



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-01492

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

12/15/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to mitigate the security concern stemming from a history of financial problems. But he did not present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his record of alcohol-related criminal conduct, which includes a recent December 2016 arrest for driving under the influence of alcohol. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on November 12, 2014. This document is commonly known as a security clearance application. Thereafter, on September 20, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified

information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations based on a history of financial problems.

Applicant answered the SOR on November 4, 2016. He admitted most of the factual allegations. He also requested an in-person hearing before an administrative judge. The case was assigned to me on February 7, 2017. While the case was pending hearing, Department Counsel amended the SOR to add allegations of misconduct under Guideline G for alcohol consumption and Guideline J for criminal conduct. Two allegations are alcohol-related incidents alleged under both guidelines. The third allegation is drug-related incident alleged under Guideline J. He answered the amended SOR on April 10, 2017, admitting the allegations with explanations.

The hearing took place as scheduled on April 26, 2017. Applicant appeared without counsel. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Exhibits 1-11 and A-J, respectively. Of note, Exhibit 10 was admitted but certain matters at pages 4, 5, and 6 were struck and not admitted. The hearing transcript (Tr.) was received on May 4, 2017.

The record was also kept open for 30 days until May 26, 2017, to allow Applicant to present additional documentation. Three additional documents were timely received. And without objection by Department Counsel, those matters are made part of the record as Exhibits K, L, and M.

Findings of Fact

Applicant is a 32-year-old employee who is seeking to retain a security clearance previously granted to him. He works as an engineering technician for a federal contractor. He has worked for a series of federal contractors since 2009. He has never married and has no children, although he has lived with a cohabitant since 2011. He has attended several community colleges going back to 2003, but he has not received a degree or certificate. He is currently a part-time student in a community college.

Concerning the financial matters, the SOR alleged the following: (1) state and federal tax problems consisting of failure to timely file state income tax returns for 2010, 2011, and 2012, failure to timely file a federal income tax return for 2012, and back taxes owed to the IRS in the amount of \$473 for tax year 2013; (2) six student loan accounts (one private and five federal loans) in collection for a total of about \$24,264; and (3) two minor collection accounts for \$389 and \$41. Applicant presented extensive documentation showing that he has addressed these matters.

First, Applicant explained that he worked with a tax preparer to address the past-due returns and learned he was delinquent with the state for 2011 and 2012, but not 2010.¹ He filed the state returns in early 2017, agreed to a payment plan in late 2016 to resolve a balance of \$272 for tax years 2011 and 2012, and completed the payment

¹ Tr. 51.

plan in early 2017.² He filed his past-due 2012 federal return in February 2017, which shows a small refund due, and he presented an IRS account transcript for 2013 showing an account balance of \$0.³ He explained that he became delinquent on his tax obligations due to inattention.⁴

Second, he paid in full the private student loan in March 2017.⁵ For the five federal student loans, the creditor placed those loans into deferment as of September 2016 based on his half-time study in community college.⁶ The total amount deferred was \$19,336. His deferment request was approved through May 30, 2019, but his goal is to complete his degree in 2018, which would accelerate the deferment's termination.⁷ He explained that he fell behind and defaulted on his student loans because he was not earning enough money to afford the loan payments.⁸

Third, Applicant paid in full the two minor collection accounts for \$389 and \$41 in March 2017 and May 2016, respectively.⁹

Concerning the criminal matters, Applicant has been arrested and charged with misdemeanor crimes on three occasions between 2007 and 2016. He was arrested the first time in March 2007 and charged with two counts of driving under the influence of alcohol (DUI). The case was resolved when he pleaded guilty to a new charge of reckless driving and paid a fine, and the DUI charges were dismissed.¹⁰

Applicant was arrested the second time the following day in March 2007 and charged with failure to appear and possession/use of marijuana. This incident happened at a house party that drew the attention of the local police, who, when they arrived, found marijuana in his apartment. He explained that the marijuana did not belong to him, but it was his apartment and so he was arrested and charged. The case was resolved after he paid a fine and completed a one-day drug-awareness class, and the charges were dismissed.¹¹

² Exhibits A, C, E, and L.

³ Exhibits B and D.

⁴ Tr. 71-72.

⁵ Exhibits H, I, and M.

⁶ Exhibits A and G.

⁷ Tr. 56-57.

⁸ Tr. 72.

⁹ Exhibits F and A.

¹⁰ Exhibit 8.

¹¹ Exhibit 8.

Applicant was arrested the third time in December 2016 and charged with two counts of DUI as well as a count of civil speeding.¹² At the hearing, he admitted making a dumb and foolish mistake, as he was speeding after drinking a total of three beers and a one drink of bourbon or whiskey over four to five hours.¹³ He also explained he was then serving a 30-day suspension of his driver's license with the option of applying for a provisional license for employment, medical, and similar purposes. He is represented by a private attorney, and the two DUI charges and the speeding violation were pending in state court as of May 2017.¹⁴

Applicant presented seven letters of recommendation on his behalf.¹⁵ Collectively, the seven character witnesses describe Applicant as a highly capable, trustworthy, dependable, honest, and hard-working person who is suitable for a security clearance.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.¹⁶

It is well-established law that no one has a right to a security clearance.¹⁷ As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁸ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁹ The Appeal Board has

¹² Exhibits 9 and K.

¹³ Tr. 87-88.

¹⁴ Exhibit K.

¹⁵ Exhibit J.

¹⁶ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹⁸ 484 U.S. at 531.

¹⁹ 484 U.S. at 531.

followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁰

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²¹ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁶

Discussion

Under Guideline F for financial considerations, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

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 or sensitive information.²⁷

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²¹ Directive, ¶ 3.2.

²² Directive, ¶ 3.2.

²³ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁴ Directive, Enclosure 3, ¶ E3.1.14.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ Directive, Enclosure 3, ¶ E3.1.15.

²⁷ AG ¶ 18.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

AG ¶ 19(a) inability to satisfy debts;

AG ¶ 19(c) a history of not meeting financial obligations;

AG ¶ 19(f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. With that said, the evidence shows that his history of financial problems is being resolved and is under control. He resolved the state and federal tax matters by filing the past-due returns and paying the back taxes. He resolved the student loans by payment in full of one loan and deferment of the others. And he paid in full the two minor collection accounts as well. Overall, Applicant presented reliable documentation showing that he takes his financial obligations seriously, that he is making a good-faith effort to repay his delinquent debts, and that a similar problem is unlikely to recur.

The same cannot be said for Applicant's police record during 2007-2016, which includes both drug-related and alcohol-related arrests and charges. The alcohol consumption and criminal conduct matters are discussed together because they are largely based on the same set of facts and circumstances. In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent under Guidelines G and J, respectively:

AG ¶ 22(a) alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

AG ¶ 22(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

AG ¶ 23(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 judgment;

AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

AG ¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The evidence supports a conclusion that Applicant has a problematic police record since 2007, when he was arrested and charged with alcohol- and drug-related misdemeanor offenses. More recently in December 2016, he was arrested and charged with two counts of DUI, and the charges were pending in state court as of May 2017, when the record in this case closed. Taken together, his police record over the last decade constitutes a pattern of failure to conform his behavior to the law, which suggests he is not a good candidate for eligibility for access to classified information.

With that said, I am no longer concerned about the 2007 misdemeanor marijuana charge that was dismissed. There is no other evidence of drug-related criminal conduct, which suggests that a repeat of similar conduct is unlikely. Accordingly, the allegation in SOR ¶ 3.b is decided for Applicant.

Turning to the other matters, I considered the mitigating conditions noted above and none are sufficient to decide this case in Applicant's favor. The evidence shows Applicant has been a problem drinker who exercised poor judgment when he was under the influence of alcohol. This is established by arrests for DUI offenses nine years apart, a conviction for reckless driving in 2007, and the most recent December 2016 arrest, which resulted in two counts of DUI that are pending in state court. In other words, the separate incidents of DUI cannot be viewed in isolation because they are part of a larger pattern or habit or practice of drinking-and-driving.

Applicant was contrite and respectful during the hearing, and he described the recent DUI arrest as a dumb and foolish mistake. His willingness to accept responsibility

for his exercise of poor judgment is certainly a step in the right direction. Nevertheless, it is too soon to tell if his days of drinking-and-driving are truly behind him. Given his record of alcohol-related criminal conduct, additional time is necessary in order for Applicant to establish that he can consume alcohol in a responsible fashion and be a law-abiding person. This is especially so given that the most recent DUI offenses were yet to be adjudicated in state court as of May 2017, when the record in this case closed. Simply put, an applicant who is pending criminal charges is not a good candidate for access to classified information.

Applicant's record of alcohol-related criminal conduct creates serious doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a-1.k:	For Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline J:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge