



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



In the matter of:)
)
-----) ISCR Case No. 10-04823
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: *Pro se*

04/30/2013

Decision

Harvey, Mark, Administrative Judge:

In 2006 and 2010, Applicant was arrested for driving under the influence of alcohol (OUI). His credit reports and SOR allege five delinquent debts, totaling \$48,883, including \$44,807 in delinquent child support debt. He has not had any alcohol-related incidents with police or the courts since 2010. He does not drive after consuming alcohol. He paid two debts; he successfully disputed one debt; and his two child support debts are current. Alcohol consumption and financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On December 7, 2009, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On June 15, 2012, the Department of Defense (DOD) Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and G (alcohol consumption). (Hearing Exhibit (HE) 2) The SOR further informed Applicant that DOD adjudicators could not make the affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied. (HE 2)

On August 27, 2012, the DOD Office of Hearings and Appeals received Applicant's response to the SOR. (HE 3) Applicant waived his right to a hearing. Department Counsel requested a hearing. On December 7, 2012, Department Counsel indicated she was ready to proceed on Applicant's case. On April 1, 2013, DOHA issued a hearing notice, setting the hearing for April 18, 2013. (HE 1) Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered seven exhibits, and Applicant offered three exhibits. (Tr. 18-21; GE 1-7; AE A-C) There were no objections, and I admitted GE 1-7 and AE A-C. (Tr. 20-21) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On April 29, 2013, I received the transcript.

Findings of Fact¹

Applicant admitted the conduct alleged in SOR ¶¶ 1.a, 1.b, 2.a, and 2.b, and he provided some extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 41-year-old employee of a defense contractor, who has worked as a security officer since August 2009. (Tr. 5, 39; GE 1) He was awarded a high school diploma in 1989, and he completed about two semesters of college. (Tr. 5-6) He has never married. (GE 1) He served in the Army Reserve from 1992 to 2000. (Tr. 7) He left the Army as a private first class with an honorable discharge. (Tr. 7; GE 1) His military occupational specialty was 63W, mechanic. (Tr. 7) He has never held a security clearance. (Tr. 8)

Financial Considerations

Applicant indicated periods of unemployment caused him to have financial problems. He also had financial problems from a heavy court-ordered child support burden for two children.

Applicant's SOR alleges five delinquent debts, totaling \$48,883. Those five delinquent debts are described and discussed in his SF 86, credit reports, Office of Personnel Management (OPM) personal subject interview (PSI), responses to DOHA interrogatories, SOR response, and at his hearing. His five SOR debts are described as follows:

¹The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

SOR ¶¶ 1.a and 1.b allege that Applicant had delinquent child support of \$33,814 from state A and \$10,993 from state B. He paid the balance down to \$23,000 in state A, and he is making payments to address the arrearage from state B. (Tr. 24) Applicant provided information to states A and B, and states A and B determined how much he could afford to pay for child support. (Tr. 44-45) Whenever he has been employed, he has had payments taken from his pay for child support. (Tr. 24; AE A) His son in state A is 17, and \$75 of his \$375 monthly payment is applied to the arrearage in state A. (Tr. 25) His daughter in state B is 21, and all of his payment goes to address the arrearage. (Tr. 25-26)

SOR ¶ 1.c alleges a \$945 debt owed to an apartment complex. (Tr. 26) Applicant was evicted during a period of unemployment. (Tr. 47) Applicant paid this debt in January or February 2010. (Tr. 27-28, 47)

SOR ¶ 1.d alleges a collection account for \$920. (Tr. 28) Applicant paid this debt. (Tr. 29, 48)

SOR ¶ 1.e alleges a delinquent insurance debt for \$2,211. (Tr. 29-30) Applicant did not recognize this debt. (Tr. 30) He disputed it on his credit report, and it does not appear on his March 27, 2012 and April 18, 2013 credit reports. (Tr. 48; GE 5, 6)

Applicant has a non-SOR debt for \$15,000 relating to a repossessed vehicle. (Tr. 31, 40-41) The car did not have tags, and it was towed. (Tr. 31) It was sold at auction. (Tr. 31) He is in the process of setting up a payment plan with his credit counseling company to address this debt. (Tr. 32-33, 49) Applicant completed a personal financial statement (PFS). He described gross monthly salary of \$3,092, net monthly salary of \$1,960, and net monthly remainder of \$375. (GE 4 at 207)

Alcohol consumption

In 2006, Applicant was arrested for operating a vehicle while under the influence of alcohol (OUI) and some traffic offenses. (Tr. 33, 42-43; SOR ¶ 2.a; SOR response) In 2007, he was convicted of OUI, sentenced to pay a fine, and required to attend a six-week alcohol class. (Tr. 34; SOR ¶ 2.c) His driver's license was not suspended. (Tr. 34) He successfully completed the court-ordered class. (Tr. 35)

On December 19, 2010, Applicant was arrested for OUI and some traffic offenses. (Tr. 36-38, 43) He had alcohol on his breath, and he refused a breathalyzer test. (Tr. 43) In 2011, he pleaded no contest, and he was convicted of driving while impaired, a lesser offense. (Tr. 36-38; GE 2) He was sentenced to pay a \$200 fine and placed on 11 months of supervised probation and four years of unsupervised probation. (Tr. 37, 51, 53-54) His unsupervised probation was terminated in February 2012. (Tr. 37, 54) He paid his fine and successfully completed his probations. (Tr. 37, 53-54)

Applicant now limits his alcohol consumption. (Tr. 38) He does not drive after consuming alcohol. (Tr. 38)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Nothing in this decision should be construed to suggest that I based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

The SOR alleges security concerns under Guidelines F (financial considerations) and G (alcohol consumption).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his SF 86, credit reports, OPM interview, responses to DOHA interrogatories, SOR response, and statement at his hearing.

Some of Applicant’s debts became delinquent when he was unemployed several years ago. Applicant’s SOR alleges five delinquent debts, totaling \$48,883. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

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

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct in resolving his debts warrants full application of AG ¶¶ 20(a) and 20(b). Unemployment and insufficient income caused Applicant to have debts he could not afford to pay. His financial problems were affected by circumstances largely beyond his control. He made numerous child support payments and his two child support debts, totaling \$44,807, in the SOR are reduced by more than \$10,000. The two states collecting child support from Applicant are being paid at a rate that is satisfactory to the two states. He paid the debts in SOR ¶¶ 1.c and 1.d.

Application of AG ¶ 20(c) is warranted. Applicant received financial counseling, and he generated a PFS. His financial situation was damaged by unemployment. Although there is limited evidence of record that he established and maintained contact with his creditors,² his financial problem is being resolved or is under control. He promised to set up a payment plan using his debt counseling service to resolve his non-SOR car repossession debt, and based on his history of debt resolution, his promise is accepted as sincere and credible.

AG ¶ 20(d) is partially applicable. Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts, establishing some good

²"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

faith.³ AG ¶ 20(e) is applicable to the debt in SOR ¶ 1.e. He disputed this debt, and it was removed from his credit reports.

In sum, Applicant fell behind on his debts primarily because of insufficient income, due to unemployment. He paid two debts, successfully disputed one debt, and brought his child support debts to a satisfactory status with the state collection agencies. Applicant has a sufficient monthly remainder as shown by his PFS to maintain his financial responsibility. It is unlikely that financial problems will recur. His efforts are sufficient to fully mitigate financial considerations security concerns.

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

- (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;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

³The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b) to 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, did not violate any court orders, and did not have a relapse after a diagnosis of alcohol abuse or alcohol dependence. He did not suffer a relapse after being diagnosed as suffering from alcohol dependence. Binge alcohol consumption is not established.⁴

AG 22(a) applies because his excessive alcohol consumption resulted in arrests in 2006 and 2010, two convictions, and various penalties imposed by the courts.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

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

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

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

⁴Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>. There is no evidence of any consumption of alcohol since March 2, 2010.

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

AG ¶ 23(a), 23(b), and 23(d) apply. Applicant completed some alcohol-use classes in 2007 after his first OUI. He has not attended any intensive, inpatient alcohol rehabilitation or counseling programs. In 2010, he was arrested for OUI; however, he was convicted of the lesser offense of driving while impaired. He has changed and no longer drives after consuming alcohol. His alcohol consumption occurred “under such unusual circumstances,” as he no longer drives after consuming alcohol. Enough time has elapsed without alcohol-related problems to fully establish his alcohol consumption is under control, and his alcohol consumption no longer casts doubt on Applicant’s “current reliability, trustworthiness, or good judgment.”

AG ¶ 23(c) does not apply. Applicant is not currently enrolled in an alcohol-related counseling or treatment program.

Applicant has abstained from driving after consuming alcohol since December 2010. He drinks alcohol responsibly. There is no evidence of negative alcohol-related problems after December 2010. Alcohol consumption security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all 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. My comments under Guidelines F and G are incorporated into my whole-person analysis. Some of the factors

in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting denial of Applicant's access to classified information. Applicant had OUI arrests in 2006 and 2010. He had an OUI conviction in 2007, and a driving while impaired conviction in 2011. Applicant's credit reports and SOR allege five delinquent debts, totaling \$48,883, including \$44,807 in delinquent child support debt.

The evidence supporting approval of Applicant's clearance is more substantial than the evidence supporting denial. Applicant is a 41-year-old employee of a defense contractor, who has worked as a security officer for the same employer since August 2009. There is no evidence at his current employment of any disciplinary problems. He served in the Army Reserve from 1992 to 2000, and he left the Army as a private first class with an honorable discharge. He has never held a security clearance. There is no evidence of disloyalty or that he would intentionally violate national security. He has not had any alcohol-related problems since December 2010, and he responsibly consumes alcohol. He does not drive after consuming alcohol. He has five delinquent debts listed on his SOR. He successfully disputed one SOR debt; he paid two SOR debts; and two SOR debts are in established payment plans. His track record of delinquent debt resolution shows Applicant's current reliability, trustworthiness, and good judgment.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude approval of Applicant's access to classified information is clearly consistent with national security.

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 F: | FOR APPLICANT |
| Subparagraphs 1.a to 1.e: | For Applicant |
| Paragraph 2, Guideline G: | FOR APPLICANT |
| Subparagraphs 2.a to 2.c: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to approve Applicant's security clearance. Eligibility for access to classified information is approved.

MARK HARVEY
Administrative Judge