



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



In the matter of:)	
)	
)	ISCR Case No. 10-01162
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

May 19, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF 86) on September 9, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on October 28, 2010, detailing security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct, that provided the basis for its preliminary decision to deny him a security clearance. 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on November 3, 2010. He answered the SOR on November 22, 2010 and requested a hearing before an administrative judge. DOHA received the request on November 24, 2010, and Department Counsel was prepared to proceed on January 24, 2011. I received the case assignment on February 1, 2011. DOHA issued a notice of hearing on February 23, 2011, and I convened the hearing as scheduled on March 11, 2011. The Government offered exhibits marked as GE 1 through GE 11, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits marked as AE A through AE D, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 22, 2011. I held the record open until April 15, 2011, for Applicant to submit additional matters. Applicant timely submitted AE E through AE L, without objection. The record closed on April 15, 2011.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on March 7, 2011, less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (Tr. 9)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 2.a- 2.f of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.a-1.c of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 32 years old, works as an electrical and systems integration engineer for a Department of Defense contractor. He began his current employment in May 2008. He previously worked for a Department of Defense contractor from 2001 to

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

2007. He held a security clearance from 2002 until he voluntarily returned his clearance in 2007 when he no longer needed it.²

Applicant graduated from college in March 2001 with a bachelor's degree in electrical engineering. He has worked as an engineer since his graduation. He and his wife married in October 2008 and anticipate the birth of their first child in August 2011. Applicant has a nine-year-old daughter, who lives with him as he has full custody of her. His wife does not work full-time.³

Financial

Applicant earns \$1,672.60 a week in gross income and \$1,210.70 a week in net income. He receives \$1,032 a month in rental income and his wife earns approximately \$100 a week babysitting. His net monthly income totals \$6,275. His monthly expenses total \$4,401 and include his rent, mortgage on his rental property, utilities, student loans, phone, cable, car payment, gasoline, insurance, food, and other miscellaneous expenses. He has savings valued at almost \$20,000 and anticipates \$14,500 in federal and state income tax refunds for 2010. He is current on his loans and debts.⁴

In 2006, a team of "friends," actually friends of a friend, approached him about an investment opportunity. The team of "friends" consisted of a real estate broker, a mortgage broker, and a property manager. These "friends" convinced him to purchase rental properties for investment. The properties would be rented and maybe sold at a later date if the value of the property increased.⁵

Through the team of "friends", Applicant purchased four rental properties at the same time in 2006. He also owned his own residence. He rented the properties for two years. When the economy started to decline in 2008, the tenants in one property moved, which resulted in a rental income loss on one property. He did not find new tenants and used his savings of \$5,000 to make the mortgage payments and repairs.⁶

After exhausting his savings in 2008, Applicant met with a financial advisor, who advised him to sell his investment properties. Before he listed his property for sale, he attempted a loan modification, but he did not qualify. Applicant listed his investment properties for sale at a market price lower than his purchase price and his loan debt. As a result, each property was considered a "short-sale". Before the bank would approve

²GE 1; Tr. 32.

³GE 1; Tr. 32-33.

⁴AE K; AE L; Tr. 83-90.

⁵Tr. 33-34, 66.

⁶*Id.* 68-70.

the short-sale of the property, the bank required him to default on his loans. Applicant defaulted on his investment property mortgages in 2009.⁷

Applicant sold one house to the tenant in 2009. He received a 1099-C form from the mortgage lender and reported the sale of this property on his 2009 federal and state income tax returns.⁸ Concerning the mortgage debt in SOR ¶ 1.a, this property sold through a short-sale in 2010. Applicant financed this property with a primary (SOR ¶ 1.a) and secondary (SOR ¶ 1.c) mortgage. He and the primary mortgage lender reached settlement on his debt, which has now been paid, and his outstanding primary mortgage debt resolved. The secondary mortgage lender cancelled its debt and provided Applicant with a 1099-C form.⁹ Applicant reported the 1099-C information on his 2010 federal and state tax returns.¹⁰ The mortgage lender for the debt in SOR ¶ 1.b cancelled the balance of Applicant's debt on a third rental property, which did not sell, and provided Applicant with a form 1099-C and a form 1098. Applicant also reported this cancelled debt on his 2010 federal and state tax returns.¹¹ The three debts listed in the SOR are resolved.

Applicant has not sold a fourth rental property and cannot sell it in the current real estate market. He is working with the bank towards a cancellation of the debt in exchange for a "deed-in-lieu" to the property. He will use his savings to resolve any balance. Applicant continues to own his personal residence. He receives rental income from the city government, pays property taxes to the city on this property, and pays his monthly mortgage payment.¹²

Applicant believes he was the victim of a scam when he became involved with the team of "friends" because he should never have qualified for these four mortgages on his 2006 income. In May 2008, he received a letter from the Attorney General's Office in his state, requesting information from him. He provided the requested information. Two members of the team of "friends" were indicted by the State and one has entered into a consent judgment with the State. It is unknown if the State indicted the third team member.¹³

⁷AE E; AE F; Tr. 34,69-74.

⁸GE 4.

⁹AE A; AE C; Tr. 25-26, 37-39, 43, 75.

¹⁰AE J.

¹¹GE 5, p.2; AE B; AE J; Tr. 39-41, 44-45, 75-83.

¹²GE 5- GE 7; AE D; AE L; Tr. 75-78, 79, 84.

¹³AE G; AE H; Tr. 36, 67-68.

Personal Conduct

As a 20-year-old college student, Applicant used cocaine approximately five times between September 1998 and November 1998. He has not used cocaine again. When Applicant completed his first SF 86 in May 2001, he acknowledged using cocaine on two occasions in November 1998. He lost his job in November 1998 because he tested positive for cocaine use. The loss of his job had a significant impact on him and led to his decision not to use drugs in the future and to change his associates. When he met with the DoD investigator in November 2002, he disclosed that he had used cocaine a total of five times between September 1998 and November 1998. Applicant credibly explained that during his discussions with the investigator, he remembered three other occasions when he used cocaine. His memory was refreshed through the questions asked, not by any specific information presented to him by the investigator. He credibly testified that he had no intent to hide information from the Government about his cocaine use, and that he provided truthful information to the best of his knowledge when he completed his 2001 SF-86.¹⁴

On October 3, 1998, the police arrested him and charged him with two counts of driving under the influence of alcohol (DUI) and with underage consumption of alcohol. The court found him guilty of underage consumption of alcohol, sentenced him to 10 days in jail, with 9 days suspended, and fined him \$400. Two months later, on December 5, 1998, the police arrested him and after he failed the field sobriety test, charged him with two counts of DUI, underage consumption of alcohol, and operation in violation of a restriction. In February 1999, the court found him guilty of one DUI count and operation in violation of restriction. The court sentenced him to jail for 24 hours, fined him \$400, and ordered him to attend alcohol awareness education classes. Applicant attended the alcohol awareness classes and some alcoholics anonymous programs in 1999. He denies any diagnosis of alcohol abuse or dependence during this time or later.¹⁵

The police arrested and charged Applicant with a third DUI in the summer of 2004. In September 2004, the court found him guilty, sentenced him to 10 days in jail, fined him, and ordered him to attend alcohol counseling. Applicant attended 10 alcohol-related classes, which he described as classes and group sessions only. He did not receive any medical treatment at this time. He never met with a counselor for an individual evaluation. He did not receive a diagnosis of alcohol abuse or alcohol dependence in 2004 or a recommendation for AA attendance or counseling. Since his 2004 arrest, he has changed his consumption of alcohol. He consumes one or two beers once a week at home or occasionally at the homes of relatives. He does not drive

¹⁴GE 2; GE 8; Tr. 46-48, 60-63.

¹⁵Tr. 48-57.

until the effects of the alcohol have worn off, and he will stay the night, if necessary. He prefers to spend time with his wife and daughter.¹⁶

The record contains a treatment summary and discharge summary for Applicant related to his alcohol treatment in 1999. The report contains conflicting information which undermines the reliability of this report, The August 1999 report indicates that Applicant, who was 20 years old, is single. Yet, the report later discusses his relationship with his wife and how he treats her. (p.5 of GE 9) Applicant married in 2008. The report also indicates that he drank excessively, got into fights after drinking too much, has been sick from drinking too much, and becomes more aggressive after drinking too much. Applicant denied this finding. The basis for this information is not identified in the report and is not supported by the record evidence. Given the inaccuracies about Applicant's marital status and lack of supporting information for the alcohol findings, this report is given limited weight.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . ." An

¹⁶*Id.* 49-51, 57-59.

¹⁷GE 9.

applicant has the ultimate burden of persuasion for 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 an 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.

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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

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 ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

- (a) inability or unwillingness to satisfy debts; and

- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems when he purchased four homes for investment, then decided to sell the homes at a loss, leaving a mortgage deficit. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that may mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and especially the following:

(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; and

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

Applicant purchase four homes for investment in 2006 when the economy was favorable. He rented the houses; however, in 2008, the economy began a serious economic downturn. One tenant moved out of a house, and he could not find a new tenant. After exhausting his savings to pay the mortgage and repair the rental houses, he met with a financial advisor, who told him to sell the rental properties. Before he attempted to sell the rental properties, Applicant applied for a loan modification with the mortgage lender, but was denied. He listed his properties for sale at a market price much lower than his mortgage debt. He eventually sold one property at the lower price with the approval of the mortgage lender. To get approval for a short-sale of his investment property, he defaulted on his mortgage loans at the request of the lender. Since defaulting on his mortgages, he has worked with the mortgage lender to resolve all the financial issues related to his investment properties. He and the mortgage lenders for the properties in the SOR have resolved their financial issues. He pays his current bills and lives within his financial means. He does not live beyond his income and has significant assets in savings. He has mitigated the security concerns under the above criteria.

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. 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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from 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;

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant experimented with cocaine as a college student in 1998, which caused him to lose his job because he failed a drug test at work. During this same time period, the police arrested him for DUI on two occasions. Almost six years later, the police again arrested him for DUI. A security concern is raised under AG ¶¶ 16(c) and 16(d).

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his May 2001 SF 86, when he failed to state that he used cocaine five times in 1998. This information is material to the evaluation of Applicant's trustworthiness and honesty. In his response and at the hearing, he denied that he had an intent to hide the extent of his cocaine use from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An

administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁸

Applicant acknowledged his cocaine use when he completed his SF 86 in May 2001. He indicated he used it twice, which he believed was truthful when he completed the SF 86. When he met with the security investigator over a year later, he voluntarily admitted to three additional uses of cocaine in 1998. His admission came as a result of his conversations with the investigator which refreshed his memory about the extent of his use. Based on his credible testimony, I find he had no intent in 2001 to deceive the Government about the number of times he used cocaine. The Government has not established that the Applicant intentionally omitted any material information from his 2001 SF 86. SOR allegation 2.e is found in favor of Applicant.

The Personal Conduct guideline also includes examples of conditions that may mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through 17(f), and especially the following:

(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; 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.

Applicant's drug use occurred more than 12 years ago when he was a college student. Losing his job became a wake-up moment for him about the problems he could create for himself if he continued his cocaine use. He decided to cease using cocaine and change his friends. He has no regrets about this decision and has not used drugs for over 12 years. After two DUIs in 1998, he continued his alcohol consumption. When he received a third DUI in 2004, he realized he needed to change his behavior and attitude towards alcohol, and he did. He participated in AA for a time, even though he

¹⁸See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

has not been diagnosed as an alcohol abuser or alcohol dependent. He drinks one or two beers on a weekend and does not drive if he has consumed alcohol. He uses alcohol responsibly. He has changed his lifestyle, focusing on his career and family. His past use of cocaine and his past DUIs do not reflect negatively on his current judgment and trustworthiness, nor can this past conduct be used to exploit, manipulate, or coerce him to reveal classified information. He has mitigated the security concerns arising from his 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 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.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems arose when the economy spiraled downward, making it difficult for him to rent his investment properties. After consulting with a financial advisor, Applicant sought a loan modification with the mortgage lender for his rental properties, but was denied his request. When he listed his investment property for sale at a price much lower than his loan debt, his mortgage lender required him to default on his loans before it would approve a short-sale of any property. Two properties sold, but the other two properties did not sell. Throughout his financial crisis, Applicant worked proactively with

his mortgage lender. As a result, he resolved his SOR debts. The cancellation of his mortgage debts did not create a tax liability for him. He pays his regular living expenses and has money saved. His finances are sound, and he does not live beyond his financial means.

Applicant's drug use occurred over 12 years ago, when he was a college student. His job loss in 1998 because of his cocaine use changed his attitude about drugs. He realized the negative impact his behavior was having on his career and decided that drug use would not be a part of his future. His excessive alcohol consumption changed after his third DUI in 2004, nearly seven years ago. With maturity, Applicant has changed his attitude about alcohol, limiting his use. He prefers to spend time with his family and to develop his career. He credibly explained at the hearing that he tried to be truthful to the best of his knowledge when he completed his SF 86 in May 2001. During the course of his clearance interview in 2002, Applicant admitted to additional cocaine use after questions from the investigator triggered his memory, not after being confronted with information. Given that he admitted to cocaine use when he completed his SF 86, the Government was on notice about his use of cocaine. Since he was never arrested for drug use, the Government learned about his cocaine use from him. One-on-one interviews provide him a way to freely establish additional information. Applicant's past conduct is not a security concern.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances and personal conduct under Guidelines F and E.

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 F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge