



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-01343
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

March 12, 2010

Decision

LYNCH, Noreen A., Administrative Judge:

On September 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 revised adjudicative guidelines (AG) and effective within the Department of Defense on September 1, 2006.

On October 29, 2009, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on January 8, 2010. DOHA issued a Notice of Hearing on January 29, 2010, and I convened the hearing as scheduled on February 23, 2010. Department Counsel offered five exhibits, which were admitted as Government Exhibits (GE) 1-5, without objection. Applicant testified on his own behalf. He did not introduce any exhibits at the hearing. I held the record open until March 2, 2010 for Applicant to offer any exhibits. He submitted an exhibit, which was admitted as Applicant Exhibit

(AE) A, without objection. DOHA received the transcript (Tr.) on March 1, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Department Counsel sent an amended SOR to Applicant on December 8, 2009, which added to Guideline F, SOR ¶ 1.g: “You failed to pay your child support obligation and as of October 2, 2008 had owed approximately \$1,611.54 in back child support. Your wages are currently being garnished at a rate of \$15.00 every week to pay back this child support obligation.”

In addition, the Government amended Guideline E, SOR ¶ 2 by adding allegation 2.b:

You falsified material facts on an Electronic Questionnaire for Investigations Processing (e-QIP), certified by you on or about October 15, 2008, in response to “Section 28. Your Financial Delinquencies a. In the last 7 years, have you been over 180 days delinquent on any debt(s)?; [and] b. Are you currently over 90 days delinquent on any debt(s)? “You answered “no” to both of those questions; whereas in truth, you deliberately failed to disclose that your child support obligation was at least 90 days delinquent as of the date you signed your e-QIP.

The amendments were admitted into the record without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.f. He denied the factual allegation in ¶ 2.a. In his answer to the amended SOR, Applicant admitted the allegations in ¶ 1.g and ¶ 2.b, as amended.

Applicant is a 43-year-old employee of a defense contractor. He graduated from high school in 1984, and attended a technical school in 1991-1992 (GE 1). He is single and has four children. He has been with his current employer since May 2008 (Tr. 18).

Prior to Applicant’s current employment, he worked on a temporary basis for a number of companies (Tr. 19). He was unemployed for a few months in 2007 and for a few months in 2006 (Tr. 20). He also recalls that he was unemployed from September 2004 until March 2005. He has never held a security clearance (Tr. 21).

The SOR alleges seven delinquent debts, including a child support obligation, student loan, and collection accounts. The approximate total for Applicant’s debts is \$25,000 (GE 3). The current status of Applicant’s delinquent debts is described below.

The debt alleged in SOR ¶ 1.a is for a collection account in the amount of \$454. Applicant co-signed a contract so that his cousin could have a phone account. She has not paid the bill. At this time, the account is unpaid.

Applicant admits the debt alleged in SOR ¶ 1.b for \$178. He sent one payment of \$25 in 2008 or 2009. The account remains unpaid (Tr.32).

Applicant admits the debt alleged in SOR ¶ 1.c. for \$21,349. The account is for his student loan from 1991 (GE 3). He had been paying \$125 a month for about 10 or 11 months in 2007 (Tr. 34). He has not made any payments since 2007 (Tr. 34).

Applicant admits the debt alleged in SOR ¶ 1.d for \$131. This cell phone account is unpaid.

Applicant admits the debt alleged in SOR ¶ 1.e for \$691. He contracted for Direct TV service in 2007. He has not returned the cable box and has not paid the account (Tr. 36).

Applicant admits the debt alleged in SOR ¶ 1.f for \$527. His cell phone company increased his monthly fees, and he could not afford to pay. He terminated the contract, but he was charged a fee (Tr. 38). This account is unpaid.

Applicant admits the debt alleged in SOR ¶ 1.g for a child support arrearage of \$1,611.54. His arrearage is due to unemployment in 2008 (Tr. 48). Applicant's wages are garnished. He pays \$60 a month. His current balance is \$61.21 (AE A).

Applicant's net monthly income is approximately \$2,292 (GE 2). He is current with his monthly expenses. He has no car payment. His net monthly remainder is approximately \$200. He has no savings account. Applicant has no credit cards (Tr. 57). He has not obtained any financial counseling.

When Applicant completed his October 2008 security clearance application, he read section 28(a) and 28(b) concerning any financial delinquencies. In that application, he answered "No" to question 28(a) concerning debts over 180 days delinquent in the last seven years, and "No" to question 28(b) concerning debts over 90 days delinquent (GE 1). Applicant denied any deliberate intent to mislead the government. He apologized for answering the questions wrong. He was not focusing on the old debts, but thought about items such as a mortgage or car loan (Tr. 45). He did not intentionally omit the child support garnishment because it appeared as an automatic deduction on his pay. He never received records of any court proceedings. I found his testimony credible. He now realizes that he should have answered sections 28(a) and 28(b) in the affirmative (Tr. 73).

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 must be considered 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 commonsense decision. According to AG ¶ 2, 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." 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 to obtain a favorable security decision.

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 (EO) 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

The security concern relating to the guideline for Financial Considerations 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.

The guideline notes several conditions that could raise security concerns. Under AG & 19(a), an inability or unwillingness to satisfy debts⁶ is potentially disqualifying. Similarly under AG & 19(c), a history of not meeting financial obligations⁶ may raise security concerns. Applicant accumulated delinquent debts on many accounts by his own admission. His credit reports confirm the debts. The evidence is sufficient to raise these disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where 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.⁶ Applicant still has significant unresolved delinquent debts. He is not in a stable financial situation. There is a likelihood that future debt will occur. This mitigating condition does not apply.

Under AG & 20(b), the disqualifying condition may be mitigated where 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.⁶ Applicant has had several periods of unemployment. When he lost his jobs and could not find work, he incurred delinquent debts. In 2008, when he found employment, he was receiving a steady salary. At that point, he did not pay his delinquent debts or arrange for a repayment plan. He did make one payment after receiving the SOR. He is disputing the phone account that he co-signed for his cousin, but Applicant is ultimately responsible for the account. Applicant has not acted responsibly in paying his accounts under the circumstances. This mitigating condition applies in part.

Evidence 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 control⁶ is potentially mitigating under AG & 20(c). Similarly, AG & 20(d) applies where the evidence shows the individual initiated a good-faith effort to repay overdue creditors or

otherwise resolve debts. Applicant has not received formal financial counseling. He has not resolved the majority of his delinquent debts. He disputed one amount but he is not actively working on resolving the issue. He has reduced his child support arrearage through garnishment. His efforts are insufficient to carry his burden in this case. I conclude these mitigating conditions do not apply.

AG ¶ 20(e) applies where the evidence shows “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.” Although he has disputed responsibility for one debt, his basis for refusing to pay is not reasonable. This mitigating condition does not apply.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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. Of special interest is any failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel 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” is potentially disqualifying.

In this case, when Applicant completed his October 2008 security application, he did not answer “yes” to section 28(a) or 28(b). He denied the allegation concerning a falsification of his answer to delinquent debts. He admitted that he did not report the child support arrearage that was being deducted automatically from his pay check. At the hearing, he stated that he “messed up the questions” but was not focusing on them. He incorrectly answered the questions but he did not intentionally falsify his application.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)). Thus, AG ¶ 16(a) does not apply in this case. I find for Applicant on SOR ¶¶ 2.a and 2.b.

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 commonsense 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 and conclude they are insufficient to overcome the government's case. Applicant has worked all his life. He attempted to get a better job by attending the technical institute after high school. He has four children. He supports them as a single parent. He has experienced unemployment on various occasions. He is a hard worker. He intends to pay his bills when he is financially stable. However, he has not acted responsibly under the circumstances. When he obtained steady employment, he did not address his delinquent debts. He has no repayment plan beyond a generalized intent to pay his creditors. He has not mitigated the security concerns under the financial considerations guideline. He answered questions 28(a) and 28(b) concerning delinquent debts in the last 7 years to the best of his ability. He did not intentionally fail to disclose reportable delinquent debts on his SF 86. He has mitigated the personal conduct concerns.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under 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: through 1.g: Against Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge