



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



In the matter of:)	
)	
)	ISCR Case No. 14-00787
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire

September 30, 2014

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on December 28, 2012. On April 24, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, E and F for Applicant. 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.

Applicant acknowledged receipt of the SOR on May 10, 2014. He answered the SOR in writing through counsel on May 17, 2014, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on July 21, 2014. I granted Applicant’s request for a delay until the “first week in September” 2014, in order for his counsel to be available. DOHA issued a notice of hearing on August 14, 2014,

and I convened the hearing as scheduled on September 3, 2014. The Government offered Exhibits (GXs) 1 through 8, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through G, which were received without objection. Applicant also submitted an Appeal Board Decision, which was admitted as Appellate Exhibit 1 DOHA received the transcript of the hearing (TR) on September 16, 2014. The record closed on September 3, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraph 1.a., of the SOR, with explanation. He denied the factual allegations in Subparagraphs 2.a. and 3.a.~3.d. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

Applicant is 68 years old, and held a security clearance without any violations whatsoever from 1982 to 2003, more than 20 years. (TR at page 47 line 16 to page 50 line 1.) He lost his security clearance as a result of the following circumstances:

1.a. and 2.a. On at least two occasions prior to the incident in question, one at the behest of his employer and the other at the behest of his employer's parent company, Applicant worked on projects outside of his employment, and for his own personal gain. (TR at page 69 line 6 to page 77 line 13, at page 109 line 21 to page 111 line 14 and AppX D at page 1.)

In 2000, Applicant was approached by one of his employer's subcontractors, seeking Applicant's help and expertise in supplying a product to Applicant's employer. (TR at page 50 line 2 to page 69 line 5.) Applicant testified that he received permission from his "boss" to help the subcontractor, and again it was for his own personal gain. (*Id.*, and TR at page 78 line 7 to page 79 line 20.) This is corroborated by a statement from Applicant's co-defendant, and by an unsigned "Outside Interests Or Activities Disclosure" from Applicant and from his co-defendant to their employer. (AppX D at pages 2~4.) They supplied the product to the subcontractor, but were not paid. They persisted in seeking payment for their work; and as a result, the subcontractor claimed it was being extorted. (TR at page 50 line 2 to page 69 line 5.)

As a result, in October of 2003, Applicant was arrested for felony Extortion through Threat of Economic Harm, felony Aiding and Abetting, and Wire Fraud. (GX 3 and 4.) Applicant's "boss" denied giving any permission; and as a result, in January of 2005, Applicant pled Guilty to one count of felony Aiding and Abetting, and Wire Fraud. (*Id.*, TR at page 117 line 13 to page 120 line 13, and at page 127 line 22 to page to page 128 line 3.) Before sentencing was imposed, the Judge averred, in part, the following:

THE COURT: . . .The crime [is] system wire fraud. And the fraud, as I see it, consists in not revealing to their employer that they were breaching the employer's internal rules. So it's like a breach of contract.

MS. . . . [Federal Prosecutor] Yes, your Honor.

THE COURT: So it's a breach case, except that they used the wires in order to facilitate the breach of contract. (AppX C at page 9.)

Applicant was placed on probation for three years, ordered to perform 200 hours of community service, and fined about \$30,000. (GX 4.) He performed his community service, paid his fine, and was released from probation in January of 2008, as evidenced by the court's records. (AppX D at pages 5~6.)

Guideline F - Financial Considerations

As a result of the above conviction, Applicant left his employer of over 20 years, tried to start his own business; but operated "in the red," making no money. (TR at page 86 line 12 to page 87 line 11.) He was forced to "live off . . . [his] 401(k)," which caused his incurring tax penalties. (TR at page 87 lines 12~23.) This, coupled with "\$60,000" in attorney fees, and the crash of the housing market in 2008, caused Applicant serious financial difficulties. (TR at page 88 line 3 to page 90 line 18, and at page 101 lines 8~24.) He has now paid all of his past-due debts and has a positive monthly cash flow of about \$4,363. (TR at page 95 line 20 to page 97 line 13, and AppX A at page 16.)

3.a. Applicant denies that he owes the Internal Revenue Service (IRS) about \$13,727 in unpaid taxes for tax years 2010~2012. He paid the taxes for tax year 2010 in July of 2012, for tax year 2011 also in July of 2012, and for tax year 2012 in July of 2013, as evidenced by documents from the IRS. (AppX A at pages 1~3.) He is currently in good standing with the IRS as evidenced by another document from the IRS. (TR at page 92 line 11 to page 93 line 25, and AppX A at page 4.)

3.b. Applicant denies that he owes a county tax assessor about \$13,483 in unpaid property taxes for 2012. This tax was paid in April of 2014, prior to the issuance of the SOR, as evidenced by a letter from that county's tax assessor. (TR at page 94 lines 1~13, and AppX A at page 7.)

3.c. Applicant denies that he owes State A's taxing agency about \$13,322 in unpaid taxes for tax years 2006~2009. A Certificate of Compliance Letter of Good Standing shows that he "has filed and paid all taxes due," as evidenced by a document from State A's taxing authority. (TR at page 94 lines 14~23, and AppX A at page 12.)

3.d. Applicant denies that he owes State B's taxing agency about \$1,451 in unpaid taxes for tax years 2007 and 2010. Documentation from State B shows that he not only has no balance due for the two tax years at issue, but he also has no balance

due for any tax year whatsoever. (TR at page 94 at line 24 to page 95 line 19, and AppX A at pages 13~15.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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 Paragraph 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible "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 J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that “*a single serious crime or multiple lesser offenses,*” may raise security concerns. Applicant pled guilty to Aiding and Abetting, and Wire Fraud in 2005. However, this is clearly countered by the mitigating condition in Subparagraph 32(a) as “*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.*” Applicant’s Criminal Conduct was more than ten years ago, and the circumstances surrounding that conviction are unlikely to recur.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(d), “*credible adverse information that . . . may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment . . . This includes but is not limited to consideration of: (4) evidence of significant misuse of . . . employer’s time or resources,*” may be disqualifying. Applicant, without the proper permission, worked with his employer’s subcontractor. However, this is clearly countered by the mitigating condition in Subparagraph 17(c) as “*the offense is so minor, or so much time has passed, or the behavior is so infrequent, 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.*” Again, the Applicant’s

misconduct occurred more than ten years ago, and the circumstances surrounding that conduct are unlikely to recur.

Guideline F - Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in Paragraph 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 conditions that could raise security concerns. Under Subparagraph 19(a), an *"inability or unwillingness to satisfy debts"* is potentially disqualifying. Similarly under Subparagraph 19(c), *"a history of not meeting financial obligations"* may raise security concerns. Applicant has had difficulty meeting his financial obligations. However, I find two countervailing Mitigating Conditions that are applicable here. Under Subparagraph 20 (b), it may be mitigating where *"the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn . . .), and the individual acted responsibly under the circumstances."* Applicant's past-due indebtedness is directly attributed to his 2005 conviction, which resulted in his loss of employment, his failed business, and to the 2008 housing market crash. Under Subparagraph 20 (d), it may also be mitigating where *"the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."* Applicant has paid all of the alleged debts.

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. Under AG Subparagraph 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 Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Those who know the Applicant in his community and in the workplace speak most highly of the Applicant. (TR at page 9 line 2 to 26 line 5, and AppX E.) This is evidenced by the testimonies of his former section leader, of a former a former colleague, and by 13 letters of recommendation. All are most laudatory as to his truthfulness and trustworthiness. (*Id.*) Thus, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his admitted Criminal Conduct, and his alleged Personal Conduct and Financial Considerations.

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
Subparagraph 1.a.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraphs 3.a.~3.d.:	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.

Richard A. Cefola
Administrative Judge