



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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) ISCR Case No. 07-03815
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Applicant for Security Clearance

Appearances

For Government: Tovah Minster, Esquire, Department Counsel

For Applicant: *Pro Se*

December 23, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant continued to consume alcoholic beverages after an alcohol dependence diagnosis. He also has failed to timely file income tax returns for many years. Moreover, he made a false statement to a government investigator. Eligibility for access to classified information is denied.

Statement of the Case

On October 13, 2004, Applicant submitted a security clearance application. On May 21, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as modified and

revised.¹ The SOR alleges security concerns under Guideline G (Alcohol Consumption), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

On July 1, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2009. DOHA issued a notice of hearing on August 26, 2009. The hearing was convened as scheduled on September 14, 2009. The government offered Government Exhibits (GE) 1 through 7, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits (AE) 1 and 2, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 18, 2009.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.b, 1.d, 1.e, 2.a through 2.e, and 3.a. He denied SOR ¶¶ 1.a and 1.c. He failed to address the allegation under SOR ¶ 3.b, and I considered it denied. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 41-year-old project manager working for a defense contractor. He graduated from college in 1991, and received a Bachelor of Arts degree in English Literature. He completed his master's degree (business management and computer science) in 1995. He has never been married and has no children.

In 1992, Applicant received an active duty officer commission in the U.S. Air Force. He achieved the rank of captain, and was honorably discharged in December 2002. While in the service, Applicant held a top secret security clearance. His security clearance was continued when he was hired by a government contractor in September 2004. Applicant has held access to classified information for approximately 17 years. There is no evidence that Applicant has ever failed to follow security procedures or that he has compromised classified information.

During 1997, Applicant consumed alcoholic beverages to excess. He attributed his excessive consumption of alcohol to several events: the end of a four-year relationship, a failing business that caused him to file for bankruptcy protection, and a

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines in all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

permanent change of duty station. Because of his failed business, Applicant filed for Chapter 13 bankruptcy protection in October 1996. The bankruptcy was discharged in about December 1996.²

In 1997, Applicant realized he had a problem controlling his alcohol consumption and started to accept himself as an alcoholic. He was consuming a six pack of beer and a bottle of wine frequently. Because of his concerns, Applicant voluntarily entered into a 28-day inpatient alcohol treatment program sponsored by the Air Force. He was diagnosed as alcohol dependent and suffering from depression.

Applicant successfully completed his alcohol inpatient treatment program. He continued his aftercare treatment and participated in group therapy once a week for one year. During that same year, he attended approximately 100 Alcoholic Anonymous (AA) meetings. Applicant testified he completed the AA 12-step process and continued attending AA regularly until 2001. He was abstinent from 1998 to 2005.

Applicant has been living with his girlfriend since 2003. However, he anticipates he will have to move out soon. Applicant has been treated for depression since around 1996. During 2004, Applicant was treated for depression at a Veterans Administration medical center and placed on medication. He is currently not taking antidepressants. Applicant and his doctor mutually agreed to stop the medications on a trial basis. Applicant believes he is doing well without the medications. Applicant informed his doctors that he started to consume alcoholic beverages again around 2005. The doctors advised Applicant against consuming alcohol.

Applicant's 2004 medical records indicate he was considered an alcoholic in remission. He was diagnosed with depression and alcoholism (alcohol dependent). His prognosis was deferred. Applicant testified that he sought treatment in 2004 because of depression problems and only received depression-related treatment. He denied receiving any alcohol-related treatment. However, from about May 2005 to about October 2006, Applicant received psychiatric treatment, in part, for his use of alcohol.

Applicant claimed that he currently consumes one drink a day or approximately two drinks three times a week. He only drinks socially. He considers himself to be a recovering alcoholic and does not drink to the point of intoxication. Applicant is currently not attending AA meetings because he moved from one state to another and lost the habit of attending AA meetings. Applicant also believes he has heard AA's message sufficiently and does not need to continue attending AA meetings. He believes he has a good handle on his personal situation. Applicant did not provide a current alcohol diagnosis or prognosis.

² Since his 1996 bankruptcy, Applicant has repaired his financial situation. He is current on all of his debts, has a high credit score, and has established a record of financial responsibility.

Applicant noted that he has never had any legal problems or alcohol-related misconduct on or off work. Applicant averred he always tries to do the right thing as demonstrated by his volunteering for alcohol treatment in 1997, and seeking depression treatment in 2004. He promised to resolve his tax problems with the assistance of his accountant, and to drink in moderation.

In August 2006, Applicant underwent a security clearance interview during which he denied consuming alcoholic beverages since his 1997 alcohol-related treatment. During a second interview in June 2007, Applicant admitted he lied to the investigator during his August 2006 interview (GE 6). He deliberately failed to disclose that he had started consuming alcoholic beverages in 2005.

At his hearing, Applicant expressed remorse for lying to the investigator. He understands the seriousness of the security clearance process and knows he should have been honest and truthful with the investigator. He explained he was facing a stressful situation and had a momentary lapse of judgment. He averred he has been honest and forthcoming to his doctors about his alcohol consumption (Tr. 33-34). Applicant considers himself to be trustworthy, honest, and reliable. He believes he has matured and is now a different person. He is enjoying a good life and he believes he has no reason to drink excessively.

Applicant failed to timely file his state and federal income tax returns for tax years 2004, 2005, and 2006. In 2007, he hired an accountant to assist him to resolve and stay on track with his taxes. He filed his state and federal income tax returns for tax years 2004, 2005, and 2006 in 2008. As of his hearing date, Applicant had not filed his state and federal income tax returns for tax years 2007 and 2008. He attributed his failure to timely file his taxes to his procrastination and disorganization. He also believed it was okay for him not to timely file his tax returns because he knew he did not owe any taxes.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant 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 criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An

administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, 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. It is merely an indication that 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. 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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See 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. 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 or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

Under Guideline G the government's concern is that excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. AG ¶ 21.

The government established its case under Guideline G by showing that on or about 1997, Applicant consumed alcohol to excess. Both in 1997 and 2004, Applicant was diagnosed with alcohol dependence and depression. He was abstinent from 1998 to 2005. Applicant relapsed in 2005, and has continued to drink alcoholic beverages to present. Guideline G disqualifying conditions AG ¶ 22(d): "diagnosis by a duly qualified medical professional of alcohol abuse or alcohol dependence," AG ¶ 22(e): "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program," and AG ¶ 22(f): "relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program," apply.

There is no evidence that Applicant has ever been involved in any alcohol-related misconduct. He has continued consuming alcohol after his diagnosis of alcohol dependence in 1997 and 2004, and against his doctors' advice. He intends to continue consuming alcohol in the future.

There are four Alcohol Consumption Mitigating Conditions under AG ¶ 23 potentially applicable to these disqualifying conditions:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Considering the totality of the circumstances in this case, I find none of the Guideline G mitigating conditions apply. Applicant's initial diagnosis of alcohol

dependence was in 1997. However, Applicant's alcohol dependence diagnosis was affirmed in 2004. Applicant's alcohol consumption appears to be tied to his depression. He consumed alcohol to excess around 1997 because of emotional and personal problems. At his hearing, Applicant indicated he is going through emotional and personal problems with his current girlfriend. Without a current diagnosis and prognosis concerning his alcohol dependence and depression, Applicant's favorable evidence is not sufficient to show it is unlikely his questionable behavior will recur. Under the circumstances, Applicant's behavior raises questions about his reliability and judgment.

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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. AG ¶ 18.

Applicant filed for Chapter 13 bankruptcy protection in 1996, because of financial problems related to a failed business and the end of a four-year relationship. He also failed to timely file his state and federal income tax returns for tax years 2004, 2005, and 2006. He filed his state and federal income tax returns for tax years 2004, 2005, and 2006 in 2008. As of his hearing date, Applicant had not filed his state and federal income tax returns for tax years 2007 and 2008. He attributed his failure to timely file his taxes to his procrastination and disorganization. He also believed it was okay for him not to timely file his tax return because he knew he did not owe any taxes. AG ¶ 19(a): "inability or unwillingness to satisfy debts;" and AG ¶ 19(g): "failure to file annual federal, state, or local income tax returns as required," apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) 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;
- (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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(f) the affluence resulted from a legal source of income.

Concerning the 1996 bankruptcy, Applicant established circumstances beyond his control contributing to his inability to pay his debts, i.e., his failed business and the end of his four-year relationship. Applicant is current on his debts, has high credit scores, and is financially stable. Since 1996, he has established a track record of financial responsibility. I find AG ¶¶ 20(a) and (b) apply, but do not fully mitigate the financial considerations concerns.

None of the mitigating conditions apply to Applicant's failure to timely file annual federal and state income tax returns as required by law (AG ¶ 19(g)). As of his hearing day, Applicant had not filed his 2007 and 2008 state and federal taxes because of his procrastination and disorganization. His behavior is recent and frequent, and casts doubt on Applicant's current reliability, judgment, and ability to comply with laws, rules, and regulations.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

In August 2006, Applicant willfully lied to a government investigator to cover his alcohol relapse. He also failed to timely file his state and federal income tax returns for tax years 2004, 2005, and 2006. He filed his state and federal income tax returns for tax years 2004, 2005, and 2006 in 2008. As of his hearing date, Applicant had not filed his state and federal income tax returns for tax years 2007 and 2008.

His falsification is material and triggers the applicability of disqualifying conditions AG ¶ 16(b): "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," and AG ¶ 16(e): "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation,

manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing." His failure to timely file his state and federal income tax returns also triggers the applicability of AG ¶ 16(e).

AG ¶ 17 lists seven conditions that could mitigate personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that none apply to the facts of this case. Applicant's behavior is recent. His falsification constitutes a felony offense under 18 USC Section 1001, and it casts doubt on his judgment, reliability, and trustworthiness.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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) the 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. He honorably served on active duty in the U.S. Air Force for approximately 10 years, and has held access to classified information for approximately 17 years. He has successfully worked for government contractors since 2004. There is no evidence he has ever compromised classified information or committed any security violations. Nor is there evidence that he has been involved in any alcohol-related misconduct on or off work. These factors show responsibility, good judgment, and mitigation.

On the other hand, Applicant was diagnosed with depression and alcohol dependence in 1997 and 2004. He successfully underwent alcohol rehabilitation in 1997, and participated in aftercare treatment. He was abstinent from around 1998 to 2005. His excessive alcohol consumption was related to personal and emotional problems. In 2004-2005, Applicant required treatment for depression and shortly thereafter, he started consuming alcoholic beverages again. Notwithstanding his diagnosis as alcohol dependent and his physicians' recommendations against his consumption of alcohol, Applicant has continued to consume alcoholic beverages to the day of his hearing. Applicant failed to present a current diagnosis and prognosis concerning his alcohol dependence.

Applicant also failed to timely file annual federal and state income tax returns as required by law because of his procrastination and disorganization. Moreover, in August 2006, Applicant willfully lied to a government investigator to cover his 2005 alcohol relapse.

On balance, I conclude that Applicant's favorable evidence is insufficient to mitigate the security concerns arising from his alcohol consumption, financial considerations, and personal conduct. Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a & 1.b:	For Applicant
Subparagraphs 1.c - 1.e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b - 2.e:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a - 3.b:	Against Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge