



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-01064

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

May 10, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his criminal conduct, personal conduct, and finances. Eligibility for access to classified information is denied.

Statement of the Case

On July 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 (AGs), implemented by the Department of Defense (DOD) on September 1, 2006.

Applicant responded to the SOR on July 19, 2010, and requested a hearing. The case was reassigned to me on December 8, 2010, and was scheduled for hearing on December 16, 2010. A hearing was held on the scheduled date. At the hearing, the Government's case consisted of 14 exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on December 29, 2010.

Procedural Issues

Before the scheduling of the hearing, the Government moved to amend the SOR to add ten additional allegations under Guideline F. Under Guideline F, Applicant allegedly accumulated ten delinquent debts exceeding \$21,500. For good cause shown, the Government's SOR amendment (which included checked off Applicant answers) was granted, and Applicant was afforded 32 days to address the new financial allegations. Department counsel was granted seven days to respond. Within the time permitted, Applicant supplemented the record with a two-page account summary of his student loan payments (creditors 3.f and 3.h) and a settlement summary from creditor 3.a of the amended SOR. Applicant's submissions were admitted as AEs A and B.

Summary of Pleadings

Under Guideline J, Applicant allegedly (a) was charged in June 2005 under Article 85 (sic) of the Uniform Code of Military Justice (UCMJ) with (1) desertion-surrendered to military authorities, (2) desertion, (3) AWOL, and (4) AWOL-surrendered to military authorities, and he was discharged under other than honorable conditions in lieu of trial by court martial; (b) was charged in 2007 with (1) DUI Liquor BAC .08 or More 1st and (2) DUI Liquor/Drugs/Vapors 1st, to which he pled guilty to count (1) and was sentenced to two days in jail, fined, and ordered to attend an alcohol awareness class; and (c) was charged in October 2009 with criminal damage deface, pled guilty, and was fined.

Under Guideline E, Applicant allegedly falsified his Questionnaire for National Security Positions (e-QIP) of September 2007 by omitting three charged offenses in February 2005 (fraud-worthless checks), May 2005 (failure to appear), and June 2005 (driving on a revoked/suspended license). The three charges covered under Guideline J are incorporated under Guideline E.

In his response to the SOR, Applicant admitted all of the allegations with explanations. He claimed extenuating circumstances and poor judgment contributed to his criminal charges and attributed his e-QIP omissions to inadvertence and haste.

Findings of Fact

Applicant is a 30-year-old engineer technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Applicant attended an automotive college between June 2005 and June 2006 and earned a diploma in June 2006. (GE 1) Applicant has never married and has no children. He enlisted in the U.S. Army in September 2001 and served on active duty between September 2001 and June 2005. (GE 1; Tr. 57-58) In June 2005, he was discharged from the Army under other than honorable conditions. (GEs 1 and 8; Tr. 63) Under the terms of his discharge, he is not eligible for reenlistment. (GE 9)

Applicant's arrests and charges

In December 2004, Applicant left his unit without authority (AWOL) and stayed with friends for several weeks. (GE 2). He turned himself in to his first sergeant in January 2005. (Tr. 62-63) In June 2005, he was charged under Article 85 of the UCMJ with the offense of desertion-surrendered to military authorities. (GEs 2 and 10) While deployed in Iraq, he experienced nightmares over his combat missions and wanted to run away from the Army. (Tr. 62-63) Soon after he told his command he wished to get out of the Army, he was returned to the barracks and remained there until he was formally discharged in June 2005, in lieu of a trial by court martial. Applicant's discharge was granted under other than honorable conditions. (GE 2; Tr. 63)

In October 2007, Applicant and a friend repaired to a local bar where Applicant consumed three to four beers. (GE 2) After running a red light when returning home, he was pulled over by local police and administered two field sobriety tests. (GE 2) He recorded a BAC in excess of .08 percent on the Breathalyzer test administered to him at the scene. (GE 2; Tr. 64) The detaining police officer then transported Applicant to the local police station where he administered another Breathalyzer test. (GE 2; Tr. 64-65) He registered a BAC of .09 percent on this test. (GE 2) Applicant was then cited for DUI Liquor BAC .08 or More 1st and DUI Liquor/Drugs/Vapors 1st.

