



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



In the matter of:)
)
) ISCR Case No. 10-10266
)
Applicant for Security Clearance)

Appearances

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

November 30, 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) on August 11, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on May 5, 2011, detailing security concerns under Guideline H, drug involvement, 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 May 17, 2011. He answered it in June 2011 and requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on July 27, 2011. I received the case assignment on August 3, 2011. DOHA issued a Notice of Hearing on October 7, 2011, and I convened the hearing as scheduled on October 25, 2011. The Government offered exhibits marked as GE 1 through GE 6, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits marked as AE A through AE F, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on November 1, 2011. I held the record open until November 9, 2011, for Applicant to submit additional matters. Applicant timely submitted AE G through AE O, which were admitted without objection. The record closed on November 9, 2011.

Procedural Rulings

Notice

Applicant received the hearing notice on October 19, 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. 12)

Motion to Amend

Department Counsel requested to amend the SOR to add allegations under Guideline F, financial considerations. Department Counsel previously forwarded the amendment to Applicant, who answered allegations 2.a and 2.b. Applicant did not object to the amendment. I granted the request to amend the SOR. (Tr. 10)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c and 2.b of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 2.a of the SOR.¹ After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

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).

Applicant, who is 43 years old, works as an engineering technician for a Department of Defense contractor. He began his employment in August 2010, after working 19 years in the agricultural industry and experiencing six months of unemployment.²

Applicant and his wife married in March 1993. They have three sons, who are 17, 14, and 7. His youngest son has been diagnosed with autism. His wife works as an accounts payable clerk.³

Financial

Applicant began his career in the agricultural industry when he started working in his father's business in 1991. In 2001, his father's company merged with another company. With the merger, Applicant assumed a job as a commissioned sales agent. He worked for this company from 2004 until February 2010, when his position was terminated. He remained unemployed for six months, which created financial problems.⁴

In 2002 or 2003, Applicant and his wife purchased a house and obtained a \$304,000 mortgage on the property. They later acquired a home equity loan for approximately \$92,000 to install a pool and "other fun stuff that he shouldn't be doing." In February 2010, Applicant listed his house for sale after he lost his job. He continued to pay the mortgage equity loan until December 2010, when he could no longer make these payments and pay other bills. He sold his house through a short sale in June 2011. The mortgage company accepted the short-sale price and forgave any remaining debt on both the mortgage and the equity loan. Applicant resolved the financial concerns identified in the SOR.⁵

Applicant currently earns approximately \$45,000 a year. His monthly income fluctuates depending upon several variables including overtime and the number of hazardous hours worked. His net monthly income in September 2011 totaled \$3,062 and his net monthly income in October 2011 totaled \$3,347. His wife earns \$23.12 an hour, but her work hours vary between 62 and 74 hours a pay period. Her net pay ranges from \$2,200 to \$2,500 a month. Applicant did not provide a budget. The credit reports of record reflect that he pays all his living expenses. His default on his mortgage and equity loan is his only negative financial obligation. He has sufficient income to pay his expenses, including the necessary monthly costs of therapy for his youngest son,

²GE 1; Tr. 26-27.

³GE 1; AE B; Tr. 25-26, 33.

⁴GE 1; 30-32.

⁵GE 3; AE D- AE F; Tr. 32-33.

which has declined from approximately \$500 a month in 2007 and 2008 to \$150 a month.⁶

Applicant's 2004 federal income tax return indicates a gross income of \$175,000 for the S Corporation formed in 2001 from his father's business. His 2009 W-2 shows a gross income for him of \$77,308. His W-2 for 2010 reflects a gross income of \$12,659. His tax returns for 2006 through 2009 show gross income between \$97,000 and \$113,000, which includes his wife's income, business income, and income from his retirement fund in 2009. In 2010, his income increased for a variety of reasons not related to salary.⁷

Drug Involvement

In July 2009, Applicant decided to experiment with the drug methamphetamine. He purchased the drug because it was available and did not think he would get caught. He knew where he could buy it. He used it twice more in the next month or so. On August 29, 2009, the Border Patrol arrested him for possession of drug paraphernalia after drug-sniffing dogs reacted to possible drugs in his car. The court later dismissed the charges against him for lack of evidence.⁸

Applicant cannot explain why he made this decision at age 40. The drug did not make him feel good; instead, it made him "turn around in circles", and he did not get much accomplished. He has not used any drugs since his arrest. Applicant signed an intent not to use drugs in the future and indicated he would voluntarily turn in his security clearance and resign his position, if he did.⁹

Applicant regrets this decision and will regret it for the rest of his life. He considers his decision poor judgment. He placed himself and his family in great turmoil for a time. He and his family worked through the problem and are closer now. Applicant stated that his oldest son learned what drug use can take from someone and that this lesson was the only good to come out of his conduct. Applicant lost his credibility, reputation, and trustworthiness, which is far greater than any physical losses.¹⁰

Applicant's employer has strong policies against drug and alcohol use. His employer conducts random drug tests. Since beginning his current job, he has been tested three times for drugs and has passed the tests. He is not concerned about failing a drug test as he is not using drugs. After his arrest, he attended Alcoholic Anonymous

⁶GE 5; GE 6; AE N; AE O; Tr. 25-28, 33-34.

⁷Applicant withdrew monies from his retirement fund to pay bills after he lost his job. Tr. 26-28.

⁸GE 2; Tr. 34, 41-42.

⁹GE 2; AE H; Tr. 34, 37.

¹⁰Tr. 35, 40-42.

and Narcotics Anonymous meetings. He learned a great deal of information about drugs and alcohol in these meetings, which convinced him that he does not want to be involved in drugs in the future. He has no contact with drug users.¹¹

Applicant submitted a letter of recommendation from the county sheriff. The sheriff is aware of his drug arrest. He has known Applicant for more than 40 years and knows him to be hard-working, honest, and trustworthy.¹²

I find that Applicant was a credible and forthright witness. He made no attempts to hide his behavior or make excuses for his conduct. His limited drug use did not impact his work or his finances. He accepted responsibility for his poor decision to use methamphetamines in 2009.

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 applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

¹¹*Id.* at 42-44, 46-47.

¹²AE G.

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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition); and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant purchased methamphetamines on three occasions for his personal use in July and August 2009. The above two disqualifying conditions apply.

AG ¶ 26 provides examples of conditions that could mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through 26(d), and the following is potentially applicable:

- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and,
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant does not associate with known drug users, and he does not seek to find methamphetamines. He last used this drug in August 2009, more than two years ago. His life centers around his family and his job, not a drug environment. He also signed an intent not to use drugs in the future, saying he would “voluntarily turn in his clearance and resign his job” if he did. This mitigating condition applies.

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 the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems after he lost his job in January 2010 and did not work for six months. He fell behind in his mortgage payments, which he did not pay. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and the following are potentially applicable:¹³

(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; and

(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.

Applicant lost his job in 2010, which created financial difficulties. He immediately put his house up for sale, but did not sell the house until June 2011. By December 2010, he could no longer continue with his mortgage payments and pay his other bills. By this time, he was unsure if he would be able to maintain his financial stability. Other than his mortgage debts, Applicant has paid his bills. He lives within his income. He sold his house through a short-sale, and the lenders have forgiven any balance due on his debts. He has resolved the financial concerns of the Government.

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

¹³ In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 200). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

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. At age 40, Applicant decided to experiment with methamphetamines for reasons he cannot explain. His decision to use this drug or any other illegal drug showed poor judgment, especially at age 40. After his arrest, he evaluated his conduct. He attended Alcoholics Anonymous and Narcotics Anonymous meetings, where he learned about the negative impact of drugs and alcohol in one's life. His conduct caused significant turmoil for his family and him, but they worked through the problem. His enhanced understanding of the impact of drugs on an individual and family influenced him and led to a decision not to use drugs in the future. The one positive outcome of his poor decision is that his 17-year-old son learned a valuable lesson about the negative impact of drugs. Applicant clearly understands he can never use drugs again. He credibly stated that he will turn in his clearance and quit his job if he does. His forthright testimony about his decision to use methamphetamines in 2009 and its impact on him and his family weighs heavily in his favor. His understanding of the problems he created by his poor judgment in 2009 reflect his evaluation of his conduct and a change in his attitude about drug use.

His financial problems arose from unemployment. He made the difficult decision to default on his mortgage because he could not remain financial solvency if he continued to pay his mortgage. He was able to sell his house, and the mortgage company has forgiven his remaining balance. He does and has paid all his other living

expenses and debts. He lives within his finances and has the ability to pay his bills. In balancing all the facts in this case, I find that Applicant has mitigated the Government's security concerns about his finances and past drug involvement.

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 past drug use under Guidelines F and H.

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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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