



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-06170
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

February 18, 2011

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on March 17, 2009. (Government Exhibit 1.) On May 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, which detailed security concerns under Guidelines F and E. 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 (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 4, 2010, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on June 22, 2010. This case was assigned to me on November 22, 2010. DOHA issued a notice of hearing on December 2, 2010, and I convened the hearing as scheduled on December 22, 2010. The Government offered Government Exhibits 1 through 10, which were received without objection. Applicant testified on his own behalf, and submitted

Applicant's Exhibits A through C, also without objection. The record was left open at the Applicant's request for the submission of additional documentation. Applicant submitted Applicant's Exhibit D on January 6, 2011. He submitted Applicant's Exhibit E on January 11, 2011. These exhibits were received without objection. DOHA received the transcript of the hearing on January 7, 2011. The record closed on January 11, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 47, single with a long-term companion, and has an Associate of Science degree. He is employed by a Defense contractor and seeks a security clearance in connection with his employment in the defense industry. In his Answer to the SOR, Applicant admitted allegations 1.a., 1.b., 1.c., 1.d., 1.e., 2.a., and 3.a. Those admissions are deemed findings of fact. He denied allegations 1.f., 1.g., and 1.h. He also provided additional information supporting his request for a security clearance.

Paragraph 1 (Guideline F - Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore at risk of engaging in illegal acts to obtain funds.

Applicant's financial situation was brought about due to two circumstances. First, he and his ex-wife, as part of the divorce decree, were supposed to alternate taking two of their three children as tax exemptions each year. The ex-wife violated this agreement, which caused Applicant to fall behind on his taxes. (Transcript at 37-39.) Secondly, in 2003, the company he was working for relocated to another state, and the Applicant was laid off. (Transcript at 53; Government Exhibit 1 at Section 13.) Applicant has health issues, including dialysis three times a week. However, he is able to pay his medical expenses.

The current status of the debts in the SOR is as follows:

1.a. Applicant is indebted to a bank for \$1,082. He has made a payment arrangement with this bank whereby he will pay this debt off in four months via direct withdrawal. The first payment has been made. This debt is in relation to the automobile described in 1.d., below. (Tr. 46-47; Applicant's Exhibit D at 3, 5.) This debt is being resolved.

1.b. Applicant admits that he had a tax lien with his state taxing authority. His state tax liability has been reduced \$1,408 to \$140.31. Applicant has always kept his state taxing authority informed of his status. He is working with his tax preparer to resolve any lingering issues. (Tr. 37-45; Applicant's Exhibits B, and D at 8-12.) This debt is being resolved.

1.c. Applicant admits he was indebted to a creditor for \$901. Applicant made a payment arrangement with this creditor which he successfully completed, pursuant to a letter from the creditor. (Tr. 47-49; Government Exhibit 10; Applicant's Exhibit C.) This debt is resolved.

1.d. Applicant admits that he is indebted to a creditor for \$19,797 for a repossessed automobile. This automobile was returned to the bank in 2004 or 2005 because Applicant could no longer afford the payments due to his layoff, described above. Applicant's credible testimony was that he owed approximately \$20,000 on this vehicle when it was returned. He further indicated the creditor indicated there would be an auction of the vehicle and Applicant would be responsible for any deficiency. He was never notified of the auction, or that there was a deficiency. Applicant indicated that he would pay any deficiency. (Tr. 49-56.) The status of this debt is unknown.

1.e. This allegation originally stated that Applicant was indebted to the state government for a tax lien. However, based on testimony and documentary evidence, Applicant and Department Counsel agreed that this was more likely to be a tax lien to the Federal Government. The SOR was amended accordingly. (Transcript at 57-58.)

The SOR alleges that Applicant owed \$7,624 to the Federal Government for back taxes. Applicant states that this lien should be substantially paid off because of the refund he is due to receive for tax year 2009. He submitted his tax return showing that he is due to receive a refund of \$5,239. His tax preparer has contacted the IRS to request information concerning any additional deficiencies. (Tr. 37-45; Applicant's Exhibits B, and D at 3, 11.) This debt is being resolved.

1.f. Applicant denied owing the Automobile Club \$60 for a past due account. After the hearing, Applicant found out he owed \$45 on his ex-wife's account. He paid this debt. (Tr. 58-59; Applicant's Exhibit D at 3-4.) This debt has been resolved.

1.g. Applicant denied any knowledge of this medical debt in the amount of \$99. Because of his medical condition, Applicant has a lot of medical bills, but indicates that he pays them consistently and conscientiously. (Transcript at 59-61.) His 2009 Federal tax return indicates that he had medical expenses of over \$18,000. Under the Health Information Privacy Act (HIPA) no specific medical creditor information is contained in his March 2009 credit report. (Government Exhibit 5.) The most recent credit reports in the record do not reflect the debt. (Government Exhibits 6, 7, 8 and 10.) The status of this debt is unknown.

1.h. Applicant denied owing a bank \$100 for service fees. He submitted a statement from the creditor indicating that the account was "satisfied in full." (Tr. 63-65; Applicant Exhibit D at 6.) This debt has been resolved.

1.i. Applicant denied owing \$6,990 for homeowner's association fees on a time share. Applicant testified that this time share is owned by his ex-wife. He quit-claimed the property to her as a result of their divorce, but he was still obligated on the debt.

Applicant stated that a mistake on the deed kept him from being released from the liability. The Government's March 2009 credit report shows that this is a joint contractual liability. Subsequent to the hearing, Applicant contacted the property manager to determine the current status. (Tr. 66-70, 88-91; Applicant Exhibit E at 7-11.) The status of this debt is unknown.

Applicant states that his current financial situation is stable. He is able to maintain a budget, which includes payments for some of his past due debts. (Transcript at 70-72.)

Paragraph 2 (Guideline J - Criminal Conduct)
Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in Paragraph 2 that the Applicant is ineligible for clearance because he engaged in criminal conduct. It further alleges in Paragraph 3 that the criminal conduct also amounted as conduct that showed questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

Applicant was arrested in July 2005 for stealing printer cartridges from his then employer. According to the Applicant, a then friend who was pastor of Applicant's church asked him to steal the cartridges so they could be used by the church. Applicant freely admits that his conduct was foolish and he will never do anything like that again. He has had no contact with this person since his arrest.

As a result of his arrest he went to court, plead guilty, and was sentenced to three years probation, a term in jail, and to pay restitution. All terms of his sentence have been fulfilled. In addition, Applicant was terminated from his employment due to this transgression. (Transcript at 77-84, 92-93.) He has been completely forthcoming with the Government concerning this incident. (Government Exhibits 1 and 3.)

Mitigation

The Applicant is a highly respected person in his field. He presented recommendations from members of his local community. (Applicant's Exhibit D at 13-20.) He also presented letters of recommendation from past and present co-workers. The letters describe the Applicant as a person of "character," who displays a "high degree of integrity, responsibility," and is "reliable and trustworthy." (Applicant's Exhibit D at 21-32, and E at 4.) Applicant has also received on-the-job recognition and Performance Awards at his current place of employment. (Applicant's Exhibit D at 33-43, and E at 5-7.)

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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 for 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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.

Finally, as emphasized by the President in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

Paragraph 1 (Guideline F - Financial Considerations)

The security concern 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 failed to pay several of his debts for a period of years. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. Mitigating Condition ¶ 20(a) states that the disqualifying conditions 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." As described above, the majority of the Applicant's debts occurred because of his divorce and loss of a job. His current financial situation is stable and the debt problems are unlikely to occur. The evidence raises this mitigating condition.

Under AG ¶ 20(b), the disqualifying conditions 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." In addition, evidence that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" is also mitigating under ¶ 20(d). Applicant's financial situation was exacerbated by his unemployment and divorce. He has behaved responsibly, paying or resolving five debts, and substantially reducing his tax liabilities. As set forth at length above, the Applicant has a legitimate dispute concerning the debt in 1.i. Applicant is taking steps to resolve this debt with his ex-wife, and with the creditor. As the Appeal Board has stated concerning the successful mitigation of security concerns arising from financial considerations, "An applicant is not required to show that [he] has completely paid off [his] indebtedness, only that [he] has established a reasonable plan to resolve [his] debts and has 'taken significant actions to implement that plan.'" ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006)). The evidence raises these

mitigating conditions as well. For all the foregoing reasons, Paragraph 1 is found for the Applicant.

Paragraph 2 (Guideline J, Criminal Conduct)

The security concern for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant was involved in a serious case of theft from his employer. Under the Criminal Conduct guideline, the following Disqualifying Conditions are applicable. AG ¶ 31.(a) "a single serious crime or multiple lesser offenses."

After considering the evidence in the record, I find that the following applicable Mitigating Conditions under Criminal Conduct apply to this case. AG ¶ 32.(a) states it may be mitigating where, "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness or good judgment." In addition, AG ¶ 32.(d) states that it can be mitigating where, "there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

Applicant's misconduct happened almost six years ago. He admitted his guilt, has paid restitution, and has a very good employment record since then. Applicant showed sincere remorse and has successfully mitigated the security significance of this conduct. Paragraph 2 is found for the Applicant.

Paragraph 3 (Guideline E, Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

The Applicant's conduct set forth under Paragraph 2, and his being terminated from his employment because of his theft, brings into play disqualifying condition ¶ 16(c) under Guideline E:

credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline,

but which, when considered as a whole, 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.

The following mitigating conditions under Guideline E ¶ 17 apply to his conduct:

AG ¶ 17(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, and

AG ¶ 17(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.

For the same reasons that Applicant established mitigation under Paragraph 2, discussed above, he met his burden with respect to this paragraph as well. Based on his testimony, and the available evidence, it is clear that his misconduct was singular in nature, and will not recur. Paragraph 3 is found for Applicant.

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. Applicant stole from his employer in

2005. He was terminated from his job and prosecuted criminally for the offense. He has paid substantial financial restitution, fulfilled his sentence, and has not engaged in any such conduct since then. The actions took place almost six years ago and he has shown good judgment since then, and expresses not only extreme remorse, but a credible intent not to engage in such conduct in the future.

Applicant's conduct was serious, but there is considerable evidence of rehabilitation. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is not a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct, personal conduct, and financial situation. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance.

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:	FOR THE APPLICANT
Subparagraphs 1.a. through 1.i.:	For the Applicant
Paragraph 2, Guideline J:	FOR THE APPLICANT
Subparagraph 2.a.:	For the Applicant
Paragraph 3, Guideline E:	FOR THE APPLICANT
Subparagraph 3.a.:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge