



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-13943
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

July 3, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 9, 2006. On December 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E as the basis for its decision to deny his request for a security clearance. 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 responded to the SOR in writing on January 22, 2008, and he requested a hearing. The case was assigned to me on March 5, 2008, and on April 18, 2008, I scheduled a hearing for May 8, 2008. The parties appeared for the hearing as

scheduled. After the parties presented their evidence,¹ the SOR was amended on the government's motion to add security concerns under Guideline F. For the reasons set forth below, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Based on Applicant's hearing testimony on May 8, 2008, the government moved to amend the SOR at the hearing to allege Guideline F, financial considerations concerns under a new SOR ¶ 2, as follows:

- a. You filed for Chapter 7 bankruptcy in approximately 1995. As a result, your bankruptcy was granted, and your debts were discharged.
- b. You are currently over 180 days delinquent on various debts totaling approximately \$16,000. As of May 8, 2008, those debts have not been paid.

Applicant did not object and the motion was granted. Applicant was given 20 days from receipt of written notice of the specific allegations to file his response, either admit or deny with or without explanation and/or supporting documentation. On May 13, 2008, Department Counsel set forth the allegations in a written motion to amend, which was received by Applicant on May 19, 2008. On June 11, 2008, the deadline for any submissions was extended to June 24, 2008, at Applicant's request and with no objections from the government.² Applicant submitted no new evidence by the due date.

Findings of Fact

In the amended SOR, DOHA alleges under Guideline E, personal conduct, that Applicant was terminated from a job he had held from January 1987 to about March 2006 for an ethics violation in that he knowingly receiving shift-differential pay of approximately \$36,000 to which he was not entitled (SOR ¶ 1.a); that he misrepresented to company personnel in February 2006 that he worked the night shift (SOR ¶ 1.b); and that he told his family that he had been laid off rather than that he had been terminated due to an ethics violation (SOR ¶ 1.c). Under Guideline F, Applicant is alleged to have been granted a discharge of a Chapter 7 bankruptcy filed in about 1995 (SOR ¶ 2.a) and to owe about \$16,000 in delinquent debt over 180 days as of May 8, 2008 (SOR ¶ 2.b). Applicant admitted the Guideline E and Guideline F allegations. After considering the evidence of record, I make the following findings of fact.

¹Two government exhibits (Ex. 1-2) were admitted, and Applicant testified as reflected in a transcript (Tr.) received by DOHA on May 19, 2008.

²On June 10, 2008, Applicant informed me in a voice mail message that he planned to apply for a grant to obtain the funds to address his debts. During a conference call with the parties on June 11, 2008, I extended the deadline to his response to June 24, 2008.

Applicant is a 45-year-old test technician who requires a secret-level security clearance for his duties (Ex. 1, Tr. 23). He served in the U.S. military from October 1982 to October 1986 where he held a top secret security clearance (Tr. 22, 24). In January 1987, he began working for a defense contractor as a test technician (Ex. 1, Tr. 26). He was eventually promoted to an engineering technician position (Tr. 26).

In 1995, Applicant filed for a Chapter 7 bankruptcy. His debts were discharged, and he was allowed to keep his secret security clearance (Tr. 25-26, 52).

In July 2004, Applicant was scheduled to switch from the first shift to the second shift at work where he would be entitled to shift-differential pay. The differential amounted to 12 percent of his then \$16 hourly wage (Tr. 26-27). Applicant was paid the differential in addition to his salary for about 18 months, even though he did not switch to the second shift. Applicant noticed almost immediately that he was paid the differential that he was not entitled to (Tr. 27-28). Applicant claims that after about four to six weeks, he notified his supervisor, who promised to look into it (Tr. 28). Applicant did not inform payroll or human resources of the error (Tr. 29), and when the matter came to the attention of Applicant's employer, his supervisor did not corroborate his claim of a relatively timely notification (Tr. 42-43).

In about January or February 2006, Applicant was contacted by an employee in the human resources' department about submitting to a random urinalysis. When she asked him about his work hours, Applicant falsely replied that he worked the second shift but happened to be on the first shift the day she called. (Tr. 32-33). Applicant attributes his "wrong decision" to not knowing what to say since he "was in a bad situation." Following an investigation, Applicant was involuntarily terminated from his employment of almost 20 years for violating his employer's ethics policy (Ex. 1, Ex. 2, Tr. 34). He was also required to repay the differential monies, which amounted to about \$3,600 (Tr. 34). Applicant took out a loan from his 401(k) to pay his former employer (Tr. 35). He told his parents that he had been laid off from his job because he was embarrassed and ashamed for having taken the pay and he did not want to add to their problems (Tr. 35-36). As of May 2008, he still had not told his family that he had been fired from his previous job in March 2006 (Tr. 36).

From March to May 2006, Applicant worked as a contract environmental technician for another defense contractor at \$20 an hour (Tr. 49). During the June/July 2006 time frame, Applicant worked only for about a week or so, as a technician for a medical device company (Ex. 1, Tr. 36).

In August 2006, Applicant began working as a security guard for his current employer (Ex. 1) at about \$17 per hour (Tr. 44). He took the job after he was informed there would be an opportunity within a few months to be placed as a contract test technician with a defense contractor (Tr. 24). Needing classified access to at least the secret level for his expected duties testing products for military applications (Tr. 23), Applicant executed an e-QIP on September 9, 2006. He disclosed on his e-QIP that he had been fired from a company in March 2006 for an ethics violation (Ex. 1). In August

2007, Applicant was interviewed by a government investigator about his termination. Applicant admitted he had been terminated for taking shift-differential pay to which he was not entitled. He took no action himself to stop the payments but claimed he had informed his supervisor of the payroll error. Applicant also admitted that he had lied in January 2006 when he indicated during a random urinalysis test that he worked the night shift. Applicant added that he repaid the \$3,600 in shift pay in May 2006 (Ex. 2). Applicant also averred that his former supervisor and human resource personnel are the only persons aware of his firing. He had told his family he had been laid off rather than fired from his previous job because he was embarrassed about what he had done (Ex. 2).

Applicant has been laid off from his contract test technician position four times over the past 18 months, with the longest layoff lasting about three weeks (Tr. 41-42). He was out of work as of May 2008 but was scheduled to report back May 8, 2008 (Tr. 14).

Applicant has had ongoing problems with his finances since his bankruptcy discharge in 1995 (Tr. 31). He took out cash advances to pay his day-to-day living expenses, including rent, over the years (Tr. 45-46, 52). He made timely payments on some accounts, including for a television he bought in May 2007 for \$700 (Tr. 51), but other accounts became delinquent. In summer 2007, he entered into a debt management agreement to repay delinquent obligations. He kept up with payments for about ten months but he fell behind when he again found himself out of work. After he failed to make a couple payments, the company terminated the agreement (Tr. 44-45).

Applicant shares a townhouse with one roommate (Tr. 45), so his share of the rent is \$650 per month (Tr. 50). He is not behind on his share of the utilities, but he owes about \$26,000 in credit card debt from the cash advances taken out to pay his living expenses since 1995 (Tr. 45-46, 52). He is paying double the minimum amount on most of his credit card accounts, but two of the accounts with an aggregate debt balance of about \$16,000 are more than 180 days past due (Tr. 46-47). Applicant incurred unexpected medical expenses in the past year. He just paid off the ambulance debt (Tr. 50), and while he owes about \$1,000 for two medical bills, he has been making those payments on time (Tr. 50-51).

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 overarching

adjudicative goal is a fair, impartial and common sense 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. 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 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 E—Personal Conduct

The security concern for personal conduct is set out in 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.

For about 18 months from 2004 to about February 2006, Applicant was paid shift-differential pay that he was not entitled to as a first shift employee. There is no indication that he initially set out to defraud his employer, but once he noticed the error, he had an ethical, if not also a legal obligation, to notify his employer. Applicant almost immediately noticed that he had been paid shift-differential pay amounting to an additional 12 percent of his hourly rate. He claims that about four to six weeks later, he informed his supervisor who promised to look into the erroneous payments. The supervisor did not corroborate this claimed notification during the company's investigation into the overpayments. Any notification would have excused inaction by Applicant for only about an additional month or so while he waited for his supervisor to look into it. Given his unethical behavior continued until he was caught in a lie about his shift work in 2006, he bears a heavy burden of overcoming the personal conduct concerns under AG ¶ 16(d):

(d) credible adverse information that is not explicitly covered under any other guideline and 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, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive or corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern or dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources.

Furthermore, his deliberate misrepresentation about his shift hours when called for the random urinalysis implicates AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to any employer, investigator, security official, competent medical authority, or other official government representative." Since he still has not told his family about his termination for cause from his previous job, security concerns are also raised under AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . ."

None of the mitigating conditions apply. AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," would have required at a minimum timely notification of the payroll error and follow up. Assuming he notified his supervisor within four to six weeks of the shift differential pay issue, his continued silence for an additional 16 or 17 months and his deliberate misrepresentation when called for the urinalysis undermine any claim to a good-faith rectification. Moreover, while Applicant has expressed remorse for his misconduct ("I fully admit I made a mistake in my judgment and I totally feel that I feel

very regretful about my situation. And basically I, what I did wasn't right and I fully admit it . . . " Tr. 13), doubts persist for his judgment where he still refers to the payroll issue as something that happened to him ("I am just very sorry that I had this thing happen to me . . . I'm very choked up about this, what happened to me. . . ." Tr. 21; "I was, I told my supervisor about it and, at one time or another, it just never came off of the books, and I mentioned it once or twice to my supervisor. However, after a various amount of time, it never went off, so I kept it for myself and then, unfortunately, it became a situation where I had the urinalysis test." Tr. 27). Applicant was not put in the situation of having to conceal his ethical violations. He chose that avenue for himself, and to the extent he still views it as unfortunate, he shows little appreciation for his obligation of full candor. Applicant now acknowledges that he should have told the truth in 2006 ("I should have told the truth back then. Regretfully, it cost me 20 years of a good job" Tr. 39), but again the focus is on what it cost him rather than on how he betrayed the trust of the government, his employer, and/or his supervisor by his serious ethical lapses.

AG ¶ 17(d), "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," also is not pertinent even as he acknowledges he made a serious mistake. Applicant claims he panicked when he realized he was still receiving the differential (Tr. 29), but he also admits that he was having difficulty making ends meet at the time (Tr. 31). Financial stressors cannot be ruled out as a contributing factor in his failure to correct the payroll error and those financial pressures still exist (see Guideline F, *infra*). Applicant owes more than \$16,000 in consumer credit debt that is more than 180 days past due.

Finally, Applicant has done nothing to address the vulnerability concerns that exist because of his efforts to conceal his involuntary termination from his family members. AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," does not apply.

Guideline F, Financial Considerations

The security concern 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.

Applicant admitted at his hearing that the special access that he held at the time was revoked following a Chapter 7 bankruptcy discharge in 1995 (Tr. 25, 52). He continued to experience financial difficulties, and had problems making ends meet in

2004/05 during the time that he continued to accept the shift-differential pay. By May 2008, he had accumulated about \$26,000 in consumer credit debt, about \$16,000 of which was more than 180 days past due (Tr. 47-48). Security concerns are raised under AG ¶ 19(a), “inability or unwillingness to satisfy debt,” and ¶ 19 (c) “a history of not meeting financial obligations.”

Applicant does not deny his ongoing financial struggles (“I was not getting my pay so right now I am in destitute, right now.” Tr. 44). Last summer he apparently entered into a debt repayment plan to resolve his delinquent debt (see AG ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”), but the plan was canceled after he missed two payments due to a job layoff. Applicant testified with no evidence to the contrary that he has been laid off four times in the past 18 months (Tr. 41), and he had unexpected medical costs within the past year (Tr. 50-51). He just paid off an ambulance bill but owes about \$1,000 on two other medical debts that have been consolidated. He was given about six weeks after his hearing to prove a case for mitigation under 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.” Nothing was submitted by the deadline. An unacceptable security risk exists because of his ongoing financial pressures.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant’s eligibility for a public trust position 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The government must be assured that those persons with classified access can be counted on to exercise good judgment at all times. Applicant exercised extremely poor judgment by failing to correct a payroll error.

He compounded the personal conduct concerns by lying about his shift hours in February 2006 out of fear that his unethical behavior would be discovered, and he still has not been candid with his family about his job loss. He has had ongoing financial problems since before 1995 due in part to lack of income, but his use of consumer credit card cash advances to pay for his living expenses raises considerable doubts about his ability to handle his finances responsibly. I am unable to conclude that Applicant possesses the requisite good judgment, reliability, and trustworthiness that must be demanded of those with access.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

| | |
|---------------------------|-------------------|
| Paragraph 1, Guideline E: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Paragraph 2, Guideline F: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | Against Applicant |

Conclusion

In light of all of the circumstances, 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.

ELIZABETH M. MATCHINSKI
Administrative Judge