



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



In the matter of:)
)
-----) ISCR Case No. 07-02785
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Department Counsel
For Applicant: J. Hatcher Graham, Esq.

March 6, 2009

Decision

TESTAN, Joseph, Administrative Judge:

On February 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guidelines F, G and J. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 24, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on October 22, 2008. Applicant filed a response to the FORM on December 16, 2008. The case was assigned to me on January 6, 2009. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 42 year old employee of a defense contractor.

Applicant is indebted to DISCOVER CD on a credit card account that has been placed for collection in the approximate amount of \$18,267.00. This debt has been delinquent since at least March 2006. In his response to the FORM, applicant's attorney stated that applicant contacted the law firm handling the collection and arranged for a payment plan to liquidate the debt. He further stated applicant "has been, and continues to make the payments in accordance with this plan." Attached to the FORM response was a July 31, 2008 letter from the creditor's law firm confirming a repayment plan requiring applicant to make monthly payments of \$450.00, beginning in August 2008. Although by the time the response to the FORM was submitted applicant should have made at least four payments to the creditor pursuant to the agreement, no credible evidence was offered to show that applicant made any of the \$450.00 payments.¹ In view of the detailed response to the FORM prepared by his attorney, which included numerous attachments, it is reasonable to assume that if applicant had made the payments, evidence of such payments would have been attached to the response to the FORM.

In or about 1990, applicant was arrested and charged in Georgia with Driving Under the Influence (DUI). He was convicted and paid a fine.

In or about 1992, applicant was arrested and charged in Georgia with DUI. He was convicted of the charge, fined \$795.00, and placed on probation for 12 months.

In or about March 1999, applicant was arrested and charged in Georgia with DUI. He was convicted of the charge, sentenced to one year in jail (suspended), fined \$700.00, and ordered to perform community service.

In or about June 1999, applicant was arrested and charged in Georgia with DUI. He was convicted of the charge, sentenced to 20 days in jail, fined \$1,000.00, placed on probation for a little less than a year, and ordered to perform community service.

In about December 2000, applicant was arrested and charged in Florida with (1) DUI, (2) Failure to Drive in a Single Lane, and (3) Open Container by Operator. He was convicted of the DUI charge, fined \$1,500.00, placed on probation for two years, and his drivers license was suspended. His probation ended in 2002.

In June 2007, the State of Florida granted executive clemency to applicant. As Department Counsel conceded in the FORM, it is reasonable to conclude from this that applicant has not had any adverse contact with law enforcement since the 2000 DUI.

In response to interrogatories sent to him by DOHA in 2007, applicant stated he has "made bad decisions and foolish judgments in the past and now that is behind me." He further stated that he has learned from his mistakes.

¹Applicant's attorney's statements are not evidence.

Applicant submitted numerous letters from current and former coworkers and supervisors. Applicant is described as an excellent worker by these individuals.

Policies

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

The security concern relating to Financial Considerations is set forth in Paragraph 18 of the new AG, and is as follows:

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 AG note several conditions that could raise security concerns. Under Paragraph 19.a., an "inability or unwillingness to satisfy debts" is potentially disqualifying. Under Paragraph 19.c., "a history of not meeting financial obligations" may raise security concerns. The evidence shows applicant has a history of not paying his large, unsecured debt to DISCOVER CD. Accordingly, these disqualifying conditions are applicable.

The guidelines also set out mitigating conditions. Paragraph 20.a. may apply where "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." Applicant's DISCOVER CD debt is still outstanding. Because no evidence was provided concerning how and why such a large credit card debt was incurred, and why it has remained unpaid for so long, there is no basis to conclude applicant is unlikely to experience further financial delinquencies.² This mitigation condition is not applicable.

Under Paragraph 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, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." There is no evidence that would support application of this mitigating condition.

Evidence that "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" is potentially mitigating under Paragraph 20.c. Applicant reached a repayment agreement with his creditor in July 2008. If he had offered any credible evidence that he made the agreed-upon payments, this mitigating condition might have been applicable. But with no such evidence, it is not applicable.

Paragraph 20.d. applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." This mitigating condition is not applicable for the same reason Paragraph 20.c. is not applicable.

Guideline G: Alcohol Consumption

The security concern for alcohol consumption is set forth in Paragraph 21 of the AG, and is as follows:

² Applicant's attorney's statement in response to the FORM that applicant "has resolved any problems that caused the incurring of the large [DISCOVER CD] debt" is not supported by any credible evidence.

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The AG note several conditions that could raise a security concern. Under Paragraph 22.a., “alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” may be disqualifying. Under Paragraph 22.c., “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” may be disqualifying. Applicant’s history of consuming alcohol to excess and five DUI convictions requires application of these disqualifying conditions.

Paragraph 23 of the AG sets out potentially mitigating conditions. Under Paragraph 23.a., it may be mitigating if “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 good judgment.” Applicant was arrested for and convicted of DUI five times between 1990 and December 2000. Because over six years elapsed between his second and third arrests, the passage of time since his last DUI (almost eight years) is insufficient by itself to safely conclude his alcohol abuse will not recur. Since applicant offered no other evidence that would support a finding that he is unlikely to consume alcohol to excess in the future (e.g., alcohol counseling, abstinence),³ this mitigation condition is not applicable.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

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.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser offenses” may be disqualifying. Applicant’s multiple DUI convictions raise this disqualifying condition.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. Under Paragraph 32.d., it may be mitigating if “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 criminal

³Applicant’s attorney’s statements in response to the FORM that “after [applicant’s] last arrest in 2000, [he] entered a program for the purpose of ridding himself of this addiction,” and “in the ensuing eight (8) years [applicant] has eliminated alcohol from his life . . .,” are not supported by any credible evidence.

conviction occurred about eight years ago, he has shown remorse, and he has offered numerous character reference letters, which describe him as a dependable and hardworking employee. These facts support application of this mitigating condition.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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) 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 Paragraph 2c, the ultimate determination of whether to grant a security clearance must be an overall common sense 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. Applicant is a mature man with a long history of alcohol abuse and one significant financial delinquency. His alcohol abuse, as evidenced by his five DUI convictions, was frequent and serious. Although the passage of time since his last alcohol-related incident is a factor in his favor, he offered no positive evidence of rehabilitation or permanent behavioral changes that support a conclusion his abuse of alcohol is unlikely to recur. With respect to his financial delinquency, applicant provided evidence of a repayment agreement, but no evidence that he followed through with it. This unsecured debt is rather substantial, and given the fact applicant ignored it for so long - even after he knew the Government was concerned about it - it is reasonable to assume that he is not financially able to satisfy it. Applicant failed to mitigate the security concerns arising under Guidelines F and G.

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 F: AGAINST APPLICANT

Paragraph 2, Guideline G: AGAINST APPLICANT

Paragraph 3, Guideline J: FOR APPLICANT

Conclusion

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

JOSEPH TESTAN
Administrative Judge