



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-16979
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

December 18, 2008

Decision

CURRY, Marc E., Administrative Judge:

On July 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F, J, and E. 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 on August 13, 2008, denying all of the allegations except 1.a and 2.a,¹ and requested a hearing. I received the case assignment on September 22, 2008. DOHA issued a notice of hearing on May 9, 2008, and I convened the hearing as scheduled on November 3, 2008. During the hearing, I received 10 government exhibits, 14 Applicant exhibits and the testimony of two Applicant

¹He admitted SOR subparagraph 2.a, in part, and denied it in part.

witnesses. DOHA received the hearing transcript (Tr.) on November 12, 2008. Based upon a review of the record, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 31-year-old, single man. He earned a bachelor of science degree in decision science information systems in 2003 (Tr. 51), and has taken some graduate courses in health and exercise fitness (Tr. 23). For the past 15 months, he has worked for a defense contractor as a communications/networking technician (Tr. 145). According to Applicant's supervisor, who supervises 31 people, he is the best out of the 31 employees who work for the company. (Tr. 145).

Applicant served in the US Army Reserve from 2000 to 2005. He worked as a shower, laundry and textile repair specialist for a combat support hospital unit (Exhibit 4 at 1). On November 23, 2004, the Army issued orders assigning him to a reserve component. Applicant reported, as ordered. A few days later, Applicant's unit received partial mobilization orders, and were transferred to another military facility (Exhibit L at 2). On December 6, 2004, Applicant was ordered to extended active duty, and to report to another military facility (Exhibit 4 at 14). He did not report (Exhibit 4 at 6).

On January 19, 2005, Applicant was charged under sections 85 and 87 of the Uniform Code of Military Justice (UCMJ) with leaving his place of duty with the intent to shirk important duty, and missing movement (Exhibit 4 at 7). Approximately six months later in June 2005, a police officer stopped Applicant's car, and charged him with speeding (Tr. 41). A roadside background check revealed the outstanding military charges. Applicant was then arrested, and transferred to a detention facility on an Army base.

Applicant contends that he never received the December 2004 orders to report to active duty. When he informed his unit commander, he was told he could not be on post without orders, and sent home (Exhibit N). Between the time Applicant went home in December 2004, and the time he was arrested, he continued to drill with his unit at the combat support hospital (Tr. 43).

While awaiting court martial, the Army prosecutor told him that the Army would drop the charges, if he either agreed to re-enroll on active duty for three additional years, or administratively separate under other than honorable conditions. Because he did not want to quit his civilian job that he held at the time, he chose the latter option (Exhibit 6).

During the separation process, the Army informed Applicant that he had been overpaid by approximately \$10,000 while in the reserves (Tr. 53). Applicant was unaware of these overpayments. Since then, the government has been intercepting his annual income tax refunds, and applying them to the debt (Tr. 55) In February 2007, Applicant stated that he intended to arrange a payment plan to satisfy the overpayment

(Exhibit 10). He has not yet organized one. The current balance is approximately \$6,500.

Approximately five years ago, Applicant's father sought to purchase a home computer (Tr. 56). He asked Applicant if he could use his name to open a credit account to finance the purchase (*Id.*). Applicant agreed. His father did not make payments on the account, as promised. Consequently, Applicant's credit report reflects a \$3,300 delinquency owed to the computer company (SOR subparagraph 1.b). Applicant contends that the delinquency, at his request, has been deleted from his credit report (Tr. 25).

Applicant's credit report also lists an allegedly delinquent credit card bill for approximately \$1,500 (SOR subparagraph 1.c). He denies this is his debt. In July 2008, he wrote a letter notifying each of the credit reporting agencies of the dispute, and sent it via certified mail (Exhibits E through I). In October 2008, he received a letter from the creditor confirming his responsibility for the debt (Exhibit J). Applicant continues to dispute the bill, and does not intend to satisfy it.

Currently, Applicant earns \$80,000 per year (Tr. 137). He maintains a budget which he plans to update to reflect a recent raise (Tr. 138). He has no trouble paying his monthly bills (Tr. 138).

On June 5, 2006, Applicant completed a Questionnaire for Sensitive Positions. In response to questions regarding whether he had ever been 180 or more days delinquent on a debt, and whether he was currently 90 days overdue on any debts, he answered "No." Applicant was unaware that the debt listed in SOR subparagraph 1.a, was delinquent when he completed the security clearance application. It was first reported delinquent in April 2006 (Exhibit B). As for SOR subparagraph 1.b, Applicant confronted his father after receiving a delinquent notice. His father then reassured Applicant that he would pay the debt. Because Applicant stopped receiving delinquent notices after their conversation, he assumed his father had any future correspondence forwarded, and had begun paying the bill, as promised.

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. 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.

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). Moreover, “an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.”

Applicant’s credit report reflects approximately \$13,000 of delinquent debt accrued between 2003 and 2006. AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations” apply.

Because Applicant was unaware that the government was overpaying him while he was in the reserves, I do not attach any negative security significance to the accrual of the debt listed in SOR subparagraph 1.a. Moreover, because he is no longer in the reserves, the circumstances surrounding the accrual of this debt are unlikely to recur. AG ¶ 20(a), “the behavior . . . 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,” is potentially applicable. However, Applicant has known about the debt since approximately 2005, and has taken no steps to satisfy it, despite promising to do so as early as February 2007. This reflects poor judgment, and therefore renders AG ¶ 20(a) inapplicable.

Applicant did not raise any issues regarding circumstances beyond his control which contributed to his financial delinquencies. 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,” does not apply.

None of the remaining mitigating conditions apply. The only debt that Applicant intends to satisfy is the one listed in SOR subparagraph 1.a. Although the government has been using his tax refunds to satisfy it, Applicant has not taken any steps to arrange a payment plan, and the debt has been delinquent for two years. Although he handled the dispute of SOR subparagraph 1.c in a comprehensive manner, notifying each credit reporting agency by certified mail, the creditor subsequently rejected his claim. He still maintains that it is not his debt, and does not intend to pay it. Consequently, he no longer has a reasonable basis to dispute the legitimacy of the past due debt, and AG ¶ 20(e)² is inapplicable.

Guideline J, Criminal Conduct

The security concern 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.

Here, Applicant was administratively separated from the US Army reserves after being charged with desertion and "missing movement" under UCMJ Articles 85 and 87. AG ¶ 31(a), "a single serious crime . . ." applies.

Applicant testified persuasively that his failure to report to the base where he was assigned stemmed from a miscommunication between his reserve unit and his base from where the order originated. Specifically, between the time he missed movement and the time he was arrested, he continued to drill with his unit. This constitutes evidence that he did not commit the offense of desertion, which requires that the conduct be intentional. AG ¶ 32(c), "evidence that the person did not commit the offense applies. He did, however, miss movement in violation of UCMJ Article 87.

Applicant has not engaged in any criminal activity since the offense. He is well-respected on his job. The circumstances that led to the UCMJ charges were unusual and unlikely to recur, particularly because he is no longer in the armed services. AG ¶¶ 32(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," and 32(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," apply.

²The 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.

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.”

Applicant’s security clearance application omissions raise 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. The record is inconclusive with respect to the issue of whether Applicant’s debt stemming from his overpayment was delinquent when he completed the security clearance application. Consequently, I conclude he did not intentionally omit it. As for SOR subparagraph 1.b, Applicant’s testimony that he assumed his father had satisfied it was credible in light of his father’s reassurances. Applicant has consistently disputed SOR subparagraph 1.c. He therefore had no responsibility to list it. In gauging Applicant’s credibility, I noted that he disclosed the nature of the discharge from the US Army reserve on his security clearance application.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant’s criminal conduct happened under unusual circumstances, and is highly unlikely to recur. He testified persuasively that he did not desert the Army reserves, as defined in UCMJ Art. 85. Nevertheless, the conduct resulted in his administrative discharge under other than honorable conditions, which occurred less than four years ago. Consequently, I conclude the nature, extent, and seriousness of the conduct remain undiminished.

The security concern is compounded by the delinquency stemming from his overpayment that the US Army discovered during the administrative discharge process.

Applicant has yet to make payment arrangements even though he promised to do so nearly two years ago. 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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	Against Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge