



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 07-12243
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

August 26, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant has substantial delinquent debt that he cannot afford to repay. His 25-year criminal history includes burglary, assault, and driving offenses, most recently in 2005, and he remains on probation. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86), on February 22, 2006. On February 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), that for some unexplained reason was dated March 16, 2008, to Applicant detailing security concerns under Guidelines F 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 (DoD) for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 5, 2008. He answered the SOR in writing on April 10, 2008, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 14, 2008, and DOHA assigned the case to me on May 15, 2008.

DOHA issued a notice of hearing on June 10, 2008, and Applicant acknowledged receiving it at least 15 days before the hearing. (Tr. at 10.) Although his signed receipt for the SOR that was delivered through his company's facility security officer was dated June 13, 2008, he did receive a copy of the notice via electronic mail on June 10, 2008. I convened the hearing as scheduled on June 25, 2008. Department Counsel offered Government Exhibits (GE) 1 through 11, which were admitted without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibit (AE) A, which was admitted without objection. I granted Applicant's request to leave the record open until July 7, 2008, in order for him to submit additional evidence. DOHA received the transcript of the hearing (Tr.) on July 3, 2008. On July 3, 2008, Applicant submitted two additional documents to Department Counsel. He did not submit any further evidence, and Department Counsel forwarded Applicant's submission without objection to its consideration on July 7, 2008. These documents were marked AE B, and the record was closed.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor, where he has worked for three and a half years. Due to heavy drinking for many years and his separation and divorce from his first wife in the late 1990s, he fell behind on many bills, despite regular employment as an electrician or tool operator since 1998. He is now remarried, with no children. (GE 1 at 1-4; AE A at 33; Tr. at 33.)

Applicant's credit bureau reports (CBRs), from July 2006 through May 2008, show an extensive history of delinquent debts and judgments, the reported number of which have declined. (GE 3, 4, 5, 6, 9, 10.) The evidence shows that some of the debts were repaid, but many appear to have simply dropped off or disappeared because the later CBRs are from a different company than the earlier ones. In his response to the SOR, Applicant admitted that he owed those debts listed in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e (formerly 1.j). During the hearing, he testified that he still had not paid any of those debts. (Tr. at 24-32.) The first three of these involve medical accounts, placed for collection, in the total amount of \$1,163. He testified to minimal, if any, effort to contact these creditors or resolve the debts. The fourth of these debts is a judgment obtained against him by a finance company in July 2006, in the amount of \$2,746. He purchased a computer on credit from an individual salesman. When the computer stopped working, he found out there was no warranty, so he stopped making payments on the loan he took out to finance its purchase. He did not contest the case in court. (Tr. at 30-32, 50-52.)

Applicant denied owing the \$5,212 medical bill, alleged in SOR ¶ 1.d, which remains on his most recent CBR in an amount of \$5,266. Applicant denied owing this

bill because he does not remember receiving medical treatment during the time the bill arose. It consistently appears on every record CBR. He called the credit bureau and orally disputed the bill, which is noted on the latest two CBRs. His dispute has not yet been resolved. (Tr. at 28-29.) He also denied owing the \$4,991 debt alleged in SOR ¶ 1.f (formerly 1.k). Although first listed separately in his July 2006 CBR (GE 3 at 8) as both an ongoing past due debt and a collection account, comparing the CBR listings shows that this reported debt is to the same creditor and involves the same loan that was reduced to judgment and alleged in SOR ¶ 1.e. Accordingly, this is not a separate debt.

Applicant's most recently submitted personal financial statement reflects a net monthly salary of \$2,344, and monthly expenses of \$1,848 comprising only rent, groceries, utilities and car expenses. It further shows \$229 in monthly debt payments for public storage and a 401k loan repayment, leaving a net remainder of \$266 to use for all other living expenses and delinquent debt reduction. It is noted that the monthly utility estimate submitted with this July 2009 statement is \$430 less than was shown on his statement submitted in January 2008. He further reported assets of \$35 in a savings account, \$86 in a checking account, and a car worth \$500. Applicant's wife no longer works, since she stays home to take care of his mother who lives with them. He said, without corroborating evidence, that his step-father's estate is being probated, and he anticipates inheriting \$20-25,000 to use toward debt reduction when that is finalized. (AE B at 4; GE 6 at 69; Tr. at 44, 46-47.)

Applicant also admitted the truth of all the criminal conduct allegations in SOR ¶¶ 2.a through 2.g, except for ¶ 2.b, which he denied. Department Counsel advised that, although there was a good faith basis for that allegation, he had no evidence to support it. Accordingly, that allegation was not established. (Tr. at 38.) Applicant's admissions are incorporated in the following findings concerning his criminal conduct.

In January 1983, when Applicant was 25 years old, he was arrested and charged with burglary, theft, and attempted burglary after a friend, with whom he had been drinking, broke into a store and stole some items while they were together. He reached a plea agreement resulting in conviction of the latter charge and dismissal of the first two. He was sentenced to three years probation. (GE 2 at 3; Tr. at 41-42.) On February 9, 1993, at age 35, he was arrested and charged with driving while intoxicated (DWI) and reckless endangerment. He was convicted on guilty pleas to negligent driving and reckless endangerment, resulting in a fine, 30 days in jail (suspended), and probation. He was also required to complete a three-day alcohol safety course. (Tr. at 41.)

In both April and June of 1995, Applicant was arrested after domestic violence incidents and charged with assault on his then-live-in girlfriend. The first incident resulted in his conviction, a suspended sentence to a year in jail, a fine and a required anger-management course. The latter charge was dismissed when his girlfriend did not appear to testify. (Tr. at 39-40.) On December 29, 2000, he was arrested for driving with expired plates and without compulsory insurance. The first charge was dismissed

because he had just not had time to change his plates, but he was fined \$400 for the insurance violation. (Tr. at 39.)

On March 17, 2005, after an evening of drinking at a pool tournament, Applicant was arrested and charged with Driving Under the Influence (DUI.) His blood alcohol content was measured at .146%, almost twice the legal limit of .08%. He entered into a deferred prosecution agreement, requiring him to serve five years probation, pay a fine and restitution, attend an alcohol treatment program and use a DUI ignition interlock for two years. Upon entering the treatment program, he was diagnosed as alcohol dependent and prescribed a two-year program, starting with 12 weeks of intensive outpatient treatment, followed by aftercare at the treatment center and AA meetings. He successfully completed the court-ordered alcohol treatment program on August 3, 2007, with a "very good" prognosis from the head counselor of the program. He has remained abstinent since this DUI arrest, and intends to continue doing so. His probation will continue until June 2010, until which time he remains subject to the terms of the deferred prosecution agreement. (AE A at 32-33, 37-38; AE B at 3; Tr. at 35-37, 42-43, 45, 48-50.)

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 used to evaluate 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 common sense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 ¶ 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 the applicant or proven by Department Counsel, and has the

ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Of these nine different disqualifying conditions, the Government asserted that two were raised by Applicant's financial circumstances: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” (Tr. at 56.)

Applicant has at least a ten-year history of failing to satisfy legitimate financial obligations, both large and small. He still has at least five SOR-alleged unresolved delinquent debts totaling \$9,121 that he cannot presently afford to repay. These debts became delinquent during a period when Applicant was continuously employed, and his present financial circumstances do not indicate an ability to resolve them in the near term. His potential for an inheritance remains speculative and uncorroborated. Substantial security concerns are raised under both AG ¶¶ 19(a) and 19(c).

AG ¶ 20 provides conditions that could mitigate security concerns. The five potentially pertinent 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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (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.

Applicant's delinquent debts arose during the last ten years, and a substantial number and amount remain delinquent at present. His family budget is such that he does not have the means to repay them, and is likely to incur additional delinquent debt when winter utility bills increase. Applicant attributed his financial difficulties to his divorce and alcoholism, but the former was more than eight years ago and his situation has only partially improved since he stopped drinking. Applicant offered no evidence that he either sought or followed financial counseling, or that he has any comprehensive plan to address his debt. He has not contacted many of his creditors to arrange repayments despite statements of intent to do so. He said that he disputes the amount claimed on his largest medical debt, but showed no evidence that he followed through with the creditor about that liability. There is insufficient indication in this record that his financial issues are either under control or likely to improve in the foreseeable future. This evidence establishes minimal mitigation under AG ¶¶ 20(a) through (e).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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." AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, including: "(a) a single serious crime or multiple lesser

offenses;" "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;" and "(d) individual is currently on parole or probation."

Applicant's criminal record spans 25 years and includes multiple violations involving theft, assault, and violation of traffic laws. His second DUI/DWI offense occurred in March 2005, and he will remain on probation under a deferred prosecution agreement for that offense for almost two more years. Applicant's admissions and the Government's evidence establish substantial criminal conduct security concerns under these three disqualifying conditions, raising doubt about his judgment and reliability while also calling into question his ability or willingness to comply with laws, rules and regulations.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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 offense was a few months over three years ago, and he has remained sober since that incident after successfully completing alcohol treatment. This effort is commendable and establishes a good start toward mitigating security concerns about his judgment, reliability, and willingness to follow the law that are raised by his long history of criminal acts. The mitigating effect of this recent good behavior is lessened somewhat by the fact that he has been on probation throughout this time, and will remain subject to severe sanctions under his deferred prosecution agreement for almost two more years. Given the extent and duration of his criminal record, it is premature to find that sufficient time has passed to predict that recurrence is unlikely, that doubts about his judgment and reliability are no longer warranted, or that rehabilitation efforts have been fully successful. As noted in the findings section, there is no evidence that Applicant committed the offense as alleged in SOR ¶ 2.b, so that denied allegation is considered 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) 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 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's conduct of potential concern involves substantial delinquent debts that he cannot afford to repay, and a lengthy history of both financial irresponsibility and criminal conduct of various types and degrees of seriousness. Applicant is a mature, experienced adult who is accountable for his decisions and conduct. All incidents of security concern arose after he was 25 years old.

Applicant's debts arose over a lengthy period, and persist to date. There is ongoing potential for pressure, coercion, exploitation or duress since he remains financially overextended. He completed a two-year alcohol treatment program about a year ago, in connection with his deferred prosecution agreement and probation for his 2005 DUI offense, and has continued to abstain from alcohol to date. This is a substantial step in the right direction toward rehabilitation, but has so far only occurred under the ongoing threat of deferred prosecution sanctions and probation. It is premature to determine that his rehabilitation and behavioral changes are permanent, or that recurrence of financial irresponsibility or criminal behavior is unlikely.

On balance, Applicant presented insufficient evidence to mitigate reliability and trustworthiness security concerns arising from his failure to satisfy debts, history of not meeting financial obligations, and lengthy criminal history. Overall, the record evidence leaves substantial doubts as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations and criminal conduct.

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 |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | Against Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | For Applicant |
| Subparagraph 2.c: | Against Applicant |
| Subparagraph 2.d: | Against Applicant |
| Subparagraph 2.e: | Against Applicant |
| Subparagraph 2.f: | Against Applicant |
| Subparagraph 2.g: | Against Applicant |

Conclusion

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

DAVID M. WHITE
Administrative Judge