



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



In the matter of:

ISCR Case No. 08-10556

Applicant for Security Clearance

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel

For Applicant: *Pro Se*

January 20, 2010

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted a Questionnaire for Sensitive Position (SF 86) for employment with a defense contractor on April 4, 2008. On May 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for criminal conduct, alcohol consumption, financial considerations, and personal conduct under Guidelines J, G, F, and E, respectively. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on May 26, 2009.

Applicant answered the SOR in writing in an undated response received at DOHA on June 10, 2009. Applicant admitted 18 of the 20 allegations of criminal conduct under Guideline J, admitted the four allegations of alcohol consumption under Guideline G with explanation, admitted the five allegations of financial considerations under

Guideline F with explanation, and denied the one allegation of personal conduct under Guideline E. He requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on June 22, 2009, and the case was assigned to me on September 4, 2009. Applicant was not immediately available for a hearing since he was serving overseas for his employer. DOHA issued a Notice of Hearing on November 23, 2009, for a hearing on December 10, 2009. I convened the hearing as scheduled. The government offered six exhibits, marked government exhibits (Gov. Ex.) 1 through 6, which were received without objection. Applicant testified on his behalf and offered two exhibits admitted without objection as (App. Ex.) A and B. DOHA received the transcript of the hearing (Tr.) on December 23, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issues

Applicant received the Notice of Hearing on November 30, 2009, 11 days before the hearing. Applicant is entitled to 15 days advance notice of the hearing (Directive E3.1.8). Applicant discussed with Department Counsel the hearing date of December 10, 2009, before the Notice of Hearing was mailed so actual notice was given more than 15 days prior to the hearing. However, At the hearing, Applicant waived the 15 days notice requirement (Tr. 6-7).

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted all but two of the 20 allegations under criminal conduct, all of the allegations under alcohol consumption and financial considerations, and denied the one allegation under personal conduct.

Applicant is 52 years old and has worked for his defense contractor employer for more than two years as an electronics technician and equipment repairman. He was deployed twice by his employer to Afghanistan for months at a time. His total time deployed to this war area was about a year. He received a certificate of achievement from the command in Afghanistan (App. Ex. A, Certificate, dated August 22, 2008). He also received a letter of commendation from his supervisor in Afghanistan (App. Ex. B, Letter, undated). He is divorced but has two adult children from a prior marriage (Tr. 17-18; Gov. Ex. 1, SF 86, dated April 4, 2008).

The criminal charges against Applicant date from 1976, and mainly consist of driving offenses, domestic assaults, drug possession, or disorderly conduct. Applicant admitted all the criminal conduct allegations except two. One he did not remember, and the other he believed was a duplicate of another offense he admitted. Applicant admitted he was arrested for and found guilty of driving under the influence of alcohol in 2002 (SOR 1.b), 1995 (SOR 1.d), 1992 (SOR 1.i), and 1980 (SOR 1.s). He did not remember an arrest and conviction for driving under the influence in 1991 (SOR 1.k).

However, the Government presented sufficient information from criminal justice reports to establish the offense (Gov. Ex. 2). He admits to an arrest and conviction for open container in 2006 (SOR 1.a), and 1992 (SOR 1.j). For the 2006 offense, Applicant drove his truck to fish with some friends. They were drinking beer and using a cooler in his truck. After fishing, he was stopped by police at a random traffic stop and an open container of beer was found in the cooler in his truck. He did not know the open container was in his truck. Applicant admits to being arrested and convicted for public intoxication in 1994 (SOR 1.g).

Applicant admits he was arrested for and convicted of driving on a suspended license in 1998 (SOR 1.c), 1994 (SOR 1.f), 1987 (SOR 1.l), 1986 (SOR 1.m), and 1982 (SOR 1.r). He admits he was arrested for and convicted of disorderly conduct in 1985 (SOR 1.p), 1983 (SOR 1.q), and 1976 (SOR 1.t).

Applicant admits he was arrested for and found guilty of assault and trespass in 1995 (SOR 1.e). Applicant's mother told him that his stepbrother had taken some of her jewelry. He called his stepbrother and told him he was coming to his home to retrieve the jewelry. His stepbrother called the police and when he arrived at the house, he was arrested for trespass and assault. He was convicted and fined (Tr. 27-28).

A charge of criminal domestic violence was dismissed (SOR 1.h). Applicant believed this was a charge related to the attempt to retrieve his mother's jewelry. However, this offense happened over a year before the offense relating to his mother's jewelry listed above. The dismissed criminal domestic violence charge is a separate offense. Applicant admits he was arrested and charged with petty larceny in 1985 (SOR. 1.o; Tr. 28).

Applicant admits he was arrested in 1986, and charged with possession of cocaine with the intent to distribute, and conspiracy to possess and distribute cocaine (SOR 1.n). He was sentenced to three years confinement, and served two years in a federal penitentiary. Applicant injured his leg and it was in a cast for a period of time, and he could not work. He agreed with a co-conspirator to receive a fee for driving to a city, picking up the cocaine, and bringing it back to the co-conspirator. He agreed to the deal since he needed money. He was arrested after picking up the cocaine (Tr. 31-33; Gov. Ex. 2, Criminal justice report, undated).

The eight alcohol-related offenses were also cross-alleged as security concerns under Guideline G (SOR 2.a). Applicant also admits he still consumes alcohol (SOR 2.b). He was in Afghanistan for a number of months in early 2009, where he was unable to drink alcohol. As soon as he returned to the United States, he started drinking alcohol. He admitted to drinking about five or six beers the weekend before the hearing when he was watching football on television with his friends. Applicant never was ordered to seek treatment for alcohol abuse, but was required to attend driving and drinking awareness courses (Tr. 21-38, 47-50; Gov. Ex. 2, Criminal justice report, undated).

Credit reports (Gov. Ex. 4, Credit report, dated December 4, 2009; Gov. Ex. 5, Credit report, dated April 18, 2008; and Gov. Ex. 6, Credit report dated March 3, 2009) list the following delinquent debts for Applicant: a collection account for \$1,126 on a credit card (SOR. 3.a); an online shopping account charged-off for \$260 (SOR 3.b, also listed at SOR 3.e); another credit card account in collection for \$8,243 (SOR 3.c); and another credit card account in collection to the same creditor for \$260 (SOR d). These debts were incurred by his former wife from whom he is now divorced. Since the items were purchased for her, she agreed to pay for them. However, she declared bankruptcy so the creditors are now seeking payment from him. He has talked to some of the creditors and said he would pay half of the debt amount. That offer was rejected. He has not made any payments on the debts. When he was last in Afghanistan, he saved money, but had to use it to live while he was not working from July to November 2009. His present monthly salary is \$2,700 with his expenses about the same. He is current with his present bills, but unable to pay these past due debts (Tr. 38-44, 50-53).

Applicant denied falsifying his security clearance application by failing to disclose all driving while intoxicated and traffic offenses in response to a question concerning his police record. Applicant answered "YES" to the question whether he ever had been charged with or convicted of an offense involving alcohol or drugs. He listed a driving while intoxicated offense in 2001, and the possession and distributing cocaine offense in 1984. He did not list any other offenses. Applicant did not remember the dates, facts, and circumstances of all of his arrests and convictions involving drugs or alcohol. He knew of the cocaine offense since he was in a federal penitentiary for the offense. He noted a driving while intoxicated offense for 2001, when it was actually 1998. He did not list any other offenses because he was unsure of the dates and circumstances. He knew that his criminal record would be examined and considered (Tr. 44-47).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to

classified information will be resolved in favor of national security.” 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

Analysis

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 (AG ¶ 30). Applicant’s multiple arrests and convictions for driving while intoxicated, driving on a suspended/revoked driver’s license, assault, trespassing, domestic violence, and possession of cocaine with intent to distribute raise Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and CD DC AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted).

I have considered all of the mitigating conditions under criminal conduct. Applicant raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) AG ¶ 32(a) (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); and CC MC AG ¶ 32(d) (there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement). There was a pattern of criminal conduct from as early as 1986. In some years, there is more than one offense. While most of the offenses are driving or alcohol-related, he did have a serious felony offense of possession of cocaine with intent to distribute for which he

served two years in a federal penitentiary. The last offense was an open container offense in 2006, which was dismissed. All of the offenses happened because Applicant made a conscious decision to drive after drinking alcohol, drive knowing that his license was revoked or suspended, have alcohol in his possession, and possess cocaine in order to drive the substance to another location. The offenses did not happen under unusual or unique circumstances. Similar criminal incidents are likely to recur because Applicant still drinks alcohol and he could easily decide to drink and drive. Applicant stated he has matured and drinks only at home and does not drive after drinking. However, he is not involved in any counseling or alcohol prevention program to assist him in not drinking and driving. Applicant has not presented sufficient information to mitigate security concerns for criminal conduct.

Alcohol Consumption

Excessive alcohol consumption is a security concern because it 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). Applicant's arrests for driving under the influence of alcohol and possession of alcohol in an open container raise Alcohol Consumption Disqualifying Conditions (AC DC) AG ¶ 22(a) (alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent).

I considered Alcohol Consumption Mitigating Conditions (AC MC) AG ¶ 23(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) and determine that it does not apply. There were eight arrests for alcohol-related incidents from 1980 until 2006. During two of those years, he was in prison. In the last two years, he spent time in Afghanistan where he could not drink alcohol. He drank as soon as he returned and still drinks alcohol. Applicant willingly drank alcohol and his willingness to drink alcohol could lead to more alcohol-related incidents.

I also considered AC MC AG ¶ 23(b) (the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of action taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)), and determined that it does not apply. Applicant does not acknowledge that alcohol is a problem for him. He continues to drink alcohol on social occasions. He drank alcohol as soon as he returned from Afghanistan, and has continues to consume alcohol mainly at home.

Applicant does not attend alcohol-related counseling, and he has not actively participated in counseling since completion of court order counseling after driving while intoxicated convictions. AC MC AG ¶ 23(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 AC MC AG ¶ 23(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 meeting of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program) do not apply. Appellant has not presented information to meet his burden that his past alcohol use does not reflect now on his reliability, trustworthiness, and good judgment. Appellant has not mitigated security concerns for alcohol consumption.

Financial Considerations

There is a security concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations indicating 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 sensitive information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds (AG ¶ 18). Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

Applicant's delinquent debts, as established by credit reports and Applicant's statements and testimony, are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). Applicant has approximately four delinquent debts from credit cards and home shopping totaling over \$10,000. These debts indicate a history of not meeting financial obligations as well as an inability or unwillingness to satisfy his debts.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 20(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), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems 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). The debts were incurred during the marriage by his ex-wife in both of their names. However, the purchases were for her. The debts became delinquent when Applicant was divorced from his ex-wife. His ex-wife filed bankruptcy and the debts for her were discharged. The creditors are now seeking payment from him. While he may be legally responsible for the debts since they were incurred under both his ex-wife's and his name, the conditions causing the debts to be attributed to him are not within his control. His ex-wife was to assume the debts but they became solely his debts when she received a discharge of debts by bankruptcy. The fact his ex-wife had her debts discharged by bankruptcy was a condition beyond his control. The debts do not cast doubt on his reliability, trustworthiness, and good judgment.

I have considered FC MC ¶ 20(c) (the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control). This mitigating condition does not apply since there is no information concerning Applicant receiving financial counseling.

I considered FC MC ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts). For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments. All that is required is that an applicant demonstrates that he has established a plan to resolve his financial problems and has taken significant actions to implement that plan. Applicant contacted at least one of the creditors for one of the credit card debts. He was unable to make payments on the debts since his salary permits him only to meet his current obligations. He is unable to pay these debts at this time and has no plan to pay them.

Applicant presented sufficient information to mitigate security concerns for financial considerations. He established that the reasons for his debts were beyond his control since his ex-wife incurred the debts, and was to pay them, but the debts were discharged for her in a bankruptcy action. Creditors are now seeking payment from him.

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 (AG ¶ 15). Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process

cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant's incomplete answers to a question on his security clearance application concerning his police record raises a potential security concern under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant denied intentional falsification. In response to questions on the security clearance application, Applicant listed one alcohol-related driving incident and a possession of cocaine with intent to sell conviction. He failed to list other alcohol-related offenses because he was unsure of the dates and circumstances of the events. A security concern may arise for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance. But every omission, concealment, or inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant was unsure of the facts, circumstances, and dates of all of his alcohol-related incidents. Since Applicant listed the one driving while intoxicated offense and his one drug offense, he put the government on notice that he had alcohol and drug-related criminal conduct. The available information shows his failure to list all of the offenses was not knowing and willful. Applicant established he did not deliberately fail to provide full information on the security clearance application with intent to deceive. I find for Appellant as to Personal Conduct pertaining to falsification of the security clearance application.

Whole Person Analysis

Under the whole person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant is a good employee commended by his supervisor and the military command. I considered that he deployed to Afghanistan twice to assist the military with maintenance of vehicles. I considered that he did not deliberately provide incomplete information on his security clearance application, and that his financial issues were caused by conditions beyond his control. Applicant has a 30-year history of criminal conduct from 1976 until 2006. He has a series of alcohol-related incidents starting in 1980. His last alcohol-related incident was in 2006. Sufficient time without alcohol-related incidents has not passed to mitigate alcohol consumption issues given that Applicant has at least one alcohol-related conduct a year from 2000 to 2006. His actions indicate poor self control, lack of judgment, and unwillingness to abide by rules and regulations. Overall, on balance the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct and alcohol consumption. He mitigated security concerns for financial considerations and personal conduct.

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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraphs 1.a - 1.g: | Against Applicant |
| Subparagraph 1.h: | For Applicant |
| Subparagraphs 1.i - 1.t: | Against Applicant |
| Paragraph 2, Guideline G: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | Against Applicant |
| Paragraph 3, Guideline F: | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |
| Subparagraph 3.b: | For Applicant |
| Subparagraph 3.c: | For Applicant |
| Subparagraph 3.d: | For Applicant |
| Subparagraph 3.e: | For Applicant |
| Paragraph 4, Guideline E: | FOR APPLICANT |
| Subparagraph 4.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge