



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



In the matter of:)
)
) ISCR Case No. 08-01715
)
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel
For Applicant: *Pro Se*

December 15, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the security concerns arising from financial considerations and personal conduct. He falsified his security clearance application. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (GE 1) on April 28, 2006. On July 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).¹

¹ 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 23, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on September 24, 2008. DOHA issued a notice of hearing on October 9, 2008. I convened the hearing as scheduled on October 27, 2008. The government offered exhibits (GE) 1 through 7, which were received without objection (Tr. 35-36). Applicant testified on his own behalf and submitted exhibits (AE) 1 through 11, which were received without objection. I granted Applicant's request to keep the record open until November 2, 2008, to submit additional matters. He submitted AE 11 post-hearing. DOHA received the transcript of the hearing (Tr.) on November 6, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.c, and 1.e-1.g. He denied the allegations in SOR ¶¶ 1.d and 2.a-2.c. After a thorough review of all evidence of record, including his demeanor and testimony, I make the following findings of fact.

Applicant is a 38-year-old senior systems analyst. He graduated from high school around 1988, and has taken college courses on and off over the years (Tr. 5). He enlisted in the U.S. Air Force in November 1990, where he served honorably for 14 years (DD 214).² In 1993, he received access to classified information at the secret level. His access was upgraded to the top secret level in 2000 (Tr. 7). He has had continuous access to classified information since then.

Applicant married his wife, who was also serving in the Air Force, in February 1996. They were divorced in February 2004. He has two children, a 13-year-old boy born of this marriage, and a 14-year-old daughter from a prior girlfriend (Tr. 14).

In his response to the SOR, Applicant included numerous Air Force documents and e-mails showing that he served with distinction. His service awards/decorations include, in part, Air Force Achievement and Commendation medals, and three Air Force Good Conduct medals. He distinguished himself through his dedication and hard work as demonstrated by his selection as non-commissioned officer of the quarter, his evaluation report, and numerous letters of commendation/appreciation for a job well done. He was specifically commended for his professionalism, strong work ethic, technical knowledge, loyalty and maturity. Applicant's primary military occupational specialty was communications and computer systems (DD 214).

In 2004, Applicant was having marital difficulties and he suspected his wife was having an affair. Seeking evidence of the affair, Applicant illegally accessed his wife's e-mail account in the Air Force's computer system. When she discovered that Applicant had accessed her e-mail account, she complained to her command about his illegal intrusion.

² See documents attached to Applicant's answer to the SOR.

In February 2004, Applicant was offered non-judicial punishment (GE 3). He consulted with a lawyer, waived his right to demand a court martial, and accepted non-judicial punishment. In March 2004, Applicant was found guilty of violating an Air Force general regulation by wrongfully viewing his wife's files or communications without appropriate authorization. His punishment included a reduction in grade to senior airman (E-4) (suspended), and forfeiture of \$945 pay per month for two months. He did not appeal his punishment.

In August 2004, he was separated from the Air Force at the rank of staff sergeant (E-5) (Tr. 5-7). He was unemployed for approximately three weeks. In September 2004, he began working as a senior systems analyst for a government contractor. In February 2005, he started working for his current employer, another government contractor. Applicant claimed to be a valuable employee with a good record working for two defense contractors. Since he started working for government contractors his gross salary has been approximately over \$95,000 a year (Tr. 157, GE 2).

In April 2006, Applicant submitted a security clearance application (GE 1). In response to question 23.e (asking whether in the last seven years Applicant had been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice (UCMJ) – including non-judicial punishment), Applicant deliberately answered “No” and failed to disclose that he received non-judicial punishment in February-March 2004. In November 2006, Applicant was interviewed by a government investigator (GE 2). During the interview, Applicant indicated he had received no disciplinary action after his wife complained about his illegal intrusion into her e-mail account (GE 2).

At his hearing, Applicant testified he did not believe he received non-judicial punishment while in the Air Force (Tr. 59). He remembered being punished by his commander for accessing his wife's e-mail account; however, he claimed not knowing he received non-judicial punishment. His belief was based on the fact that he was considered a top non-commissioned officer (NCO), and to his recollection, his commander gave him a break (Tr. 59-62). In cross-examination, Applicant denied being familiar with the non-judicial punishment process, ever recommending a subordinate for punishment, or ever dealing with subordinates that had received non-judicial punishment (Tr. 68-74).

In his answers to the financial questions, he disclosed that in the last seven years he had his wages garnished to pay child support obligations (e-QIP, question 27.b), and that he was participating in a financial counseling/debt consolidation program (e-QIP, questions 28.a & .b). Applicant's background investigation addressed both his financial problems and the omission of material information from his security clearance application.

Applicant explained he filed for bankruptcy protection in 1995 because he had limited earnings as a new E-1 in the Air Force. His financial situation was aggravated by

having to pay support for a child he had out of wedlock, and a change of station. He could not afford to pay his child support obligation, his day-to-day living expenses, and his outstanding debts (Tr. 34-35, 54-55).

The SOR alleges five delinquent/charged off accounts totaling approximately \$27,000. SOR ¶ 1.b originated from a credit union loan Applicant made to consolidate his debts and purchase a car. At the time, he had received non-judicial punishment, he was separating from the Air Force, and was undergoing a divorce (Tr. 105). The loan became delinquent in 2004. The total for this delinquent debt is approximately \$12,250 (AE 1). In October 2008, the creditor accepted Applicant's offer to start making payments of \$200 monthly beginning on November 14, 2008.

SOR ¶ 1.c (\$3,415) originated as a credit card debt, and it is still outstanding. Applicant settled and paid the debt alleged in SOR ¶¶ 1.d (\$950) on October 24, 2008 (AE 11). Applicant paid the debt alleged in SOR ¶ 1.e (\$968) in April 2008 (Tr. 55).

While in the Air Force, Applicant was paid a \$10,000 reenlistment bonus. When he left the Air Force in 2004, the government initiated action to recoup the bonus, and the debt was referred to a collection agency (SOR ¶ 1.f (\$10,134)) (Tr. 126). Applicant has made no payments to the government or the collection agency (Tr. 128). After his security clearance background interview in November 2006, Applicant contacted the collection agency seeking to settle his debt. According to Applicant, the collection agency refused to negotiate an affordable monthly payment plan (answer to the SOR, Tr. 54). He promised to contact the creditor again after paying other smaller debts. At his hearing, he indicated he currently cannot afford to pay this debt (Tr. 132).

In May 2004, Applicant sought financial assistance/counseling through a debt consolidation company (CSA). He included the debts alleged in SOR ¶¶ 1.b and 1.c in his consolidation plan (Tr. 53). Applicant participated in CSA's debt consolidation program from May 2004 to June 2006, and paid CSA \$3,019 (Tr. 57-58, AE 11 at 3-11). Applicant established CSA was a rogue company which took his money and failed to pay his creditors and to assist him to negotiate and settle his delinquent debts. After he stopped working with CSA, Applicant did not contact the creditors again or make any further payments on these two debts until November 2008. He did not contact the creditors because he did not have the financial means to pay them.

Applicant's monthly take home pay is approximately \$3,300. His monthly expenses include, in part, \$1,500 in court ordered support for his two children; \$950 rent; \$95 car insurance, and around \$100 car maintenance expenses. His monthly net remainder is approximately \$700 (Tr. 700). He drives a 2001 BMW X5 SUV he purchased used in 2004 (Tr. 143). While married, he had purchased a GMC Yukon Denali, and larger luxury SUV. In 2004, because of the pending divorce he downsized by trading in the Yukon Denali to purchase the BMW X5 (Tr. 153). He has been paying a \$30,000 note for the last four years.

Applicant does not have the financial means to make all his delinquent debt payments, child support obligations, and the day-to-day expenses associated with living in his state. He claimed to be making those payments he can afford (Tr. 65). Applicant believes his financial problems were the result of his divorce and his high child support payments (Tr. 161). His goal is to pay the small debts first and then pay the remaining debts one by one.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.³

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 controlling 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."⁴ 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.

³ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ *Egan*, supra, at 528, 531.

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 F, Financial Considerations

Under Guideline F, the security concern is that an Applicant’s 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. AG ¶ 18.

Applicant filed for Chapter 7 bankruptcy protection in 1995. His debts were discharged in 1996. In 2008, Applicant paid two of the five delinquent debts alleged in the SOR (SOR ¶¶ 1.d and 1.e). He has three outstanding delinquent debts that have been charged off or in collection since around 2004-2005, totaling approximately \$25,700. He presented some evidence of efforts to pay or resolve his legal obligations. He does not have the financial means to pay his legal obligations, delinquent debts, and his day-to-day living expenses. AG ¶ 19(a): inability or unwillingness to satisfy debts; and, AG ¶ 19(c): a history of not meeting financial obligations, apply in this case.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns. After considering all the mitigating conditions (MC), I find that AG ¶ 20(a) does not apply. Applicant’s behavior is recent as his debts are still outstanding. Considering his favorable evidence as a whole, Applicant failed to establish that his questionable behavior is not likely to recur.

Applicant presented evidence that established circumstances beyond his control contributing to his inability to pay his debts, i.e., his divorce and separation from the Air Force. AG ¶ 20(b) applies, but only partially. Applicant’s evidence is not sufficient to show he acted responsibly under the circumstances. He purchased two luxury vehicles, apparently beyond his financial means. He made some effort to resolve his debts by

entering into a debt consolidation program which failed through no fault of his own. After the initial debt consolidation program failed in 2006, Applicant failed to take any further action to resolve his debts until he received the SOR. He has been consistently employed since he left the Air Force with a salary of approximately over \$95,000.

AG ¶ 20(c) does not apply because, although he paid two of his delinquent debts, there are no clear indications that his financial problem is being resolved or is under control. His inability to pay his debts shows he is financially overextended. Considering the totality of the circumstances, Applicant's actions to repay his creditors do not raise to the level of good-faith efforts to resolve his debts.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that 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.

Applicant failed to disclose relevant information in his answers to question 23 of his security clearance application. He also falsified material facts in his statement to a government investigator. Furthermore, Applicant's testimony was less than candid. Considering the record as a whole, I am convinced Applicant deliberately failed to disclose the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's maturity, his service and employment history, his demeanor and testimony, and the lack of credibility of his explanations. He served in the Air Force for close to 15 years, and by his own account, he was a top notch NCO. It is difficult to believe Applicant did not know he received non-judicial punishment in 2004.

Because of his extensive experience in the Air Force and holding a security clearance, Applicant knew the importance of accurately completing his security clearance application and telling the truth. Nevertheless, he failed to provide information that was material to making an informed security decision and made false statements. AG ¶ 16(a) "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire," applies.

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns. After considering all the mitigating conditions, I find none of the mitigating conditions apply to this case. I specifically considered AG ¶ 17(c), and find it does not apply since his behavior is recent and shows Applicant's lack of reliability, trustworthiness, and judgment.

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.” 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 is a mature, well trained man. He honorably served 14 years in the Air Force, and has been successful working for two defense contractor for four years. He has held access to classified information at the secret and top secret level for approximately 15 years. Other than his illegal access to his wife’s e-mail account in 2004, there is no evidence to show Applicant has violated other laws and regulations or that he ever compromised or caused others to compromise classified information. Because of his rank and years of service in the Air Force, and his many years holding access to classified information, Applicant knew or should have known the importance of the trust placed on him by the government. He failed to be candid and honest on his security clearance application, during his background interview, and during his testimony at hearing. His behavior shows he lacks judgment, reliability, and trustworthiness.

Overall, the record evidence fails to convince me of Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial considerations and personal conduct 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
Subparagraphs 1.d - 1.e:	For Applicant
Subparagraphs 1.f - 1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2c:	Against 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 continue Applicant's security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge