



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 11-00483
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

10/25/2012

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Personal Conduct and Financial Considerations concerns. He was involved in an alcohol-related accident while on duty in 2010 and continues to deny he was drinking prior to the accident. His credit card has been in collection status since 2009 and he has yet to take any concrete action to resolve the debt. Clearance is denied.

**Procedural History**

On March 16, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR), notifying him that it was unable to grant him a clearance because information from his background investigation raised the security concerns under Guideline E (Personal Conduct) and Guideline F (Financial Considerations).<sup>1</sup> Applicant's Answer, wherein he requested a hearing, was received by DOHA on April 18, 2012.

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<sup>1</sup> DOHA took this action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense*

On September 1, 2012, Department Counsel indicated the Government was ready to proceed with a hearing. I was assigned the case on September 7, 2012. After coordinating with the parties, I scheduled the hearing for October 4, 2012.<sup>2</sup>

At hearing, Department Counsel offered Government Exhibits (GE) 1 – 8, which were admitted without objection. Applicant testified and offered Applicant's Exhibit (AE) A – B, which were also admitted without objection. At the conclusion of the hearing, I left the record open to provide the parties an opportunity to submit additional matters for my consideration. Applicant submitted a letter from his attorney, dated October 16, 2012, which was admitted, without objection, as AE C.<sup>3</sup> The transcript (Tr.) was received on October 12, 2012.

### **Findings of Fact**

Applicant is a 52-year-old truck driver working for a DoD contractor since August 2010. He has been with his wife for nearly 25 years and they have two adult children. His financial trouble started four to five years ago when his wife got sick and could no longer work. Applicant's previous employer then cut back on his hours and his pay decreased by about half. Applicant started using his credit card to pay the bills and then eventually stopped paying his credit card bill. His credit card account is currently in collection status, with a balance of a little over \$9,000. (Tr. at 26-27, 52, 69-76; GE 1)

In September 2010, Applicant told an investigator conducting his background interview that he had already contacted the creditor for the delinquent credit card account and was in the process of settling the debt. He told the investigator that he would start repaying the debt by November 2010. (GE 2, *Subject Interview*) In December 2011, Applicant informed DOHA that he had hired counsel and that his counsel was attempting to work out a repayment plan with his creditor to resolve his delinquent credit card account "ASAP." (GE 2 at 1)<sup>4</sup> Applicant's attorney has advised Applicant and his wife not to pay their debts because they are "judgment proof," and the statute of limitations on their delinquent accounts will expire in about 10 months. (AE C) Applicant's wife's medical bills total between \$75,000 and \$100,000. Applicant's delinquent credit card remains unresolved. (Tr. at 52-56, 71, 76; Answer)

Prior to starting with his current employer, Applicant worked for another trucking company from 2006 to 2010. In February 2009, Applicant received a written warning for purportedly making an indecent comment to a woman at one of his delivery locations. Applicant denies he actually made any such comment and claims that the woman was

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*Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

<sup>2</sup> Applicant waived the 15-day notice requirement. (Tr. at 8-9)

<sup>3</sup> The Government did not submit additional matters and the record closed on October 19, 2012.

<sup>4</sup> See also GE 3 ("We are working with our lawyer to consolidate bills and work out a payment plan and hopefully avoid bankruptcy.")

the sexual aggressor. Applicant was led to believe by his former employer that they were issuing him a written warning to quell a client's complaint and not due to any actual misconduct on his part. (Tr. at 27, 40, 69; GE 1; GE 6)

In May 2010, at approximately 1030, Applicant was involved in a traffic accident while on duty and driving a truck for his former employer. It is unclear who was at fault in the accident. The police investigated the accident and, while questioning Applicant, smelled alcohol on his breath. Applicant agreed to take a field sobriety test and a breathalyzer at the scene. Applicant's blood alcohol content (BAC) at the scene was a .069. Applicant was arrested for driving a commercial vehicle under the influence of alcohol (DUI). At approximately 1300, Applicant's blood was drawn at a local hospital and it was tested for the presence of alcohol. Applicant's lab results registered a BAC of .066. Applicant went to trial and, after hearing the police officer's testimony, a judge dismissed the DUI charge. (GE 5; Tr. at 29-35, 61-65) Applicant was told by his attorney that he would not have to disclose this information on future job applications, because he had not been convicted of the charge. (Tr. at 44-46) During his background interview and at hearing, Applicant claimed that the only alcohol he consumed prior to the accident was two to three beers the night before, while mowing his lawn. (Tr. at 12-13, 30-31, 56-57; GE 2) Applicant has had no other alcohol-related incidents and is subject to no-notice alcohol and drug testing at his current job. (Tr. at 50, 67-69)

Applicant was fired by his former employer two days after he was arrested on the DUI charges. (GE 6; Tr. at 27-28, 61, 81-82) Applicant did not list his adverse employment history and his DUI charge on his security clearance application (SCA). (GE 1; Tr. at 35-50, 61) Applicant explained that his omission of this adverse information was unintentional. This was Applicant's first SCA. Applicant's only prior experience in filling out such forms were with job applications for truck driver positions that are at most two pages in length and do not require the detail asked for in a SCA. (Tr. at 57, 65-67) Applicant readily admits, and it was clearly apparent at hearing, that he is "not very good at paper work." (Tr. at 46) Applicant filled out the SCA to the best of his knowledge and belief, and disclosed adverse information to questions that he understood, including revealing his delinquent credit card account. (GE 1 at 39)

Applicant's current employment is over 1,100 miles from his home. His stepmother has moved in with his wife to help reduce expenses. He does not own a vehicle and lives in a motel that is provided to him by his employer. He lives modestly, shopping at the local Walmart for his groceries and other necessities. He has seen his wife twice this past year. He is trying to make as much money as possible to pay his debts. He sends his wife his paycheck and she is responsible for managing the couple's finances. (Tr. at 57-60, 71-73) Applicant's current supervisor, who has known him for the past two years, writes that Applicant is "dependable, reliable, hard-working, trustworthy, and very helpful." (AE A)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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 Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b).

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. Decisions regarding an applicant's suitability include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline E, Personal Conduct**

The personal conduct concern is set forth at AG ¶ 15:

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.

The guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 16. Applicant's purported dishonesty on his SCA and misleading statements during his background investigation invokes AG ¶¶ 16(a)<sup>5</sup> and 16(b).<sup>6</sup> His alcohol-related incident and purported workplace misconduct raise the applicability of AG ¶ 16(c).<sup>7</sup>

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA. An applicant should disclose any potential derogatory information. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified his or her SCA. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.<sup>8</sup>

Applicant did not deliberately fail to disclose his DUI charge and adverse employment information on his SCA. He is not a sophisticated individual and this was his first application for a security clearance. He genuinely did not believe the omitted information had to be disclosed in response to the relevant questions at issue. His misunderstanding was partly attributable to his attorney's prior advice that the DUI charge did not need to be listed on future employment applications because he had not been convicted of the charge. SOR ¶¶ 1.a – 1.d are decided in Applicant's favor.

Applicant's purported indecent comment in February 2009 does not raise a security concern. After observing Applicant's demeanor while he testified and after questioning him myself, I found his denial of said misconduct credible. Moreover, assuming such reprehensible conduct did occur, the incident took place nearly four years ago and there have been no further incidents of a similar nature. SOR ¶ 1.g is decided in Applicant's favor.

Applicant's 2010 alcohol-related accident while on duty appears to have been a one time, isolated incident. Furthermore, Applicant has been subject to no-notice alcohol and drug testing for the past two years at his current job without recurrence of a

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<sup>5</sup> 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.

<sup>6</sup> Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

<sup>7</sup> 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 safeguard protected information.

<sup>8</sup> See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

similar incident.<sup>9</sup> However, Applicant denied during his background interview and at hearing that he had consumed alcohol prior to the accident. Applicant's claim is contradicted by the overwhelming weight of the evidence. Specifically, the observations of the police officers who arrested him at the scene and the breathalyzer results that showed he had far more alcohol in his system than would be expected of an individual who had supposedly consumed just two to three beers, some 12 or more hours before the accident. Applicant submitted no evidence to refute the Government's evidence.<sup>10</sup> Applicant's refusal to accept responsibility for his actions that led to the accident demonstrates that he is not rehabilitated and the mere passage of time alone does not mitigate his conduct. Moreover, Applicant's misleading statements during his background investigation that he only had two to three beers to drink the night before the accident raises concerns about his credibility. Applicant was given ample opportunity at hearing to correct this misleading information, but he continues to claim that the only alcohol he drank prior to the accident was the night before while mowing his lawn. Consequently, SOR ¶¶ 1.e, 1.f, and 1.h are decided against Applicant. In addition, I find that AG ¶¶ 16(b) and 16(c) apply and none of the mitigating conditions under AG ¶ 17 apply. Applicant failed to mitigate the personal conduct concern.

## **Guideline F, Financial Considerations**

The security concern relating to financial problems is articulated at 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.

One aspect of the concern is that an individual who is financially overextended may be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Applicant's delinquent credit card account raises this concern and establishes the following disqualifying conditions under AG ¶ 19:

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<sup>9</sup> See AG ¶ 17(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." I specifically considered this mitigating condition and, for the reasons noted above, do not find it is warranted in this case.

<sup>10</sup> Although the DUI charge was dismissed, Applicant failed to submit proof that such dismissal was based on a finding of actual innocence or proof of actual innocence. ISCR Case No. 08-09337 at 2 (App. Bd. Oct. 16, 2009) (due to the different burdens of proof, DOHA judges are not bound by a not guilty verdict). See *also* ISCR Case No. 11-03025 at 2-3 (App. Bd. Jan. 6, 2012) (even though there was no conviction and applicant denied the SOR allegation, DOHA judge properly found applicant committed alleged criminal offense based on evidence at hearing); ISCR Case No. 11-00391 at 3 (App. Bd. Dec. 1, 2011) ("Once an applicant's SOR admissions and/or the Government's evidence raise a security concern, the burden of persuasion shifts to the applicant to mitigate the concern.")

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

However, an applicant's past or current indebtedness is not the end of the analysis, because "[a] security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness."<sup>11</sup> Accordingly, Applicant may mitigate the financial considerations concern by establishing one or more of the mitigating conditions listed under AG ¶ 20. The relevant mitigating conditions are:

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

Applicant's financial problems are primarily due to matters beyond his control, namely, his wife's medical issues that resulted in her inability to work and mounting medical debts. Applicant used his credit card to pay their expenses. When he was unable to pay his debts, Applicant sought legal counsel who advised him not to pay his bills, including his delinquent credit card account. Even after Applicant was advised of the Government's concerns regarding his delinquent credit card account, his attorney continued to advise him not to pay the debt because his overdue creditor would soon be without legal recourse to force him to pay it. This aspect of Applicant's case is admittedly a close call, especially in light of the sacrifices Applicant has made to provide for his family and the non-frivolous nature of the overdue debt at issue. However, Applicant has been gainfully employed for the past two years and submitted no evidence of having made a good-faith effort to repay his delinquent credit card account. Applicant's decision not to pay his financial obligation leaves me with doubts as to whether he would similarly disregard his security obligation if provided advice that would presumably absolve him of such responsibility. I must resolve such doubt in favor of

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<sup>11</sup> ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See also ISCR Case No. 09-07916 at 3 (App. Bd. May 9, 2011).

national security. AG ¶ 2(b). Accordingly, I find that Applicant failed to mitigate the financial considerations concern and his financial situation remains a concern.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>12</sup> Applicant is a hard working individual who is dedicated to his family and his job. He has been entrusted with sensitive information and cargo over the past two years without incident. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a – 1.d and 1.g:	For Applicant
Subparagraphs 1.e, 1.f, and 1.h:	Against Applicant
Paragraph 2, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is hereby denied.

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Francisco Mendez  
Administrative Judge

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<sup>12</sup> The non-exhaustive list of adjudicative factors are: (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.