



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 14-05640
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro se*

01/28/2016

Decision

HOGAN, Erin C., Administrative Judge:

On April 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations, and Guideline J, Criminal Conduct. 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 (AG) effective within the Department of Defense after September 1, 2006.

On May 27, 2015, Applicant answered the SOR and requested a decision on the record. Department Counsel issued a File of Relevant Material (FORM) on September 2, 2015. Applicant received the FORM on September 25, 2015. He had 30 days from his receipt of the FORM to submit additional information in response to the FORM. Applicant did not submit a response to the FORM. On November 4, 2015, the FORM was forwarded to the Hearing Office and assigned to me on November 9, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings on Evidence

Item 9 of the FORM is a portion of the Report of Investigation (ROI) from Applicant's background investigation. It is a summary of Applicant's Personal Subject Interview completed by the investigator conducting his background investigation on April 24, 2014. It is unsworn and unauthenticated. DOD Directive 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte* because Item 9 is not properly authenticated. Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule because he more than likely was unaware of the rule. Waiver means "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, editor-in-chief, 9th ed., West 2009).

Applicant was not expressly informed of the requirement in ¶ E3.1.20 of the Directive. I cannot conclude he expressly waived this rule because he did not submit a response to the FORM. In accordance with the Directive, Enclosure 2, ¶ E3.1.20, Item 5 is not admissible and will not be considered in this Decision because the document is not authenticated.

Findings of Fact

In his response to the SOR, Applicant admits the SOR allegations. (Item 2)

Applicant is a 33-year-old employee who is seeking to obtain a security clearance. If he obtains a security clearance, he will be hired by the DOD contractor who is sponsoring him for the clearance. The highest level of education he has achieved is an associate's degree. Applicant has also taken additional college course work. He is currently unemployed pending approval of his security clearance. From December 2013 to March 2014 and from February 2013 to October 2013, he was a self-employed car mechanic. From January 2012 to January 2013, he was unemployed. He was also unemployed between August 2007 to February 2008. He is single and has no children. He lives with his parents. (Item 4)

On March 24, 2014, Applicant submitted an electronic questionnaire for investigation processing (e-QIP). Applicant listed that he had several arrests in response to Section 22 – Police Record and some delinquent debts in response to Section 26 – Financial Record. (Item 4) A subsequent background investigation verified this information.

Financial Considerations

Applicant has 15 delinquent accounts totaling approximately \$52,842. The debts include: a \$23,486 automobile loan that was charged off (SOR ¶ 2.a: Item 6 at 3; Item 8 at 4); a \$11,678 debt owed to a technical institute that was charged off (SOR ¶ 2.b: Item 6 at 3; Item 8 at 4); a \$3,248 charged off credit card account (SOR ¶ 2.c: Item 6 at 4; Item 7 at 2; Item 8 at 4), a \$3,537 student loan account placed for collection (SOR ¶ 2.d: Item 8 at 3); six medical accounts in the amounts of \$187, \$163, \$55, \$37, \$36, and \$31 placed for collection (SOR ¶¶ 2.e, 2.k – 2.o: Item 6 at 9-10; Item 7 at 2); a \$2,466 account placed for collection (SOR ¶ 2.f: Item 6 at 6, Item 7 at 2, Item 8 at 5); a \$2,456 account that was charged off (SOR ¶ 2.g: Item 2 at 2); a \$4,551 account placed for collection (SOR ¶ 2.h: Item 6 at 8); a \$649 utility account placed for collection (SOR ¶ 2.i: Item 6 at 8); and a checking account debt placed for collection (SOR ¶ 2.j: Item 6 at 9).

In his response to the SOR, Applicant states the debts alleged in SOR ¶¶ 2.a, 2.c, and 2.f - 2.i were incurred when he had a job. He was unable to pay his debts once he lost his job. He intends to begin repaying these bills when he becomes employed. The debts alleged in SOR ¶¶ 2.b and 2.d were for college expenses. He did not complete the courses, but was charged anyway. At one time, he did have a payment plan for his educational loans. He intends to pay the debts in the future. (Item 2 at 4)

Applicant claims the medical bills in SOR ¶¶ 2.e, and 2.k – 2.o, were medical expenses he incurred in a car accident. He mentioned that a lawyer is going to pay them. He did not provide any additional information or documentation regarding this matter. With regard to the debt alleged in SOR ¶ 2.j, he had an insufficient funds check on his account after he lost his job. (Item 2 at 4-5)

Applicant states that he will repay his debts once he becomes employed. He has learned a good lesson as a result of the mistakes he made in life. (Item 2 at 5)

Criminal Conduct

Applicant was arrested on three occasions between May 2003 and February 2013. On May 14, 2003, he was arrested for Assault Causing Bodily Injury. Applicant plead guilty. He received deferred adjudication. The charge was dismissed after completion of community service, probation, and payment of a fine. (SOR ¶ 1.c: Item 4 at 36-37; Item 5)

On December 31, 2011, he was arrested for Driving While Intoxicated. In his answer to the SOR, Applicant admits he was pulled over by the police after driving a friend home. He admits that a bench warrant was issued because he failed to show in court. He states he was working out of the area and was not aware of the court date. He has never missed a court date since that day. (SOR ¶ 1.a: Item 2 at 4; Item 4 at 33; Item 5)

In February 2013, Applicant was arrested for Driving Under a Suspended License. He plead guilty, paid a fine, and completed unsupervised probation. Applicant claims he did not know his license was suspended. He believed his attorney took care of it. He fulfilled the terms of his punishment. (Item 2 at 4; Item 4 at 36-37)

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 must be considered when determining 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to 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 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.

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.

The guideline notes several disqualifying conditions that could raise security concerns. I find AG ¶ 19(a) (an inability or unwillingness to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations) apply to Applicant's case. Applicant has encountered financial problems for several years. He was unable to pay his bills because he was unemployed or did not earn enough income.

An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to pay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions potentially apply:

AG ¶ 20(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);

AG ¶ 20(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);

AG ¶ 20(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);

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

AG ¶ 20(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)

Of the mitigating conditions under Guideline F, only AG ¶ 20(b) partially applies. Applicant has endured several periods of unemployment which led to his debts becoming delinquent. He has been unable to resolve the debts because he does not have sufficient income. None of the other mitigating conditions apply. Applicant may become more financially stable in the future, but at this time his financial situation is not under control.

Guideline J, Criminal Conduct

The security concern for Guideline J, Criminal Conduct, is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 lists disqualifying conditions that could raise a security concern. The following apply to Applicant's case:

AG ¶ 31(a) a single serious crime or multiple lesser offenses; and

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The above disqualifying conditions apply because Applicant was arrested and charged on three occasions for multiple offenses between May 2003 to February 2013.

AG ¶ 32 lists the conditions that could mitigate security concerns under criminal conduct. The following mitigating conditions apply to Applicant's case:

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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's last arrest occurred close to three years ago and there is no evidence of recent criminal behavior. I also considered Applicant's expression of remorse in his response to the SOR as well as his efforts to obtain full-time employment. There is evidence of successful rehabilitation. Security concerns under Criminal Conduct 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Several periods of unemployment adversely affected Applicant's finances. He initially ran up the debts because he could not pay his bills. At present, he is unable to repay his delinquent debts because of lack of income. The security concerns remain under Financial Considerations. Applicant mitigated the Criminal Conduct concerns because he has not been arrested since February 2013. His expressed remorse in his Answer to the SOR and the lack of a recent arrest record indicate evidence of rehabilitation.

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 J:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a – 2.o:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge