



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



In the matter of:)
)
) ISCR Case No. 08-10204
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

March 29, 2010

Remand Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s favorable information is not sufficient to mitigate the security concerns arising from financial considerations. Security clearance denied.

Statement of the Case

On November 25, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On December 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and the adjudicative guidelines (AG) effective within DoD on September 1, 2006. The SOR alleges security concerns under Guideline F (Financial

¹ FORM Item 5.

Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be denied or revoked.

On January 25, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated February 19, 2009, was provided to him by letter dated February 23, 2009. Applicant signed the receipt for the DOHA transmittal letter on March 11, 2009. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He timely submitted a response to the FORM that included mitigating evidence.² The case was assigned to me on May 15, 2009.

Procedural Issue

Applicant's response to the FORM was received by DOHA on April 7, 2009, but not forwarded to Department Counsel. I did not receive or consider Applicant's response to the FORM before issuing the July 23, 2009, denial Decision.

Applicant appealed the Decision. In his Reply Brief, Department Counsel conceded Applicant timely submitted a response to the FORM, which was not provided to me before issuing the Decision. The DOHA Appeal Board remanded the Decision stating (in its pertinent part): "in the interest of administrative economy, the case is hereby remanded to the Judge for further processing." ISCR Case No. 08-10204 at 2 (App. Bd. Oct. 6, 2009).

On February 16, 2010, I issued an Order asking Applicant to submit "any additional information he would like for me to consider prior to issuing a decision."³ Applicant's counsel timely provided a "Submission of Additional Evidence" (including Tabs A-L), dated March 1, 2010, which was marked Appellate Exhibit (App. Ex. 2), and made part of the record. Department Counsel submitted the Government's Response to App. Ex. 2 on March 3, 2010, which was marked App. Ex. 3, and made part of the record.

In his response, Department Counsel objected to any documents submitted by Applicant in App. Ex. 2, except for three documents Applicant had attached to his September 1, 2009, Appeal Brief (included in App. Ex. 3). The three documents are: Applicant's written statement⁴ (undated); Applicant's divorce decree,⁵ dated February 6,

² Applicant's response to the FORM was not provided to me and it was not considered in my original decision (Decision). See the section entitled "Procedural Issue" on this Remand Decision.

³ The Order and a copy of the delivering e-mail to Applicant's counsel and Department Counsel was marked as Appellate Exhibit (AE) 1, and made part of the record.

⁴ Included in App. Ex. 2 as Exhibit C, and in App. Ex. 3 as Exhibit D.

2009; and a letter from Applicant's credit counseling services company,⁶ dated March 12, 2009. The Government argued, *inter alia*, that consideration of any documents not included in Applicant's appeal would be the same as re-opening the record to consider new evidence. The remaining objections are hearsay objections and objections to the weight of the evidence.

After evaluating all of the Government's objections, I admitted and considered all the documents submitted by Applicant in App. Ex. 2. The documents were admitted based on equity and fairness considerations,⁷ as well as in the interest of developing a full and complete record.⁸ The Government's objections were considered when deciding what weight, if any, was to be awarded to the evidence in light of the record evidence as a whole.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, 1.d, 1.h, 1.j, 1.n, and 1.r. He denied SOR ¶¶ 1.c, 1.e, 1.f, 1.g, 1.i, 1.k-m, 1.o, 1.p, 1.q, and 1.s. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including all the evidence submitted in App. Ex. 2, I make the following additional findings of fact.

Applicant is a 28-year-old video teleconference coordinator working for a defense contractor.⁹ He graduated from high school in June 2000, and shortly thereafter he joined the U.S. Army. He served on active duty from August 2000 to June 2002, and achieved the rank of private first class. His service was characterized as General, under honorable conditions. While on active duty, Applicant had access to classified information at the secret level. There is no evidence that he ever compromised or caused others to compromise classified information.

Applicant married his wife in January 2002. They separated in February 2007, and divorced in February 2009. He has a six-year-old child of this marriage.¹⁰ In October 2002, Applicant was charged with a felony offense (menacing with a knife). He pled guilty to harassment, and was sentenced to two years probation. After six months of good behavior, the probation was terminated.

⁵ Included in App. Ex. 3 as Exhibit E.

⁶ Included in App. Ex. 2 as Exhibit I, and in App. Ex. 3 as Exhibit F.

⁷ Directive ¶ E3.1.10.

⁸ Directive ¶ E3.1.19.

⁹ Item 5 (2008 e-QIP) is the source for the facts in this decision, unless stated otherwise.

¹⁰ Applicant's divorce and child is new information acquired from App. Ex. 2 (L) and App. Ex. 3 (E).

Applicant's work history is summarized as follows (Item 5): From December 2002 to June 2003, he was unemployed. He has been employed from July 2003 to the present. During this period, he worked for nine different employers, most of them for short periods of time. He has worked for his current employer, a defense contractor, since June 2008.

In his 2008 security clearance application, Applicant disclosed having no debts over 180 days delinquent over the last seven years, and having no debts over 90 days delinquent when he submitted his security clearance application. He stated, however: "I'm currently going through a divorce and I'm waiting that to be completed before I know what exactly I have to pay back . . . I don't have all the details of my past." His background investigation included the review of his security clearance applications and two credit bureau reports (CBR) from July (Item 6), and November 2008 (Item 7).

The SOR alleges 19 delinquent and/or charged off accounts totaling approximately \$29,069, which are listed in the two credit reports. He admitted seven debts totaling approximately \$10,379. After a review of the record evidence,¹¹ I make the following findings about Applicant's delinquent debts:

- a. All the alleged delinquent accounts are identified as Applicant's individual accounts, except for SOR ¶ 1.f, in which he is identified as an authorized user;
- b. SOR ¶¶ 1.c, 1.f, 1.m, and 1.o were deleted from Applicant's CBR without any explanation;¹²
- c. SOR ¶ 1.i was identified as a fraudulent account and deleted (App. Ex. 2 (J));
- d. SOR ¶ 1.k concerns a check, apparently issued by Applicant that was returned for lack of sufficient funds; and
- e. All of the alleged debts are Applicant's unresolved debts, and have been delinquent for a number of years, except for SOR ¶¶ 1.f and 1.i.

Applicant failed to present evidence of any payments made towards any the alleged delinquent debts since he acquired them, or of any efforts to contact creditors or resolve his debts. Around March 2009, Applicant contracted the services of a credit counseling company (App. Ex 2 (I)). Through this service, he disputed and removed from his CBR some of his delinquent debts. Applicant receives credit for his recent effort to clean up his credit report.

¹¹ The review included, in part, the two CBRs offered by the Government's (Items 6 and 7), Applicant's CBR (dated February 2010, App. Ex 2 (H)), the Equifax credit file (dated December 2008, App. Ex. 2 (J)), and the TransUnion dispute results (dated December 2009, App. Ex. 2 (L)).

¹² See Equifax credit file (App. Ex. 2 (J)) and the TransUnion dispute results (App. Ex. 2 (L)).

Applicant explained his financial problems started in December 2002, when he was administratively discharged from the U.S. Army because he was pending felony charges. In general, he attributed his financial problems to numerous factors: losing his military job; the payment of extensive legal fees for his criminal defense (from November 2002 until June 2003); his inability to obtain a job while pending a felony prosecution; the expenses associated with being involved in a bad marriage and the consequent divorce; his wife's financial mismanagement; identity theft and fraud committed by his wife; and his inability to find a stable, well-paying job.

Applicant claimed that after he found out about his financial problems, he took corrective action by placing a fraud alert on his CBR to prevent his wife from engaging in additional fraud against him;¹³ separating from his wife in February 2007, and divorcing her in February 2009; retaining the services of a credit counseling company to assist him disputing and removing fraudulent entries from his CBR;¹⁴ and engaging in efforts to resolve his delinquent debts. Except for disputing some of his debts, Applicant presented no evidence of debt payments, negotiations with creditors, or of any other efforts to resolve his delinquent debts.

Applicant provided no explanation about the debts he admitted or denied. He failed to explain how he acquired the admitted debts or what he has done to resolve his delinquent debts. He also failed to identify which of the denied debts were incurred by his wife.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 commonsense 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.

¹³ Applicant's February 2010 CBR indicates he asked to be considered as a fraud victim and that an extended alert to be placed on his CBR. The CBR does not indicate when he requested such actions. App. Ex. 2 (H).

¹⁴ There is no evidence as to when Applicant retained the services of the credit counseling agency. Based on App. Ex 2 (I), I presumed it was sometime between January and March 2009.

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.

In the decision-making process, the government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”¹⁵ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹⁶

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

¹⁵ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

¹⁶ “The administrative judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that an applicant's failure or inability to live within his or her 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 has accumulated 19 delinquent accounts totaling approximately \$29,000, many of which have been outstanding for a number of years. He admitted seven debts totaling approximately \$10,379. All the alleged delinquent accounts are identified as Applicant's individual accounts, except for SOR ¶¶ 1.f and 1.i. SOR ¶¶ 1.c, 1.f, 1.m, and 1.o were deleted from Applicant's CBR without any explanation.

The CBRs establish the rebuttable inference that debts identified in Applicant's CBR are his debts. Considering the evidence as a whole, I find that Applicant's evidence is insufficient to rebut this inference. I also find that all of the alleged debts (except for SOR ¶¶ 1.c, 1.f, 1.i, 1.m, and 1.o) are Applicant's unresolved debts, which have been delinquent for a number of years. 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:

- (a) 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;
- (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;
- (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; and

(f) the affluence resulted from a legal source of income.

Applicant's favorable evidence fails to fully raise the applicability of any mitigating condition. Except for disputing the debts, he presented no evidence of efforts to pay, settle, or resolve his financial obligations. He also failed to present evidence of his current financial situation. His favorable information is not sufficient to support the conclusion that his financial problems are over, or under control, or that they occurred under such circumstances that they are unlikely to recur. AG ¶ 20(c) does not apply. Applicant's financial situation continues to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant's divorce constitutes some evidence of a circumstance beyond his control contributing to his inability to pay his debts.¹⁷ AG ¶ 20(b) applies, but only partially. Applicant's evidence is not sufficient to show that he acted responsibly under the circumstances. He presented no evidence of efforts to contact creditors or to resolve his debts by entering into settlement agreements or payment plans with any creditors. Other than the above-mentioned period of unemployment, he has been consistently employed since July 2003. He presented no evidence of efforts to resolve any of his admitted delinquent debts from 2003 to the day he received the FORM.

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.

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. AG ¶ 2(c).

¹⁷ I do not consider Applicant's losing his military job, his inability to secure employment, and the payment of legal fees because of his criminal misconduct as "circumstances beyond Applicant's control."

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his two years of service on active duty in the U.S. Army. He has been successful working for a defense contractor since June 2008. There is no evidence of any security violation or that he ever compromised classified information. These factors show some responsibility and mitigation.

Notwithstanding, security concerns remain about Applicant's current financial responsibility, reliability, and judgment. His favorable 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.

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.e, 1.g, 1.h, and 1.j – 1.s:	Against Applicant
Subparagraphs 1.c, 1.f, 1.i, 1.m, and 1.o:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge