



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 09-01570
)
)
Applicant for Security Clearance)

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

May 25, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

On November 8, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 Adjudicative Guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 5, 2009, and requested a hearing. On January 22, 2010, DOHA assigned the case to me. On February 3, 2010, DOHA issued a Notice of Hearing, setting the case for February 23, 2010. The case was heard as scheduled. Department Counsel offered Exhibits (GE) 1 through 5 into evidence without objection. Applicant testified, but did not provide any documentary evidence. The record remained open until March 12, 2010, to give Applicant an opportunity to submit information. He timely submitted documents that I marked as Applicant Exhibits (AE) A, B, and C, and admitted into the record without objection from Department Counsel. DOHA received the hearing transcript on March 3, 2010.

Findings of Fact

In his Answer to the SOR, Applicant admitted the allegations contained in ¶¶ 1.a through 1.g, and denied ¶¶ 1.h, 2.a, and 2.b.

Applicant is 59 years old. In March 2005, he earned a Master of Business Administration degree. In December 2005, he began a position as a software engineer with his current employer, a defense contractor. From November 2004 until December 2005, he worked for another defense contractor. He was unemployed from September 2002 until November 2004, after being laid off. During that two-year period, he had a short-term consulting contract and attended school. (GE 2 at 148.) Prior to September 2002, he was self-employed. (*Id.*) He recently completed one year of law school with the assistance of educational benefits from his employer. (Tr. 48; GE 1.)

Prior to losing his position in late 2002, Applicant earned \$175,000 annually. In 2003, he was unemployed and received about \$1,000 per month in unemployment benefits. (Tr. 26.) In 2004 and 2005, he earned about \$10,000. In 2006, he began earning \$90,000 annually at his current position. In 2009, he earned about \$101,500. As of March 19, 2010, his gross income increased to \$117,500, annually. His past two yearly performance evaluations noted that he “exceeded expectations.” (Tr. 77.)

Applicant is twice divorced. He married his first wife in June 1979 and they divorced in January 1984. He has a 29-year-old daughter from that marriage. In October 1984, he married his second wife. They filed for a divorce in 2001, which was finalized in September 2003, while he was unemployed. He has eight children from that marriage, ages 10 to 26 years old. Six of those children reside with his former spouse in another state and two children are independent. His 17-year-old son is severely disabled.

According to the final divorce decree, Applicant is required to pay \$1,000 per week in child support, which amount was based on his high earnings from 2001 to 2002. During the two-year period of unemployment, he accrued \$48,000 in arrearage. His current support payments are \$1,250 per week and include \$250 for arrears. Depending on the amount of money he earns in overtime, he pays approximately \$4,333 to \$5,500 in child support each month through a state garnishment order. (Tr. 39-41; AE C.) He chose not to seek a modification of the child support payments while

he was unemployed because he felt strongly about his obligation to support his children. (Tr. 43.) The divorce agreement does not contain any provision for a decrease in support as his children become independent, which is the situation for his 26 and 24-year-old children. (Tr. 66.)

Applicant acknowledged that he has experienced significant financial problems and accrued delinquent debts since late 2002. He attributed the situation to the two-year period of unemployment from 2002 to 2004, a litigious divorce between 2002 and 2003, and high medical and educational expenses related to his son's disabilities. (GE 3 at 118; Tr. 22-25.)

Based on credit bureau reports (CBR) dated July 2009 and December 2008, the SOR alleged security concerns related to the accumulation of eight delinquent debts totaling \$30,749. The status of each of those debts is as follows:

1. (¶ 1.a) In February 2008, the federal Internal Revenue Service (IRS) filed a \$20,661 tax lien against Applicant for the tax years of 2000 and 2001, relating to his child support deductions, and garnished his wages. In May 2009, he entered into a \$298 monthly repayment plan with the IRS and the garnishment order was lifted. As of February 2010, the balance on the tax debt is \$12,295 and includes a small liability amount for 2006 and 2007. (Tr. 32-34; AE A.) The debt is being resolved.
2. (¶¶ 1.b through 1.g) These six delinquent debts total \$7,800 and remain unpaid because Applicant has not had enough money at the end of the month to negotiate payments with the creditors. (Tr. 44-45.)
3. (¶ 1.h.) The \$2,285 debt is owed to an electric company for his former wife's residence. According to Applicant's divorce agreement, the debt is not his responsibility. (Tr. 45; AE B.) This debt is resolved.

According to a March 2010 budget, Applicant has a gross monthly income of approximately \$9,795. After deducting child support payments, taxes, and insurance, his net income is \$2,640 and expenses are \$1,637. He makes approximately \$818 in payments on debts, consisting of the \$298 payment to the IRS, and minimal payments on credit cards, personal loans, and to department stores.¹ He has about \$185 remaining that he could use to make small payments to the six unpaid creditors listed in the SOR. (AE C.) Until his recent salary increase, he could not afford to make any amount of a monthly payment toward those debts. (Tr. 74.)

In November 2006, Applicant completed an e-QIP. In response to "*Section 24. Your Use of Illegal Drugs and Drug Activity: a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example,*

¹Applicant's \$41,848 student loan is deferred, but is included in his list of outstanding debts attached to a March 2009 Personal Financial Statement. (GE 2 at 134.)

marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs,” he answered, “Yes,” and disclosed that he used marijuana twice between December 2001 and January 2002. He noted that he had not used it since that time. (GE 1.)

In December 2008, a Government investigator interviewed Applicant. During that interview, the investigator asked him about his marijuana use. Applicant indicated that he used it on two occasions in 1969 and then not again until he separated from his wife in December 2001. After reviewing his 2006 e-QIP with the investigator, he noted that he made an error in listing his use of marijuana as two times between December 2001 and January 2002. He indicated that he used it more than that and did not intend to mislead the government. The investigator recorded that Applicant was uncertain of the exact number of times he used it but estimated about 15 times. He smoked it with a friend who purchased it. He used it to relieve stress. (GE 3 at 110.)

On May 27, 2009, Applicant completed a set of Interrogatories concerning his drug usage. In response to Question 1a, regarding the history of his marijuana use, Applicant estimated that he had a “few puffs per day” from October 1970 to November 1970. He estimated that he smoked it on “2 occasions” between December 2001 and January 2002. (GE 2 at 126.)

In July 2009, the Government sent Applicant another set of Interrogatories along with a copy of his December 2008 interview. In a written response to the accuracy of that interview, Applicant wrote, “Regarding marijuana usage, my use on social occasions was casual enough to not remember specifics of usage and events in 10/1970-11/1970 and 12/2001-10/2002.” (GE 3 at 118.)

In his Answer to the SOR, Applicant denied that he intentionally falsified his response to Section 24 of the e-QIP or to Question 1a in the May 2009 Interrogatories by failing to disclose the extent of his marijuana use. He stated that he was going through a litigious divorce at the time he used marijuana and he did not have an “exact recollection of the specific number of incidences.” (Answer.)

During his testimony, Applicant denied telling the investigator that he used marijuana 15 times between December 2001 and January 2002. He thinks the investigator prompted him for an estimated number and arrived at 15 without input from him. He reiterated that he believed he used marijuana about two times, but cannot recall with certainty. (Tr. 56-58.)

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 AG 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.

According to 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 and has the ultimate burden of persuasion to obtaining a favorable clearance 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 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."

Analysis

Guideline F, Financial Considerations

The security concern relating to 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.

The guideline notes several conditions that could potentially 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 has a history of financial delinquencies that began in late 2002 and continue to the present, as he does not have the financial ability to pay all of his debts. The evidence is sufficient to raise these potentially disqualifying conditions.

AG ¶ 20 provides six conditions that could mitigate security concerns arising under this guideline:

(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.

AG ¶ 20(a) does not apply because Applicant's numerous financial problems have been ongoing for the past seven or eight years. AG ¶ 20(b) has partial application. Applicant's delinquent debts accrued as a result of two years of unemployment, a litigious divorce, significant medical and educational bills for one child, and large child support obligations. Those were circumstances beyond his control. However, he did not present evidence that he attempted to responsibly resolve or manage all of the debts

during those times, which is necessary for full application of the mitigating condition. Applicant has not obtained credit counseling, but did present his budget, which indicates that many of his obligations, including the alleged IRS debt, are being paid and coming under control. Those facts support the application of AG ¶ 20(c) to that debt. Applicant has not made a good-faith effort to resolve six delinquent because he does not have sufficient income; hence, AG ¶ 20(d) cannot apply. Applicant provided proof that the \$2,285 debt alleged in SOR ¶ 1.g is not his responsibility, but rather his former wife's. AG ¶ 20(e) applies to that debt. There is no evidence to support the application of AG ¶ 20(f).

Guideline E, Personal Conduct

The security concern pertaining to 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Government alleged in SOR ¶¶ 2.a and 2.b that Applicant falsified his answers to a question on his e-QIP and a question on the May 2009 Interrogatories, regarding the extent of his marijuana use between December 2001 and January 2002. The Government contended that his omissions may raise a security concern and be disqualifying under AG ¶ 16(a):

Deliberate omission, concealment, or falsification of relevant facts from any personnel security 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.

Applicant denied that he intentionally falsified two answers about the frequency of his marijuana usage during said time. 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 a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See 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)).

Applicant disclosed in the November 2006 e-QIP that he used marijuana twice between December 2001 and January 2002. During a December 2008 interview, he indicated that he used it more than twice. The investigator recorded Applicant's usage as being about 15 times. Applicant also disclosed during the interview that he used it

twice in 1969. In the May 2009 Interrogatories, Applicant stated again that he used it twice between December 2001 and January 2002. He disclosed that he used it daily between October and November 1970. In July 2009, he had an opportunity to review the accuracy of the summary of the December 2008 interview. He noted that he could not accurately recall the specifics of either time because he used it casually for social purposes. In his October 2009 Answer, he reiterated that he did not have a specific recollection of the number of times he used it between December 2001 and January 2002. During his February 2010 testimony, he denied telling the investigator that he used it 15 times during that time frame, but could not recall the number of times he did use it.

Although the full extent of Applicant's marijuana usage is unclear, it is apparent that he smoked marijuana more than twice between December 2001 and January 2002. His testimony that he cannot recall or that he only used it twice is not credible. In May 2009, he specifically recalled daily use between October and November 1970, some forty years ago, but in July 2009, he could not recall his usage from seven years prior. Instead of acknowledging that he used marijuana more than twice, as he told the investigator in December 2008, he equivocated during the hearing and attempted to minimize his usage. While the number of times he smoked marijuana for one month seven or eight years ago would not normally be a great security concern at this time, his lack of candor about the incident raises a significant concern about his trustworthiness and reliability. Hence, the evidence establishes deliberate falsification.

AG ¶ 17 provides four conditions that could mitigate security concerns arising under this guideline:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not initiate any effort to correct his omission of information until confronted by an investigator in December 2008. There is no evidence that Applicant received inadequate advice or instruction during the clearance process about the necessity for full disclosure. He continues to deny that he intentionally concealed information throughout this investigation, to such an extent that the offense is not minor and does cast doubt about his reliability and trustworthiness. He has not acknowledged his omissions or taken other steps to assure the Government that similar behavior is unlikely to recur or that his susceptibility to exploitation has diminished as a result of his previous conduct and current lack of candor. None of the above four mitigating conditions apply.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

(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 include 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 facts and circumstances surrounding this case. Applicant is a 59-year-old educated man and father of nine children. As a consequence of a divorce from his second wife, a two-year period of unemployment, and financial obligations for a large family, he has experienced significant financial obligations and difficulties for the past seven years. While he is unable to pay \$7,800 of debt alleged in the SOR, he is resolving the \$20,000 debt owed to the IRS and has successfully disputed \$2,280. According to his

budget, he carefully manages his finances and acknowledges his obligations. He calculated that there may now be money in his budget for small monthly payments to the six unpaid creditors listed in the SOR. His delinquent debts no longer pose a security concern. However, his equivocating about the extent of his marijuana use seven years ago does raise a personal conduct concern. After disclosing in December 2008 that he intended to be truthful about his past marijuana usage, which occurred more than the two times which he disclosed in the e-QIP, he subsequently decided that he could not specifically recall the number of times or asserted that it was no more than twice. Unfortunately, that lack of forthright disclosure is precisely the type of conduct that raises a potential risk which the Government cannot assume. If Applicant cannot be fully candid about incidents in his past, he may not be truthful about future conduct, especially as it may relate to his access or handling of classified information.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude that he mitigated the security concerns raised under financial considerations, but did not mitigate those raised under personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge