



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 09-01410 |
| SSN: |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Candace Le'i, Esquire, Department Counsel
For Applicant: *Pro Se*

September 23, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86) on September 23, 2008. The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F on March 25, 2009. 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 acknowledged receipt of the SOR on April 2, 2009. He answered the SOR in writing, which DOHA received on April 30, 2009. He requested a hearing before

an administrative judge. Department Counsel was prepared to proceed on June 6, 2009, and I received the case assignment on June 11, 2009. DOHA issued a notice of hearing on June 29, 2009, and I convened the hearing as scheduled on July 22, 2009. The government offered six exhibits (GE) 1 through 6, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted one exhibit (AE) A, which was received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on July 30, 2009. I held the record open until August 14, 2009, for Applicant to submit additional matters. Applicant did not submit any additional evidence. The record closed on August 14, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on July 8, 2009. (Tr. 8.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (Tr. 9.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.c-1.f, 1.h, 1.i-1.u, and 1.w of the SOR. He denied the factual allegations in ¶¶ 1.b, 1.g, 1.i-1.k, and 1.v of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 42 years old, works as a rigger for a Department of Defense contractor. He has held this position since September 2007.²

Applicant started working at age 15. He graduated from high school and married in 1997. He and his wife have a son, who is four years old. He has a son, age 26, and a daughter, age 23, from other relationships. His grown children do not depend upon him financially. However, he continued to pay the mother of his older son for child support arrearages at the rate of \$55 a week, which is deducted from his pay. He anticipated that the remaining \$2,000 balance on his debt will be paid in full in less than one year.³

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

²GE 1; Tr. 20.

³GE 1; AE A; Tr. 16-17.

In October 2001, Applicant and his wife filed a Chapter 13 bankruptcy petition. The bankruptcy trustee determined that they should pay \$143 bi-weekly on their debts, which they did for several months. Their bankruptcy payments stopped when Applicant developed new financial issues. The court dismissed his bankruptcy case on September 26, 2002.⁴

Applicant worked as a truck driver for many years. He drove a truck for a food service company from November 1999 until May 2002. He next drove a truck for a furniture company from some months until his job ended with his lay off. For the next year, he drove a truck for another food service company. He then began working in produce for a large national company. About one year later, he obtained another truck driving job and reduced his produce job to part-time. He worked in this truck driver position until he injured his back in 2004.⁵

While working, Applicant sustained a significant back injury. Initially, doctors treated his injury conservatively with medicine, including expensive injections. Applicant underwent back surgery in August 2005. Worker's compensation initially denied him benefits, resulting in a six-month loss of income. He eventually received his worker's compensation benefits and settled his worker's compensation case for \$12,000. As a consequence of his injury, Applicant did not work for one year and had no income for six months after his injury in 2004. When he could not return to work, his employer cancelled his health insurance coverage. Although his wife worked in a hospital at the time of his injury, her income did not pay all the household bills. Applicant used his worker's compensation settlement to pay his attorney's fees and other bills.⁶

When he returned to work in late 2005, Applicant initially worked through a temporary agency for truck drivers. After two months, he obtained another full-time truck driver position. This job lasted eight months and ended when his employer decided to close its operations in the east. The company offered him a position in its western operations, but Applicant decided not to move his family West.⁷

Applicant secured another truck driver position in 2006, which lasted until January 2007. While employed, he drove his personal car one day after consuming alcohol. The police stopped him and conducted a breathalyzer test. He registered .05 or .06, which is not over the legal limit for a driver's license, but is above the commercial driver limit of .04. His commercial and personal driving licenses were suspended for one

⁴GE 6; Tr. 22.

⁵GE 1; Tr. 22-24.

⁶Tr. 24-28, 42.

⁷*Id.* 29-30.

year. His driver's licenses have been returned to him. During this time, he worked at another position, earning \$8 an hour. He left this job for his current position.⁸

For a 40-hour work week, Applicant earns \$609 in gross income. He began earning significant overtime in April 2009. With his overtime earnings, Applicant has doubled his 2009 yearly earnings through the pay period ending on July 12, 2009. His leave and earnings statement for the pay period ending July 12, 2009 showed his net pay as \$964. His wife works six hours a day in home health care, earning \$7.14 an hour. Her gross income for a 30-hour week is \$214.⁹

Applicant's monthly expenses include \$525 for rent, \$113 for water, \$85 for electric, \$45 for gas in the summer and \$140 for gas in the winter, \$120 for cell phones, \$300 for gasoline, and \$147 for car insurance. He estimated \$200 a month in food for three people, which is low. I find that \$300 a month for food is reasonable. He did not estimate any miscellaneous expenses such as hair cuts, car repairs, clothing, dry cleaning, medical bills, or other unanticipated expenses. I find that his total other monthly expenses to be around \$150. His total monthly expenses are approximately \$1,800. He indicated he had approximately \$400 at the end of each month. Because his wife spends money shopping, this money pays for her shopping bills. He owns a 1998 car and a 2001 car, which have no liens encumbering them.¹⁰

Applicant contacted the creditor holding the judgment in allegation 1.a about a repayment plan in December 2008 or January 2009. He learned that the creditor had started garnishment proceedings against him. He agreed to the garnishment. Since the garnishment began in January 2009, Applicant has paid \$4,113 on the judgment based on his leave and earnings statement. He anticipated that the judgment debt will be paid in full by October 2009, as his pay is usually garnished at the rate of 25%.¹¹

Applicant has not paid any of the remaining bills listed in the SOR. He disagreed or denied the debts listed in SOR allegations 1.b, 1.g, 1.i, 1.j, 1.k, and 1.v. He paid his bill with the creditor in 1.b before he moved. He has no idea why he is being charged an additional \$265. He does not recognize the creditor listed in allegation 1.v. and, in light of his denial, the government has not provided sufficient evidence to show that this debt is his. He believed that his medical insurance should have paid the debts listed in allegations 1.j and 1.k, as these medical bills are for the injections to his injured back. He did not provide evidence that these bills were covered by insurance. At the hearing,

⁸*Id.* 30-32.

⁹AE A; Tr. 109, 22, 54-55.

¹⁰Tr. 57-62.

¹¹AE A; Tr. 32-34, 64, 66.

he acknowledged that the debt in 1.g is probably related to an early cancellation fee for a cell phone, which did not work when he moved.¹²

The majority of Applicant's unpaid bills arose from medical care. With the exception of the debt listed in SOR allegation 1.u, all his unpaid debts occurred between April 2003 and January 2007. Three debts became delinquent in December 2006 (1.f, 1.h, 1.s) and one debt became delinquent in January 2007 (1.i).

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 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.

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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion as to obtaining 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

¹²Response to SOR; Tr. 26-27, 34-41, 43-46.

an 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

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 debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debt, which he has been unable to pay for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

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.” While Applicant’s financial worries arose between 2003 and 2006, his debt did not arise from circumstances that are unlikely to recur.¹³ Thus, this mitigating condition does not apply.

Under AG ¶ 20(b), it may be mitigating 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.” Applicant’s financial

¹³His delinquent debts are “a continuing course of conduct” under the Appeal Board’s jurisprudence. See ISCR Case No. 07-11814 at 3 (App. BD. Aug. 29, 2008)(citing ISCR Case No. 01-03695 (App. BD. Oct. 16, 2002)).

problems became unmanageable when he injured his back in 2004 and had no income for six months. Following his return to work in the fall of 2005, he worked, but not steadily and at times for low wages. When he settled his worker's compensation case, he used the settlement proceeds to pay old bills, but he did not pay all his overdue bills. He acted responsibly in identifying and resolving some of his debts. I find this mitigating condition partially applies.

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 control" is potentially mitigating under AG ¶ 20(c). Applicant has not obtained financial counseling. There are no clear indications that the problem is under control. This mitigating condition is not applicable.

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 contacted the creditor who obtained the judgment against him with the intent to develop a repayment plan. The creditor had already initiated garnishment proceedings, so Applicant agreed to repay this debt through garnishment. He continues to pay his past-due child support. However, the majority of his SOR debts are not resolved, and Applicant did not disclose a practical plan to resolve most SOR debts. This mitigating condition is partially applicable.

Finally, AG ¶ 20 (e) applies when "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." Applicant denies several debts, but has not provided documentary proof that he challenged the validity of these debts. Thus, this mitigating condition is not applicable.¹⁴

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 an applicant's conduct and all relevant 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.

¹⁴AG ¶ 20(f) is not raised in this case.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant and his wife tried to gain control over their finances by filing for Chapter 13 Bankruptcy in 2001, the wage earners plan. They agreed to the monthly payment plan, and complied with it plan for a short period of time. Their payments stopped, and the court dismissed their case. Applicant's finances continued to be problematic because his income fluctuated and he lost work and income when he injured his back. He did not have steady and reliable employment until two years ago. For the last three years, he and his wife have paid their usual monthly bills in a timely manner. They have not, however, made a strong effort to resolve their unpaid bills, several of which are less than \$100. Applicant faithfully pays his back child support and agreed to the garnishment of his salary to pay the judgment against him. With his overtime, he is earning more money, but has not applied any of this extra money to resolve his many small debts. While he manages his current finances well, Applicant needs more time to organize his finances and resolve his other debts.

Overall, the record evidence leaves me with questions or 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 from his finances.

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 |
|---------------------------|-------------------|
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | Against Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraph 1.f: | Against Applicant |
| Subparagraph 1.g: | Against Applicant |
| Subparagraph 1.h: | Against Applicant |

| | |
|-------------------|-------------------|
| Subparagraph 1.i: | Against Applicant |
| Subparagraph 1.j: | Against Applicant |
| Subparagraph 1.k: | Against Applicant |
| Subparagraph 1.l: | Against Applicant |
| Subparagraph 1.m: | Against Applicant |
| Subparagraph 1.n: | Against Applicant |
| Subparagraph 1.o: | Against Applicant |
| Subparagraph 1.p: | Against Applicant |
| Subparagraph 1.q: | Against Applicant |
| Subparagraph 1.r: | Against Applicant |
| Subparagraph 1.s: | Against Applicant |
| Subparagraph 1.t: | Against Applicant |
| Subparagraph 1.u: | Against Applicant |
| Subparagraph 1.v: | For Applicant |
| Subparagraph 1.w: | For 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge