



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



In the matter of:)
)
-----) ISCR Case No. 08-07753
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

November 24, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on March 5, 2008. On September 11, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines F and E. DOHA acted 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 September 1, 2006.

Applicant received the SOR on September 19, 2009; answered it on September 30, 2009; and requested a determination on the record. DOHA received the request on October 2, 2009. On November 23, 2009, Department Counsel requested a hearing before an administrative judge. (Hearing Exhibit (HX) I.) Department Counsel was ready to proceed on June 30, 2010, and the case was assigned to an administrative judge on July 7, 2010. DOHA issued a notice of hearing on July 21, 2010, scheduling it for September 1, 2010. The case was reassigned to me on August 19, 2010, to resolve a scheduling conflict. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 11 were admitted in evidence without objection. Department Counsel also submitted a demonstrative exhibit summarizing the Government evidence, which was marked as HX II. Applicant testified and submitted Applicant's Exhibits (AX) A through P, which were admitted without objection. I kept the record open until September 17, 2010, to enable Applicant to submit additional documentary evidence. He timely submitted AX Q through U, which were admitted without objection. Department Counsel's comments regarding AX Q through U are attached to the record as HX III. DOHA received the transcript (Tr.) on September 9, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the debts alleged in SOR ¶¶ 1.c, 1.f, and 1.g, but he disputed the amounts of the debts. He denied SOR ¶¶ 1.a and 1.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 65-year-old systems engineer employed by a defense contractor since September 2008. He has been employed by defense contractors for about 29 years. (GX 2 at 13.) He received a security clearance in October 1987, which he is seeking to continue. (GX 1 at 9; Tr. 10-11.)

Applicant married in September 1969. He has no children. His wife does not work outside the home. (Tr. 52.)

Applicant's security clearance application reflects active duty and reserve service in the U.S. Army from January 1967 to May 1975. (GX 1 at 7.) He did not submit any documentary evidence of his military service, but in his response to DOHA interrogatories and his answer to the SOR, he described himself as a decorated Vietnam veteran who was awarded the Bronze Star. (Answer at 7; GX 2 at 13.) He attended college from January 1974 to May 1977 and received a bachelor's degree in electrical engineering.

Applicant began working for a defense contractor in October 2001, while continuing his employment by another defense contractor until February 2002. (GX 8; GX 11.) He decided to leave his first employer because of disagreements with management and a dispute about assignments. He was working for his first employer on an Army-specific radio system for use at the battalion and brigade level when he began developing a test facility for a joint service radio system for his second employer. He testified he told his second employer and its legal office that he was still working for

his first employer. He informed his first employer that he intended to leave his job, but he did not disclose his dual employment. (GX 3 at 6; AX L at 3; Tr. 85.) He was able to perform work for both employers without his supervisors knowing about it, because he had no day-to-day direct supervision. (Tr. 89.)

The Code of Corporate Conduct published by Applicant's first employer provided: "If you consider undertaking any activity, including an investment, that may create an actual or apparent conflict of interest, you must seek approval of the activity in advance from your supervisor or from the Corporate, Company or Value Center Director of Human Resources." (GX 10 at 15.) In August, 2000, Applicant acknowledged in writing that he had received a copy of the Code of Corporate Conduct and acknowledged his obligation to comply with it. (GX 9.)

At the hearing, Applicant admitted that he was aware of his obligation to obtain approval before working for another company if there was a potential conflict of interest. (Tr. 84; GX 9.) He testified he told his first employer that he had already begun working for his second employer, but he did not identify his second employer. He had nothing in writing showing approval for his dual employment. He testified he did not care if his supervisor objected, because he was not "getting along" with him and did not feel he owed him an explanation. (Tr. 82-83.) He did not know if his two employers were competing for the same contracts. (Tr. 92, 94.)

Applicant's employment history on his security clearance application did not reflect his dual employment. Instead, it reflected that Applicant ended his first job and began his second job in August 2001. (GX 1 at 3-4.) When Applicant was confronted with the evidence obtained from his two employers, he stated he mistakenly extracted the information from his notes and was unaware of the mistake until a security investigator pointed it out. (GX 3 at 2, 6.)

Applicant quit a job with a defense contractor in May 2003 because he was harassed after a dispute with his manager's wife, who also worked for the same contractor and was supervised by her husband. He quit a job with a defense contractor in September 2004 after refusing to relocate to another state. (GX 1 at 1-5.) In an interview with a security investigator in April 2008, he told the investigator that his job changes and resulting salary decreases contributed to his financial problems. (GX 2 at 4.) His employment history on his security clearance application does not reflect any periods of unemployment.

Applicant's two most recent performance reviews commented favorably on his technical knowledge and experience, responsiveness to customers, positive attitude, cooperativeness, and effective management. (AX N; AX O.) He has received two pay raises since starting his current job, and his take-home pay has nearly doubled since early 2008. (Tr. 67.)

Between 1996 and 2003, Applicant was the victim of identity theft, and several credit cards were opened in his name. (GX 1 at 10; GX 2 at 4.) He paid off the debts, and none of them are included in the delinquent debts listed in the SOR. (Tr. 47.)

Starting around 2001, Applicant accumulated the seven delinquent debts totaling about \$34,400 that are alleged in the SOR. He has acknowledged that his delinquent debts arose in part because of his financial mismanagement. (GX 4 at 4; Tr. 105.) He admitted he made no payments on his delinquent debts after he started his higher-paying job in September 2008. He testified he did not make any payments or payment arrangements because he was on probation and did not want to make any commitments until he was more secure in his new job. (Tr. 64-65.) His wife has taken over the management of the family finances. (Tr. 68.) After paying his mortgage, car payment, and living expenses, he has a net monthly remainder of at least \$3,000. (Tr. 73.)

In September 2009, Applicant settled the debt alleged in SOR ¶ 1.b (AX T.) In July 2010, he made the first payment pursuant to an agreement with the creditor alleged in SOR ¶ 1.a. (AX C, D, and S; Tr. 47.) In August 2010, he engaged a debt resolution company to assist him with the debt alleged in SOR ¶ 1.c, but the debt was not yet resolved when the record closed. (AX H at 13; Tr.57-58.)

Applicant testified he had been unable to make contact with the creditors alleged in SOR ¶¶ 1.d and 1.e. He indicated at the hearing that he had additional contact information about the two creditors, but he did not submit any additional information about them in his post-hearing documents. (Tr. 45-46.) At the hearing, he submitted extensive handwritten notes of his attempts to track down his creditors. (AX E; AX I.)

Applicant testified that the two judgments alleged in SOR ¶¶ 1.f and 1.g were partially paid by garnishment of his pay. (Tr. 48-49.) His pay vouchers from a previous employer reflect a “wage assignment,” but his pay voucher from his current employer does not reflect any deductions to pay these judgments. (GX 2 at 15-18.) The two judgments are still unsatisfied.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead,

recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges seven delinquent debts totaling about \$34,400. The concern under this guideline 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's financial history establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"), shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems may be mitigated by showing that "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." AG ¶ 20(a). This mitigating condition is not established because Applicant's delinquent debts are numerous, not yet fully resolved, and not the result of circumstances making them unlikely to recur.

Security concerns under this guideline also may be mitigated by showing that "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." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established. Applicant's employment changes and resultant salary reductions were voluntary choices, and not conditions beyond his control. He admitted financial mismanagement. Neither prong of this mitigating condition is established.

Security concerns under this guideline also may be mitigated by showing that "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." AG ¶ 20(c). Applicant has engaged a debt resolution company, but the documentation does not reflect the kind of financial counseling contemplated by this mitigating condition. He has made some recent progress in resolving his debts, but it is too soon to conclude that his financial problems are under control. I conclude this mitigating condition is not established.

Security concerns under this guideline also may be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant presented evidence that the judgments in SOR ¶¶ 1.f and 1.g were partially paid by wage garnishment by a previous employer. Involuntary collection by wage garnishment does not establish good faith. Applicant's efforts to resolve the debts in SOR ¶¶ 1.a-1.c and to track down the creditors in SOR ¶¶ 1.d and 1.e were recent, shortly before the hearing. He took no significant actions to resolve his financial problems until he realized that his security clearance was in jeopardy. The timing of his efforts indicates that his primary motivation was to protect his clearance, and not a sense of duty or obligation. I conclude this mitigating condition is not established.

Security concerns under this guideline also may be mitigated by showing "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." AG ¶ 20(e). Applicant denied the debts in SOR ¶¶ 1.a and 1.b, but he has since acknowledged them and made payments on them. He admitted the debts in SOR ¶¶ 1.c, 1.g, and 1.h, disputed the amounts due, and provided documentary evidence of payments on them. He denied the debts in SOR ¶¶ 1.d and 1.e because he was unable to contact the collection agents for the debts, but he has not articulated or documented a basis for disputing the underlying debts. I conclude this mitigating condition is established for the debts alleged in SOR ¶¶ 1.c, 1.g, and 1.h, but it is not established for the remaining debts.

Guideline E, Personal Conduct

The SOR alleges that Applicant failed to report a potential conflict of interest to his two employers when he held full-time jobs with both. The concern under this guideline 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."

A disqualifying condition under this guideline may be raised by "deliberately providing false or misleading information concerning relevant facts to an employer." AG ¶ 16(b). Unlike AG ¶ 16(a), this disqualifying condition does not specifically encompass intentional omissions. Thus, Applicant's intentional failure to inform his first employer about his dual employment does not raise AG ¶ 16(b). However, Applicant's deceptive behavior and intentional violation of his employer's Code of Corporate Conduct establish several disqualifying conditions:

AG ¶ 16(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;

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing; and

AG ¶ 16(f): violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Security concerns raised by personal conduct may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). Applicant's deception was not “minor.” It was a serious breach of trust. Although he did not work on projects common to both employers, he did not know whether his two employers were competing on any contracts, and he was not concerned about it.

Applicant compounded his deception by misstating his employment dates on his security clearance application and giving a false explanation to a security investigator for misstating them. He was no neophyte to the security clearance process and knew the importance of accurate information. I found his explanation for misstating his employment dates implausible and not credible in light of his previous experience with security clearance applications and his clear memory of his dual employment concerning what he did for each employer, where he did it, and why he did it. In light of all the circumstances, I conclude that the first prong of AG ¶ 17(c) (“so minor”) is not established.

The second prong of AG ¶ 17(c) (“so much time has passed”) also is not established. Although Applicant's deceptive behavior with an employer happened more than nine years ago, he continued the deception on his security clearance application in May 2008 and subsequent security interviews. The third prong of AG ¶ 17(c) (“so infrequent”) is not established because of Applicant's subsequent deceptive behavior. The fourth prong (“unique circumstances”) is not supported by the evidence. Overall, Applicant's conduct casts doubt on his reliability and trustworthiness. I conclude that AG ¶ 17(c) is not established. No other enumerated mitigating conditions under this guideline are applicable.

Because the SOR did not allege that Applicant falsified his security clearance application, his misrepresentation of his employment dates and subsequent false explanation for the misrepresentation may not be an independent basis for denying his application. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered the evidence of Applicant's falsifications for these limited purposes.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature, well-educated adult. His employment record reflects that he is a talented engineer. He has served honorably in the Army, worked in support of national defense for most of his adult life, and held a security clearance for many years. On the other hand, he has not yet established a track record of financial responsibility, and his deceptive behavior casts doubt on his current trustworthiness and reliability.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.g: **Against Applicant**

Paragraph 2, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 2.a: **Against Applicant**

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge