



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



In the matter of:)	
)	
)	ISCR Case No. 07-16653
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: Stephen J. Bildman, Personal Representative

February 1, 2012

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the financial considerations and information technology security concerns, but failed to mitigate the personal conduct security concern. Clearance is denied.

Statement of the Case

On June 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, financial considerations, M, use of information technology, and E, personal 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) implemented by the Department of Defense on December 1, 2006.

Applicant answered the SOR on August 20, 2011, denying all of the allegations except 1.a, and requesting a hearing. The case was assigned to me on August 31,

2011. A notice of hearing was issued on November 14, 2011, scheduling the case for December 1, 2011. I held the hearing as scheduled and received nine Government exhibits, marked as Government Exhibits (GE) 1 through 9, and 17 Applicant Exhibits (AE) marked as AE A through Q. Also, I considered the testimony of Applicant and a character witness.

At the close of the hearing, I left the record open, at Applicant's request, for the submission of an additional exhibit. Within the time allotted, Applicant submitted the additional exhibit. Department Counsel had no objection, and I admitted it as AE R. DOHA received the transcript (Tr.) on December 9, 2011.

Findings of Fact

Applicant is a 34-year-old married man with four children, The oldest three are teenagers from an earlier marriage that ended in divorce in 2003. The youngest is seven years old. Applicant's ex-wife has physical custody of the two oldest teenagers, and Applicant has physical custody of the youngest teenager. (Tr. 25) Applicant is a high school graduate and has taken some college courses.

Applicant works in the information technology field. He has earned several information technology certifications over the years. Applicant has worked for his current employer since March 2011.

From 2003 to approximately 2010, Applicant accrued approximately \$22,000 of delinquent debt. (Tr. 28) Applicant owes the majority, totalling approximately \$15,000, to a car company (subparagraph 1.a). This debt became delinquent in 2007. (GE 5 at 2) The remainder of the delinquencies include a credit card account (subparagraph 1.b), utilities (subparagraphs 1.c, 1h), a medical account (subparagraph 1.d), another automobile delinquency (subparagraph 1.e), two student loan accounts (subparagraphs 1.f and 1.g), and two miscellaneous delinquencies (subparagraphs 1.i, 1.j).

Applicant's financial problems stem from his 2003 divorce, and were exacerbated when his current wife lost her job in 2010. (Tr. 48) She remains unemployed. (Tr. 47)

Since beginning his current job, Applicant's salary has increased by \$20,000. (Tr. 33) He has several hundred dollars of after-expense monthly income. (Tr. 48) This has enabled him to begin satisfying his delinquencies. As of the hearing date, Applicant had satisfied all of the debts except subparagraphs 1.a, 1.g, and 1.i.

Applicant contacted the creditor listed in subparagraph 1.a. It agreed to reduce the delinquency by half, but insisted on the payment in a lump sum, which Applicant could not afford. (Tr. 31) Applicant's supervisor, the chief executive officer of the company, testified. He was so impressed with Applicant's work quality that he agreed to pay the debt and deduct it from a future "bonus or profit share . . ." (Tr. 84) The day after the hearing, Applicant submitted a copy of the check, drawn from his employer's account, satisfying subparagraph 1.a. (AE R)

Applicant disputes subparagraphs 1.g and 1.i. Subparagraph 1.g is an allegedly delinquent student loan totalling \$3,527. Applicant contends this is his father's debt.¹ Neither the age of the debtor listed on the bill nor the social security number of the debtor matches Applicant. (*Compare* AE G and GE 1 at 1) Applicant submitted evidence showing that his student loan account is current. (AE F) I find that Applicant has only one student loan account, as listed in subparagraph 1.i, and it is current.

Subparagraph 1.i is a debt allegedly owed to a book club totalling \$70. Applicant disputes this debt, but has been unsuccessful in contacting the original creditor.

Before Applicant worked for his current employer, he worked, among other places, for another defense contractor between 1998 and 2003. (GE 1 at 16) His duties included assisting the Government employees with using their information technology system, "changing system tapes for backups, balancing daily logs, and running system scripts." (Tr. 37)

On January 24, 2003, the Government client of Applicant's employer alleged that he created directory files and scripts within a larger directory without obtaining permission from the Government's system administrator. Also, Applicant was alleged to have installed an editor within the system directory without the system administrator's prior review. (GE 4 at 3)

The Government system administrator who reported these problems noted that Applicant did not act with "malicious intent," and was actually trying to improve or minimize the risk of operator error. (GE 4 at 3) However, he "did not think to ask the appropriate personnel for permission," nor did he first inquire about the "rules and regulations that govern creating, editing, and modifying such files. (GE 4 at 3)

Based on these alleged information technology infractions, the Government client of Applicant's employer asked that he be removed from the contract. When Applicant's employer confronted him with these allegations, Applicant stated that he was unaware that he had committed any information technology infractions. Also, he asserted he had no reason to believe he was violating protocol because one of the onsite Government employees helped him download the editor. (GE 4 at 3) The system administrator who reported Applicant's alleged misconduct acknowledged that a Government employee helped Applicant, but noted that he was not in her chain of command.

Applicant's employer, after reviewing the allegations against him, told him to sign a resignation in lieu of dismissal, but told him to "hang tight," and promised to re-hire him as soon as an employment opportunity on another contract arose. Applicant then resigned. Nine days later, his employer re-hired him and assigned him to another contract. (AE E at 3) Applicant continued to work with his employer for another six

¹Applicant and his father share the same name.

weeks before leaving to take another position. He had no additional adverse incidents for the remainder of his stint with his employer.

Applicant completed a security clearance application on October 3, 2006. He answered “no” in response to “Section 22: Employment Record . . . e. Last 7 years, fired, quit, or left/unfavorable circumstances?” (GE 1 at 34) Applicant testified that he did not consider that his employer in 2003 released him under unfavorable circumstances after asking him to resign, because they rehired him to work on another contract, as promised, within ten days of his resignation.

Applicant enlisted in the U.S. Navy in 1997. He did not complete basic training, as he received a general discharge after testing positive for marijuana. (Tr. 56, 97) In response to questions about his discharge from an investigative agent in 2006, Applicant stated it occurred after he experienced a knee problem. (GE 2 at 10) He did not disclose that he had failed a drug test. (GE 2 at 10)

During cross-examination, Applicant testified that he told the investigative agent of the failed drug test, and that the investigator’s interview summary inaccurately excluded it. (Tr. 57) In late 2009, DOHA propounded interrogatories to Applicant. (GE 2) Attached to the interrogatories was a copy of the investigator’s summary of Applicant’s personal subject interview. (GE 2 at 10) Question 3 asked whether the summary accurately reflected the information that Applicant provided to the investigator. Applicant answered, “Yes.” (GE 2 at 8)

Policies

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

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 for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, “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” (AG ¶ 18). Applicant’s financial struggles trigger the application of AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.”

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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 did not elaborate about his 2003 divorce and how it contributed to his financial problems. Moreover, his most significant delinquency, the car loan listed in subparagraph 1.a, became delinquent four years after the divorce. Nevertheless, since obtaining his current job with a significantly higher salary, Applicant has contacted his creditors and satisfied all of the delinquencies except subparagraph 1.a, 1.g, and 1.i. Although Applicant had not satisfied subparagraph 1.a as of the hearing date, he did make good-faith efforts to develop a payment plan. When these efforts were unsuccessful, his boss paid the debt for him, and will develop a repayment plan whereupon Applicant will repay him through either a reduced future bonus, or reduced profit-share.

Applicant provided evidence successfully disputing the student loan listed in subparagraph 1.g. The only unresolved debt is 1.i, a disputed debt less than \$100 dollars. I conclude that all of the mitigating conditions apply.

Guideline E, Personal Conduct

Under this guideline, “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.” (AG ¶ 15) Moreover, “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.”

Applicant’s omission from his security clearance application of a job that he resigned from under adverse circumstances raises the issue of whether AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” applies. Applicant contends that the circumstances of his resignation from his job in 2003 is not covered under Section 22 of the security clearance application because his employer was not taking a punitive action when it asked him to resign in lieu of termination. Rather, they were simply removing him from the contract and taking him off the payroll until another contract opportunity became available.

According to the Appeal Board, “however narrowly [an] applicant seeks to characterize . . . the facts and circumstances, applicant[s] are bound by the plain language of the question,” when completing a security clearance application. (ISCR Case No. 98-0470 (App. Bd. Apr. 19, 1999)) Consequently, although the credibility of Applicant’s contention is bolstered by the fact that the company re-hired him within two weeks of his resignation, I am unable to conclude the omission was unintentional.

In evaluating Applicant’s credibility, I considered his cross-examination responses to questions regarding the circumstances surrounding his discharge from the Navy. Specifically, when asked why he did not tell the investigative agent in 2006 that a failed drug test led to his general discharge, he provided an explanation that contradicted his 2006 interrogatory responses. In considering this information, I am cognizant that the SOR does not allege any other falsifications. However, unlisted adverse information has probative value in weighing an applicant’s credibility. I conclude Applicant intended to conceal the circumstances of his resignation when he omitted it from his security clearance application. AG ¶ 16(a) applies without mitigation.

Guideline M, Use of Information Technology Systems

Under this guideline, “noncompliance with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual’s reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information.” (AG ¶ 39) Information technology systems include “all related computer hardware, software,

firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.” (*Id.*)

Applicant committed several information technology infractions including creating scripts within a directory and installing an editor without permission. The disqualifying conditions set forth in AG ¶¶ 40(e), “unauthorized use of a government or other information technology system,” and 40(f), “introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization when prohibited by rules, procedures, guidelines or regulations,” apply.

The following mitigating conditions are potentially applicable:

(a) so much time has elapsed since the 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 misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one’s password or computer when no other timely alternative was readily available; and

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

Applicant modified his company’s Government client’s information technology system to make it better-organized, improve its efficiency, and make it more fail-safe. In the process, he was unaware he was violating any Government regulations or protocol, and had no reason to know he was violating any regulations or protocol because a Government employee was assisting him in completing the tasks.

Before this episode in 2003, Applicant had no history of information technology violations, and has committed none since then. AG ¶¶ 41(a) and 41(b) apply, and the first prong of AG ¶ 41(c) applies.

Subparagraph 3.b of the Guideline M paragraph cross-alleges the falsification allegation set forth in Guideline E, subparagraph 2.a. Although Applicant’s conduct, as set forth under subparagraph 2.a, constitutes a security concern under Guideline E, the conduct is not covered under Guideline M. Consequently, I have resolved subparagraph 3.b in Applicant’s favor, not because the underlying conduct was mitigated, but because the Government erroneously alleged it under Guideline M.

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.

Applicant deserves credit for mitigating the financial considerations security concern. Also, his job performance is so outstanding that his employer paid his most significant delinquency, in an effort to mitigate the security concerns. Applicant's misuse of information technology was minor, isolated, and remote in time. Applicant however, failed to overcome the negative ramifications of his falsification of his 2006 security clearance application. Upon considering this case in the context of the whole-person concept, I conclude Applicant has failed to mitigate the security concerns.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.j:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline M:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For 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.

MARC E. CURRY
Administrative Judge