Considering the totality of the circumstances, Applicant failed to demonstrate clear evidence of successful rehabilitation. As such, his questionable behavior is likely to recur. Furthermore, his 1994 conviction and sentence triggered the statutory disqualification imposed by 10 U.S.C. § 986.⁽²¹⁾ Guideline J is decided against Applicant.

Under Guideline F (Financial Considerations), a security concern exists when a person has significant unpaid debts. An individual who is financially overextended may be tempted to engage in illegal or unethical acts to generate funds to meet financial obligations. ⁽²²⁾ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life can often indicate how a person may behave in other aspects of life.

Applicant has a history of failing to meet his financial obligations dating back to 1996. As of the date of his hearing, he still had 23 outstanding delinquencies - some for debts he incurred before his imprisonment, and others for new credit/debt he continues to accumulate indiscriminately. Applicant is financially overextended, and his financial problems are recent and ongoing. Applicant's unwillingness to honor his financial obligations is evidenced by the delinquent debts he has been carrying for years, his failure to make meaningful efforts to repay creditors or otherwise resolve his financial situation, and his stated refusal to pay his old debts. Financial Considerations Disqualifying Condition (FC DC) 1: *A history of not meeting financial obligations*; and FC DC 3: *Inability or unwillingness to satisfy debts*, apply in this case.

Appellant raised one mitigating factor that could be considered as a circumstance beyond his control contributing to his inability to pay his debts -- i.e., his 18 months confinement with no income to pay debts. Financial Considerations Mitigating Condition (FC MC) 3: *The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*, applies.

Three of Applicant's delinquencies (2.a, 2.b, and 2.c) are financial obligations he established before his confinement. While in prison, he had no income and was not able to keep up with his financial obligations. However, Applicant was released from prison around December 1996 and, as of the day of the hearing, he was still carrying these delinquencies. Applicant has made no effort to resolve these delinquencies and has no intention to do so. Notwithstanding the circumstance beyond his control, Applicant presented little or no evidence to show he has dealt responsibly with his financial obligations. Other than making a passing remark about considering filing for bankruptcy in 2006, Applicant presented little evidence of paid debts, settlements, negotiations, payment plans, budgets, financial assistance/counseling, or that he has otherwise made any effort to resolve his financial situation. Applicant's financial history precludes a finding that he has established a track record of financial responsibility. I find that Applicant has not taken or is unable to take control of his financial situation and failed to demonstrate he is or could be capable of overcoming his financial difficulties. Guideline F is decided against Applicant.

Under Guideline G (Alcohol Consumption), excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. ⁽²³⁾ The government established its case under Guideline G by showing that Applicant, on at least four occasions from 1994 to 2004, consumed alcohol to the point of exercising questionable judgment and failed to control impulses. Applicant also admitted alcohol was likely involved in two other incidents of criminal misconduct in 1993 and 1994. Guideline G Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence*, ⁽²⁴⁾ and DC 5: *Habitual or binge consumption of alcohol to the point of*

impaired judgment, [\(25\)](#) apply here.

Applicant's drinking was addressed through a period of substance abuse counseling while on parole. Notwithstanding, in 2004 Applicant was involved in yet another alcohol related criminal incident that resulted in his conviction and sentence to confinement. Although Applicant's last two alcohol related incidents occurred 10 years apart, the evidence suggests he has continued to use alcohol and his alcohol consumption is related to his 2004 misconduct. In light of the totality of the circumstances, I conclude none of the Guideline G Mitigating Conditions apply.

Under Guideline E, personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. [\(26\)](#)

The government established its case under Guideline E by showing that Applicant failed to disclose that in 1999 and 2001 he was dismissed from two jobs. Notwithstanding, I do not believe his omissions were deliberate or made with the intent to falsify or mislead the government. Applicant credibly testified that the secretary typing his SF 86 made the mistakes of transposing companies and failing to accurately type Applicant's information. Applicant's SF 86 corroborates his testimony, as it discloses the employers that had fired him. Additionally, he submitted a favorable character reference letter from the employer that mistakenly was disclosed as having fired him. Guideline E is decided for the Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns. Furthermore, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. My decision is not based solely on 10 U.S.C. § 986, therefore, no recommendation regarding waiver is necessary or appropriate. Applicants' clearance is denied.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a -1.h Against Applicant

Paragraph 2, Financial Considerations (Guideline F) AGAINST APPLICANT

Subparagraph 2.a, 2.c-2.n, 2.p, 2.q, 2.t, 2.v,
2.y-2.bb, 2.dd, and 2.ee Against Applicant

Subparagraphs 2.b, 2.o, 2.r, 2.s, 2.u, 2.w, 2.x
and 2.cc For Applicant

Paragraph 3, Alcohol Consumption (Guideline G) AGAINST APPLICANT

Subparagraph 3.a Against Applicant

Paragraph 4, Personal Conduct (Guideline E) FOR APPLICANT

Subparagraph 4.a and 4.b For Applicant

DECISION

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

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. I marked the government's exhibit list as GE 9 for Identification. The government's memorandum, dated April 12, 2006, forwarding to me Applicant's post-hearing submissions, was marked Appellate Exhibit 1.
3. Tr. 34 - 36.
4. AE 4.
5. Tr. 49 - 50. AE 4. Applicant's statement of earnings and deductions for the period October 23, 2004 to November 5, 2004, shows that from January to November 2004 his gross pay was \$39,794, and his take home pay was \$22, 762.
6. Tr. 60, 62 - 63.
7. Tr. 59.
8. Tr. 52.
9. Tr. 44 -45.
10. Tr. 68.
11. AE 3.
12. AE 1 is the character reference letter provided by company "A".
13. Directive, ¶ E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
14. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 98-0761, at p. 2 (December 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, at p. 3 (April 3, 2006)(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.); Directive, ¶ E3.1.32.1.

16. *Egan*, 484 U.S. 518, at 528, 531.

17. Directive, ¶ E2.2.2.

18. Directive, ¶ E2.A10.1.1.

19. Directive, ¶ E2.A10.1.2.1.

20. Directive, ¶ E2.A10.1.2.2.

21. In 2001, Congress enacted 10 U.S.C. § 986 to prohibit DOD from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. In 2004, 10 U.S.C. § 986 was amended to limit its prohibition to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year.

22. Directive, ¶ E2.A6.1.1.

23. Directive, ¶ E2.A7.1.1.

24. Directive, ¶ E2.A7.1.2.1.

25. Directive, ¶ E2.A7.1.2.5.

26. Directive, ¶ E2.A5.1.1.