When Applicant appeared in court to answer his DUI charges, he pled guilty to DUI Liquor BAC .08 or More 1st and was sentenced to two days in jail, fined \$1,520, and ordered to attend 16 sessions of an alcohol awareness class. (GEs 2, 5, and 6) Applicant spent two days in jail, made payment arrangements of \$100 a month, and completed his alcohol awareness classes in May 2008. (GE 2)

Applicant was charged with the offense of criminal damage deface in June 2009. (GE 7) He and his girlfriend had gotten into an argument, and she locked him out of their house. (GE 2) In an attempt to get her attention, he knocked on the window (a little hard in his estimation). A neighbor called the police who later arrested him at his father's home for criminal damage deface. Applicant pled guilty to the offense in August 2009 and was fined. (GE 7)

Applicant's finances

Between 2003 and 2009, Applicant accumulated numerous credit card and student loan debts. Credit reports reflect that he defaulted on nine of these accounts exceeding \$20,000. (GEs 11 through 14). Applicant's furnished evidence documents his

payment in full of one small account not listed in the SOR (AE B) and monthly payments on his student loan accounts covered by subparagraphs 3.f and 3.h of the SOR. See GE 3 and AE A; Tr. 75-76. Applicant's furnished student loan account summary reflects his account in current status. (AE A)

Applicant's loan consolidation claims draw sufficient support from his credit reports, student loan account summary, and personal testimony to be sufficiently credible to merit acceptance. See GEs 2 and 11 through 14 and AE A. Applicant's claims that creditors 3.g and 3.j represent the same debt are also sufficiently corroborated by the creditor reports to warrant acceptance.

Applicant attributes most of his delinquent debts to the lack of monies sufficient to satisfy the debts listed in the SOR. (GE 2; Tr. 81) While he briefly explored debt consolidation, he has never sought or obtained debt counseling. (Tr. 82) His repayment efforts to date have been limited to his student loan accounts and his satisfaction of a small consumer account. (creditor 3.a) Applicant's claims that creditors 3.g and 3.j represent the same creditor are accepted. The amounts are sufficiently similar to reflect plausible explanations of the debts. See GEs 3 and 11 through 14.

Applicant currently nets around \$2,600 a month. (GE 3; Tr. 79) His monthly expenses total less than \$2,400. (Tr. 79-80) This leaves him with a small monthly remainder. (Tr. 80)

Applicant's e-QIP arrest omissions

Asked to complete an e-QIP in September 2007, Applicant admitted his acceptance of non-judicial punishment for his acknowledged AWOL in 2005, but omitted three other offenses: a February 2005 fraud-worthless checks conviction and fine, a May 2005 failure to appear charge and fine, and a June 2005 driving on a revoked/suspended license. See GEs 2 and 5.

Applicant attributes his e-QIP omissions to haste and inadvertence. (Tr. 56, 68) While lacking in detail, his explanations are plausible and sufficiently credible to warrant acceptance. He listed the most potentially derogatory charge (his acknowledged AWOL that resulted in a future enlistment bar). And while the questions asked of him in question 23 of his e-QIP, are clear and straightforward, Applicant does not impress as an individual interested in withholding information from the Government. He disclosed his most derogatory charge (*i.e.*, his Article 85 desertion charge) and persuades that his omissions of his 2005 bad check charge, his failure to appear on the bad check charge, and his driving on a revoked license charge were not intentional.

In March 2008, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). In this interview, he provided a complete arrest history to the OPM agent that included the three omitted arrests in his e-QIP. (GE 2) The summary of interview contains issue codes that suggest the agent scheduled the interview to address Applicant's criminal arrest history. From the interview summary, it

can not be determined whether Applicant was confronted with the arrest information before he volunteered the information himself.

Applicant did not provide any endorsements or personnel evaluations. His DD Form 214 lists a number of commendations and medals he earned during his Army service. They include an Army Achievement Medal, an Iraq Campaign Medal, an Army Commendation Medal, a Global War on Terrorism Service Medal, and a National Defense Service Medal. (GE 8)

Policies

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and all of the "[c]onditions that could mitigate security concerns," if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(a) factors:

(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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Criminal Conduct

The Concern: 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG, ¶ 15.

Financial Considerations

The Concern: "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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts." Adjudication Guidelines, ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the revised AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security

clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is an engineering technician for a defense contractor with some history of criminal behavior that resulted in his discharge from the U.S. Army under less than honorable conditions, and ensuing arrests and convictions. His actions are a source of continuing security concerns. Applicant’s accumulated delinquent debts and omissions of other arrests predating the e-QIP he completed in 2007 also raise security concerns.

Criminal offense and personal conduct concerns

Applicant’s cumulative history of actions that resulted in charges of desertion during his Army service and eventually a discharge under other than honorable conditions and convictions from civilian courts raise security concerns covered by Guidelines J and E. On the strength of the evidence presented, two disqualifying conditions (DC) of the Adjudication Guidelines for criminal conduct (AG ¶ 30) apply: DC ¶ 31(a), “a single serious crime or multiple lesser offenses,” and DC ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecute or convicted.”

Because Applicant’s admitted offenses involve judgment lapses, one disqualifying condition of the personal conduct guideline also applies to Applicant’s situation: DC ¶ 16 (c), “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.” Although Applicant’s DUI and criminal damage deface charges are clearly covered by Guideline J and do not require additional Guideline E coverage, his acceptance of a discharge under less than honorable conditions more closely mirrors adverse personal conduct than criminal behavior.

While Applicant has not been involved in any arrest incidents since his criminal damage deface offense of October 2009, his three cited offenses between 2005 and 2009 reflect recurrent conduct without any extenuating circumstances to lessen the security significance of his actions. By virtue of the terms of his other than honorable discharge, he is barred from future enlistment. Applicant's lifetime enlistment bar reflects in unmistakable terms the seriousness that the Army attaches to his discharge under other than honorable conditions, and limits the application of any of the mitigating conditions. At this time, it is too soon to apply MC ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," to Applicant's circumstances. Nor has Applicant shown sufficient rehabilitative efforts to date to merit the application of any of the mitigating conditions of Guideline E.

Both from a consideration of the applicable guidelines, and from a whole-person perspective, Applicant, at this time, fails to demonstrate he possesses the strength of overall character and rehabilitation to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance.

Applicant's earned medals during his military service in Iraq entitle him to considerable credit for his service missions in Iraq. However, without any endorsements or performance evaluations, or other current evidence to consider his overall reliability and trustworthiness, there is not enough in the record to illustrate what important lessons Applicant has learned from his unfortunate lapses in judgment, and how he can avert recurrences. Taking into account all of the facts and circumstances, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c of the SOR.

Financial issues

Security concerns are raised under the financial considerations guideline of the AGs where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts and his past inability to pay these debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines ¶ DC 19(a), inability or unwillingness to satisfy debts, and ¶ 19(c) "a history of not meeting financial obligations."

Applicant attributes most of his delinquent debts to a lack of funds. Without providing more details of his financial circumstances, only limited application of ¶ MC 20(a), "the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," and ¶ MC 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 responsibility,” of the financial considerations guideline are available to him. Neither of these mitigating condition are dispositive.

Based on his limited repayment efforts, Applicant may claim some benefit of ¶ MC 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” His efforts to date do not reflect a strong enough track record, though, to fully apply the mitigation benefits of ¶ MC 20(d) to Applicant’s situation.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases.

At this time, Applicant is able to document monthly a year of monthly payments on his student loan accounts (creditors 3.f and 3.h) and satisfaction of one small consumer account (creditor 3.a). However, he provides no evidence of his addressing any of his remaining accounts or persuasive reasons why he has not been able to do so with the resources available to him.

From a whole-person standpoint, there is not evidence presented to show that Applicant is currently living within his means and has his finances under his control. What security risks exist on this record and have not been satisfactorily resolved to date pertain to his still unaddressed debts. Taking into account all of the extenuating facts and circumstances surrounding Applicant’s accumulated debts and the absence of a sufficiently developed track record to make safe predictions about his ability to satisfy his remaining debts, Applicant fails to mitigate judgment, reliability, and trustworthiness concerns related to his debts. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 3.b through 3.e, 3.g, and 3.i. Favorable conclusions warrant with respect to subparagraphs 3.a, 3.f, 3.h, and 3.j.

Personal conduct concerns over e-QIP omissions

Security concerns over Applicant’s judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of his numerous arrests and convictions in the E-QIP he completed in September 2007. By omitting his past 2005 and charges and dispositions, Applicant failed to furnish materially important background information about his criminal history that was needed for the Government to properly process and evaluate his security clearance application. DC ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts to any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” has some application to Applicant’s situation.

Applicant's explanations of his omissions are sufficiently plausible and credible under all of the circumstances considered to warrant findings and conclusions that the falsification allegations are unsubstantiated. He listed his potentially most serious offense (his desertion charge that resulted in his discharge under less than honorable conditions), and he impressed as an essentially honest and credible applicant.

Further, Applicant may be credited with prompt, good-faith corrections of his arrest omissions. Close examination of the 2008 summary of interview reveals that the OPM agent contacted Applicant in March 2008 (some six months after Applicant completed his E-QIP) for the specific purpose of discussing his omitted charges and convictions. The interview summary reveals that Applicant provided prompt answers to the specific questions asked of him by the investigator. Whether or not his answers were prompted by the investigator is unclear.

In evaluating all of the circumstances surrounding Applicant's E-QIP omissions, his ensuing OPM interview corrections, his explanations, and whole-person considerations, his disclosures are sufficient to enable him to convincingly refute the falsification allegations. Overall, Applicant's explanations are persuasive enough to warrant conclusions that the falsification allegations relative to his E-QIP omissions of his bad check, failure to appear, and driving on a revoked license charges are unsubstantiated. Favorable conclusions warrant with respect to the falsification allegations covered by Guideline E.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparagraphs. 1.a through 1.c	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
GUIDELINE F: (FINANCIAL CONSIDERATIONS):	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant
Subparagraph 3.d:	Against Applicant
Subparagraph 3.e:	Against Applicant

Subparagraph 3.f:	For Applicant
Subparagraph 3.g	Against Applicant
Subparagraph 3.h:	For Applicant
Subparagraph 3.i	Against Applicant
Subparagraph 3.j:	For Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge