



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



In the matter of:)
)
-----) ISCR Case No. 09-06391
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

November 9, 2010

Decision

LYNCH, Noreen, A. Administrative Judge:

On May 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). 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 adjudicative guidelines (AG).

On June 1, 2010, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on July 19, 2010. DOHA issued a Notice of Hearing on September 5, 2010, and I convened the hearing on September 14, 2010. Department Counsel offered seven exhibits, which were admitted as Government Exhibits (GE) 1-7, without objection. Applicant testified and presented the testimony of one witness. He offered 14 exhibits, which were admitted as Applicant Exhibits (AE) A-N, without objection. DOHA received the transcript (Tr.) On September 21, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline J (Criminal Activity), and Guideline E (Personal Conduct). He denied several allegations, with explanation, under Guideline F (Financial Considerations).

Applicant is a 49-year-old employee of a defense contractor. He graduated from high school in 1979 and attended a technical college from 1980 until 1981. He married in 1983 and separated in 1997, but is still not divorced. Applicant has three children from his marriage. He has worked for his current employer since May 2009. (GE 1)

Applicant used cocaine and methamphetamine (meth) from approximately 1983 until 1997 during the course of his marriage. He and his wife used cocaine and meth every day in their home. He reports that he stopped due to the impact on his children and the fear that he would lose them. (Tr. 82) He claims he did not consume alcohol during this time period. (Tr. 27)

In 1997, Applicant was arrested and charged with possession of a controlled substance and paraphernalia. He was driving a motorcycle and admits that he had illegal drugs in his possession. (Tr. 32) He related that he told his attorney at the time that he had illegal drugs. (Tr. 33) However, the charges were dismissed based on a technicality. (GE 4)

Applicant was employed with a car rental agency for almost 18 years (January 1989 until June 2007). He reports that he quit his job because two children were emancipated and his child support was reduced. (Tr. 45) He was self-employed for about one year prior to his current employment. (Tr. 42) His business failed in November 2008. Applicant then helped his brother who is a painting contractor and earned some income. (Tr. 48) He left that job and was unemployed for approximately four months in 2009. (Tr. 49)

On April 4, 2008, Applicant was driving and was stopped for speeding. (GE 2) The police officer believed Applicant was under the influence of an illegal substance or alcohol. A blood sample was taken when Applicant was arrested. A trace of meth was detected in the blood sample. (Tr. 29) Applicant denied any use of alcohol or drugs on that day. He stated that he was using antihistamines and drank approximately five energy drinks. However, on his security clearance application, he specifically listed meth use on April 4, 2008 in section 23 concerning drug use. (GE 1) Applicant requested a second blood sample which also showed a trace of meth. (GE 2)

In April 2008, Applicant was arrested and charged with “under the influence of a controlled substance” and DUI of alcohol/drugs. He pled guilty to a misdemeanor charge of “wet and reckless” on the advice of his attorney. (Tr. 30) Applicant claims that he pled guilty because he could not afford a \$5,000 retainer fee and time for a trial in another state. (Tr. 30) He also stated that he was initially represented by a public defender, but changed to a private attorney because he did not believe he would be defended “very good.” (Tr. 36) Applicant was sentenced to three years unsupervised

probation. He was ordered to complete an alcohol and drug awareness program. Applicant did not complete the classes because he moved to another state. The court released him from attendance in the program. (Tr. 35) Applicant is still on probation. He believes he has approximately 18 months remaining. (Tr. 38) His parents were paying his fine. Applicant began paying his fine on a monthly basis in late 2009. Applicant reports that he did not drink alcohol until 2008. He drinks at barbeques and at card games with his parents and their friends. (Tr.)

The SOR alleges delinquent debts totaling approximately \$100,213, including state and federal tax liens, judgments, and collection accounts. Applicant acknowledged that he had not paid his state or federal taxes from 1997 until at least 2009.

Applicant has court-ordered child support dating from 1998. His wages were garnished for child support until 2006 or 2007. (GE 3) Due to insufficient income, he defaulted on his child support in 2006 or 2007. (Tr. 41) He has arrears of \$9,788. He pays \$575 a month toward the arrearage. (AE F) He began paying child support in May 2009. (Tr. 42)

Applicant did not file federal and state tax returns from 1997 until at least 2009. He claims that due to child support payments, he did not have money to pay taxes. He admits that it was poor judgment not to file, despite the fact that he did not have the income to pay tax. (Tr. 51) He also acknowledged that he did not take the responsibility to file his state and federal returns. In 2009, Applicant filed his tax returns. (AE C-E)

Applicant presented an offer to compromise his federal tax. He owed \$76,371 to the IRS. His offer in compromise of \$32,944 was accepted on July 1, 2010. He is currently making monthly payments of \$241 for five years. (AE C) Applicant also applied his 2009 income tax refund of \$6,223 to the current balance, which reduces the amount owed to \$25,595. (AE D)

Applicant made an offer in compromise to the State for his tax liability of \$36,532. His offer of \$7,000 was accepted for the tax years 1998 through 2007. (AE E) Applicant borrowed money from his family to pay the State. (Tr. 53) He is repaying his family.

Applicant has a \$17,037 judgment unpaid from a truck repossession in 2003. He plans to pay the judgment when he has the money. (Tr. 66) He has three other bank judgments (utilities) that have not been paid. (Tr. 68) Applicant has not paid a disputed \$575 bill for phone service.

Applicant purchased a home for \$45,000 in 2009. (Tr. 58) His parents loaned him the money and he is repaying them about \$200 a month. Applicant's mother helps him with his finances. (Tr. 55) She has access to his checking account. His checkbook remains in his parents' home.

Applicant's monthly net income is \$2,199. He listed monthly expenses of \$1,075. In addition, Applicant noted that he was current on his daily expenses. He has a monthly net remainder of approximately \$204. (GE 3) He believes he has approximately \$300 in his savings account. (Tr. 56)

Applicant was unemployed for part of 2009. He claimed that he could not pay for some of his delinquent accounts because he did not have sufficient income. He specifically noted that he received an offer to settle the debt for the truck in the amount of \$6,000, but he responded that he had a difficult financial situation and would pay later, when better equipped." (Tr. 65) However, he noted on his security clearance application that he traveled to Mexico on two separate occasions for "tourism." He listed the dates as February to April 2009 (many short trips), and in May 2009 for ten days. (GE 1) At the time, he was living with his parents and did not pay rent.

Applicant admitted that he gambled two or three times a week until 2008. (Tr. 61) He no longer gambles. Applicant reports that he currently drinks very little. He has not had alcohol or drug counseling. He believes he does not need counseling. (Tr. 62)

Applicant claims he has changed his life in many areas. He claims no longer uses drugs. When he separated from his wife in 1979, he stopped associating with people who used drugs. (Tr.71) Applicant enjoys his current employment and states that he has never missed a day of work. He is subject to random drug tests at work. (Tr. 25) He acknowledged that he has been irresponsible with his finances in the past. He moved to the state where his parents live in 2009. He is close to his mother and father and seeks their advice on financial issues. His father, who is a retired CPA, has helped him. Applicant acknowledged that "his father is handling all his financial affairs." He spends time with his family and their friends. (Tr. 84)

Applicant's father testified that he urged Applicant over the years to either file for bankruptcy or to file his taxes. However, he did not live in the same state and Applicant did not heed his advice. When Applicant moved near his family in 2009, he contacted the IRS. His father helped him to assemble the information for the tax returns. Applicant's father also noted that Applicant pays health insurance for his daughter. (Tr. 102)

Applicant received an award from his employer in 2010. Applicant was recognized for his support and efforts in his work and his willingness to service equipment on short notice. (AE H) He will receive a cost-of-living raise in the next fiscal year. (AE I)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied

in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The United States Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." ⁴ "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. ⁶ The decision to deny an individual a

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Here, Applicant admitted that he did not file his federal and state taxes from 1997 until 2009. He has unpaid judgments and other delinquent debts. Applicant also has monthly payments for child support that he defaulted on in 2007. Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts) and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. In addition, FC DC AG 19(g) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same) applies. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Applicant only recently resolved his federal and state tax liens for unpaid taxes. He still has unresolved judgments and other delinquent accounts. Consequently Financial Considerations Mitigating Condition (FCMC) AG ¶ 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) does not apply.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (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) and the individual acted responsibly under the circumstances) does not apply. As noted, Applicant had a period of unemployment in 2009. He also separated in 1997, and incurred child support payments. He noted that his self-employment was not successful. These events, no doubt, impacted his finances. However, he did not act reasonably under the circumstances. He allowed the delinquent debts to remain unpaid. He visited Mexico on two separate occasions for "tourism" in 2009. He did not file his taxes or attempt to resolve them until late 2009. He

also reported gambling two or three times a week until 2008. He has not shown mitigation.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies in part. Applicant has made progress during the last year. He has resolved his state and federal tax liens. He is paying monthly on his child support arrearage. He is repaying his family on several loans. He does not have current debt. He has not had financial counseling but he has had the direction of his father, who is a retired CPA. FC MC AG ¶ 20(c) (the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control) partially applies.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and,
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

Applicant's 1979 and 2008 criminal conduct is sufficient to raise AG ¶¶ 31(a) and 31(c). Applicant admitted having illegal drugs in 1979. He used cocaine and meth for many years. He pled guilty to a “wet and reckless” charge in 2008. Although Applicant received probation for his latest offense, it does not diminish the seriousness of the crime. Applicant's blood test results showed a trace of meth. This occurred two years ago. Although there was a 20-year gap in time between Applicant's two crimes, he has

not shown any insight into his behavior. He has not been successfully rehabilitated. He denies any drug use since 1997, but given the blood test results from 2008, I have doubts about his reliability. He has not had any drug counseling. He reported using meth in April 2008 on his security clearance application. This leaves me with doubts about his judgment and reliability.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense;

(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; and,

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

Applicant has not received counseling for drugs or alcohol. He is currently on probation for at least 18 more months for his conviction in 2008. He has not mitigated the concerns under criminal conduct.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Under the facts thus far presented, credible adverse information regarding the single allegation under Guideline E was explicitly covered under Guideline F, where it was sufficient by itself for an adverse determination and undermines the whole-person assessment noted below. Therefore, independent analysis of those same facts under Guideline E is not necessary. Applicant admitted that he did not file his Federal or state income tax returns for a period of time. He acknowledged that he used poor judgment. This creates doubts about his judgment, reliability, truthfulness, and willingness to comply with the law.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude that AG 16(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) applies. He began to address the federal and state tax liens in 2009 prior to receipt of the SOR. His father helped him to gather information and to make offers in compromise. I find that he has mitigated the concern listed under personal conduct.

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 an applicant's conduct and all the 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.

Under AG ¶ 2(c), 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is 49 years old. He has a history of behavior that involves illegal drug use with cocaine and meth. He denied use of meth in 2008, despite the blood test results. He has never received drug counseling. He has not shown successful rehabilitation or true insight into his behavior. He is still on unsupervised probation.

At the hearing, Applicant was not able to answer some questions concerning his finances. He did not appear forthright or candid. Applicant has unresolved financial difficulties, despite having steady employment most of his career. Applicant acknowledged gambling two or three times a week until 2008. Applicant shows a lack of candor and questionable judgment. Although Applicant received minimal punishments for his 1979 and 2008 criminal behavior, it does not lessen their seriousness. Applicant did not file income tax returns for nearly ten years.

Applicant has made progress since 2009 in his financial affairs with a great deal of help from his father and mother. He relied on them for loans to pay his tax liens. Granted, he is paying them back, but he does not have much money after he pays his bills. He still has unresolved judgments. He deferred payments on them but traveled to Mexico in 2009. He filed his income taxes in 2009. He is in repayment status for the state tax lien. He has mitigated the single concern under the personal conduct guideline. However, he has not mitigated the security concerns under the criminal conduct or financial considerations guidelines.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a through 1.b:	Against Applicant
Paragraph 2., Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant
Subparagraphs 2.d through 2.g:	Against Applicant
Subparagraphs 2.h. through 2.l:	For Applicant
Subparagraph 2.m:	Against Applicant
Subparagraph 2.n:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

NOREEN A. LYNCH.
Administrative Judge