



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



In the matter of:)	
)	
)	ISCR Case No. 09-01818
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

September 30, 2010

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Criminal Conduct, Financial Considerations, and Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct; Guideline F, Financial Considerations; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 for cases dated after September 1, 2006.

Applicant answered the SOR on February 8, 2010, and requested a hearing before an administrative judge. The case was assigned to me on June 15, 2010. DOHA

issued a notice of hearing on June 21, 2010. The hearing was scheduled for August 2, 2010. Applicant requested a continuance, which was granted. The hearing was rescheduled and convened on August 17, 2010. The Government offered Exhibits (GE) 1 through 18. All of them were admitted without objection, except GE 5 which was admitted over Applicant's objection. The Government also presented GE 19, a Memorandum of Law, post-hearing. The Applicant offered Exhibits (AE) A through WW, called two witnesses, and testified on his own behalf. All were admitted without objection, except AE B, C, D, H, I, and K, which were admitted over the Government's objection. The record was left open for the receipt of additional documents. The Government offered GE 19, which was admitted. Applicant presented AE XX through KKK on August 13, 2010. The Government had no objection to AE XX through JJJ, and they were admitted. The admissibility of AE KKK is addressed below. DOHA received the transcript of the hearing (Tr.) on August 27, 2010.

Procedural Ruling

The Government objects to AE KKK, Applicant's final post-hearing exhibit. The Government's initial objection was based upon the Doctrine of Completeness, Federal Rules of Evidence (FRE) 106, as Applicant did not present the full document. Applicant then presented a copy of the 10-page pre-sentence report, with portions that were redacted. The Government again objected, based upon FRE 106. It should be noted that the Government did not object to AE LL, which also contains portions of the same pre-sentence report. Applicant appears to be introducing KKK to provide information on his "Other Criminal Conduct" addressed in the pre-sentence report. This information does not appear elsewhere in the record.

DoD Directive ¶E3.1.19 provides that the Federal Rules of Evidence shall serve as a Guide. However, it permits the technical rules of evidence to be relaxed to permit the development of a full and complete record. The DOHA process encourages Judges to err on the side of admitting evidence into the record and then to consider a party's objections when deciding what, if any, weight to give to that evidence.¹ AE KKK is admitted.

Findings of Fact

Applicant admitted the SOR allegations ¶¶ 1.a, 1.b, 1.c., 1.d., 2.b., 2.c., 2.d., and 2.e. He denied SOR ¶¶ 2.a., 2.f, 3.a. and 3.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 47 years old. He served in the U.S. Army from 1986 through 1991. He was discharged under other than honorable conditions, as set forth below. He reenlisted in October 1998 through October 2004. The Government presented documents that questioned the validity of the re-enlistment noting that some of the documentation was forged; however this was not alleged in the SOR. Applicant received an honorable discharge from the Army Reserve in 2004. He is divorced and

¹ See, ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb. 8, 2007).

has two adult children that reside with Applicant. (GE 1; GE 5; GE 6; GE 9; GE 18; AE Z; AE KK; AE MM; AE VV; Tr. 162-166, 180-182, 228.)

On November 25, 1984, Applicant was arrested for Carrying a Firearm in a Vehicle. He was approximately 21-years old at the time. He had been shooting at a range earlier that day. After finishing target practice, he wrapped the unloaded gun up in a towel and placed it in the glove box of his car, since he did not have a case for it. In his haste to get ready for a date that evening, he forgot to remove the gun. After dropping his date off for the evening, he was pulled over by the police for a tail light infraction. He reached in his glove box to get his registration and the handle of the gun was visible to the police officer. Applicant was arrested. He was later found guilty and sentenced to four days in jail and one-year probation. The gun was confiscated. (GE 7; GE 9; Tr. 166-172.)

On March 21, 1991, Applicant was charged with violation of the Uniform Code of Military Justice (UCMJ) Article 92 for Failure to Obey Lawful Order or General Regulation; Article 103, Captured or Abandoned Property; and Article 121, Larceny. While serving in the Army in Iraq, Applicant acquired three pistols and one submachine gun, captured enemy property, given to him by co-workers who were Kuwaiti nationals. He was aware that it was against orders and regulations to keep these weapons. He retained the guns, hoping the regulations would change. They did not and when it came time for Applicant to return to the U.S., he attempted to smuggle the weapons into the U.S. in a sniper rifle case that was in the armory. He planned to retrieve the guns from the armory when he returned back to the U.S. He was smuggling the guns for both personal use and for possible resale. He included a personally owned weapon in the rifle case, which was also prohibited by regulation. He hid the weapons in the rifle case, after signing a document acknowledging that he was aware of the regulations prohibiting these actions. Applicant acknowledged that he made a poor decision in this instance. He blames his bad judgment on the death of his father and the birth of his son, two events he was absent for, due to his service in Iraq. As a result of his actions, Applicant was administratively separated in lieu of court-martial and received an other than honorable discharge. (GE 2; GE 5; AE N; AE O; Tr. 172-180, 281-288.)

On July 2, 1996, Applicant was charged with Failure to Appear and Contempt of Court. Applicant claims the charge was resolved when he paid an \$81 fine. Applicant entered a diversion program for twelve months, without entering a plea to these charges. The case was dismissed on June 17, 1997 when the diversion program was terminated. (GE 7; AE P; AE KKK; Tr. 185-188.)

On December 11, 2003, Applicant was charged with Impersonating Authorized U.S. Military Personnel, Making False Writings, and Theft of Government Property. On May 9, 2005, he pled guilty to 18 USC § 701, Unlawful Manufacture or Possession of Official Insignia. He was found guilty and sentenced to a fine of \$5,000 and two-years probation. In mid-to-late 1997 through his re-enlistment in October 1998 Applicant became associated with a reserve unit. He wanted to obtain a waiver and re-enlist in the Army. Prior to actually joining the unit or being granted a waiver on the bar to re-enlistment, he "volunteered" his services with the unit and became the individual

responsible for obtaining supplies for training purposes. This volunteer service is not permitted by law. As a volunteer, he created a document, which authorized him to obtain Defense Reutilization and Marketing Office (DRMO) items for the unit, by copying a pre-existing supply memorandum on Department of Defense letterhead and adding his name. Applicant claims he created this memo at the direction of his commander. I did not find his testimony credible. He denies that he impersonated U.S. Military Personnel and used the supply memorandum to obtain military items that were then leased privately to the motion picture industry, as well as the other criminal allegations made against him by the Federal Bureau of Investigations. (GE 3; GE 4; GE 5; GE 6; GE 9; GE 18; AE Q; AE R; AE S; AE LL; AE MM; AE NN; AE OO; AE PP; AE QQ; AE RR; AE WW; Tr. 79, 91, 109, 182-224, 228.)

A tax lien was filed against Applicant in November 2009 in the amount of \$77. Applicant provided copies of two checks that he claimed satisfied this tax obligation. Neither of the checks had been canceled. Applicant provided copies of releases on several tax liens, none of the releases correspond to this lien. (GE 14; AE U; AE JJJ; Tr. 138-139, 230-238.)

Two tax liens (SOR ¶¶ 2.b and 2.c) were filed against Applicant by a county tax collector in December 2004 and November 2005, for approximately \$104 and \$100, respectively. Applicant explained that these liens were for property taxes on jet skis that he had sold prior to the liens. The individuals who purchased the jet skis failed to register the transfer of the titles. Applicant produced documentation showing these liens were released and he is no longer liable for these amounts. (GE 8; GE 10; GE 11; GE 12; GE 15; GE 17; AE JJJ; Tr. 230-238.)

SOR ¶¶ 2.d and 2.f., allege the same collection account owed to a collections agent for a bank, in the approximate amount of \$260. Applicant incurred this debt when he failed to close his banking account after switching to another bank. Applicant claims he has disputed this debt, but failed to provide documentation of the dispute. (GE 10; GE 11; GE 12; GE 15; GE 17; Tr. 229, 260.)

SOR ¶ 2.e. is a credit card debt in the approximate amount of \$953. In August 2010, Applicant paid this creditor \$800 to settle the account. He provided a copy of the canceled check as proof of payment. (GE 8; GE 15; GE 17; AE T; Tr. 136-137.)

Applicant also presented documentation to show that he settled an additional debt, not listed on the SOR. He claims that he has no other past due accounts and presented an August 2010 credit report to substantiate this claim. He blames his financial delinquencies on a trade union strike that took place a few years ago. Applicant failed to introduce evidence, other than his testimony, to support his claim of a strike. Due to the nature of Applicant's current profession, he works for short periods of time on many different projects. Thus, he does not have a stable income. He presented pay stubs from several different employers to substantiate this claim. (AE T; AE V; AE W; AE X; AE HHH; Tr. 229.)

Applicant executed his e-QIP on August 6, 2008. The e-QIP asked: "Section 27: Your Financial Record c. In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" Applicant indicated "No." In doing so, he failed to disclose the two tax liens filed against him in December 2004 and November 2005, for approximately \$104 and \$100, respectively, as set out in SOR ¶¶ 2.b. and 2.c. Applicant contends that his omission was not deliberate. He claimed at the hearing that he was not aware of the liens. However, when he was asked about the liens during his October 2008 subject interview, Applicant acknowledged that he was aware of seven small tax liens around the \$100 range, but did not list them on his e-QIP due to oversight. (GE 6; GE 9; GE 12; Tr. 242-260.)

Applicant's good character was attested to by his two witnesses and through 13 letters from personal and professional colleagues. He has been active in the Boy Scout "exploring program" for a number of years. He has also participated in other volunteer activities. He presented evaluation reports to show he met the Army's standards and values, while in the Army. His waiver packet for his re-enlistment in the Army also contained numerous letters of recommendation, letters of commendation, and award certificates. (AE A; AE B; AE C; AE D; AE E; AE F; AE G; AE H; AE I; AE J; AE K; AE L; AE M; AE Y; AE Z; AE XX; AE YY; AE ZZ; AE AAA; AE BBB; AE CCC; AE DDD; AE EEE; AE FFF; AE GGG; Tr. 57-67, 74-75, 78-108, 223-224.)

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 to be used 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, administrative judges apply the guidelines 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.

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 the 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 EO 10865 provides that adverse 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 J, Criminal Conduct

The security concern relating to the guideline 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and

- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has a long criminal history from 1984, through his most recent conviction in 2005. Over this 21-year time span, he had four criminal incidents, three of which were serious offenses. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (a) 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; and

(d) 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 criminal conduct involves extremely poor judgment. While a number of years have passed since his last criminal act and subsequent conviction, the passing of time does not mitigate his lack of judgment. He was a mature adult at the time of his last criminal act. His 21-year history of criminal conduct reflects a disregard for following rules and regulations and not only cast doubt on his judgment, but also his reliability and trustworthiness. Based on his long history of criminal conduct I cannot find that future criminal conduct is unlikely to recur. AG ¶ 32(a) does not apply.

Applicant presented numerous letters of recommendation, work performance appraisals, certificates, evidence of volunteer work, and other character evidence. However, these alone are not enough to mitigate his criminal activity. Applicant displayed little remorse for his most recent criminal actions. He did not recognize that any of his actions were wrong. I find at this juncture there is insufficient evidence to show successful rehabilitation. AG ¶ 32(d) does not apply.

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18, as follows:

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 concern under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has demonstrated an unwillingness or inability to satisfy his debts. He has failed to closely monitor his finances since 2004. AG ¶ 19(a) and 19(c) are disqualifying.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially applicable:

(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; and

(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.

Applicant has satisfied three of his debts, but two debts remain unpaid. Applicant believes he paid the remaining tax obligation (SOR ¶ 2.a.) and is disputing the bank collection (SOR ¶¶ 2.d and 2.f.). However, he has not provided any documentation that supports his claims. The lack of documentation indicates that the financial problems are recent and ongoing. AG ¶ 20(a) does not apply.

Applicant blames his recent financial delinquencies on a union strike. However, he failed to show that he has been acting responsibly under the circumstances with respect to his remaining debts. While an applicant is not required to be debt free, nor is he required to develop a plan for paying all debts immediately or simultaneously, "an applicant must act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by 'concomitant conduct'."² He did not demonstrate any type of plan for handling his remaining debts. AG ¶ 20(b) does not apply.

Applicant failed to present evidence that he had received any financial counseling. Further, he failed to show that his financial problems are under control. AG ¶ 20(c) does not apply.

Applicant has satisfied three of five of his delinquent debts. He claims that SOR ¶ 2.a. is satisfied, but failed to present documentation to support his claim. There is no

² ISCR Case No. 08-06567 at 3 (App. Bd. October 29, 2009.)

evidence he has initiated a good-faith effort to repay his remaining overdue creditors or otherwise resolve debts with respect to SOR ¶¶ 2.a and 2.d. (duplicated in SOR ¶ 2.f.). AG ¶ 20(d) is only partially applicable.

Applicant contests that he owes any amount to the creditor listed in SOR ¶ 2.d. (duplicated in 2.f.). However, he admits that he incurred the debt when he failed to close a bank account. He failed to produce any documentation of the steps that he has taken to dispute this debt or other documented proof to substantiate the basis of the dispute. AG ¶ 20(e) 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

I find Applicant was not credible when he testified he was unaware of the tax liens when he completed his e-QIP. When he was asked about the liens during his October 2008 subject interview, Applicant acknowledged that he was aware of seven small tax liens around the \$100 range. I find he deliberately omitted or concealed the liens from his e-QIP.

Applicant is clearly embarrassed by his criminal history and he is vulnerable to exploitation, manipulation, or duress. His conduct from 1984 through 1998 is sufficient to raise concerns under AG ¶ 16(e).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

Applicant's failure to list his tax liens on his e-QIP was deliberate. He did not correct his omission prior to being confronted in the subject interview about the liens. Further, there is no evidence of improper or inadequate advice with respect to this omission. Applicant's omission casts doubt on his personal judgment.

Applicant's criminal conduct raises questions about his trustworthiness, judgment and reliability. He has demonstrated that even when given a second chance, when he was "volunteering" for the reserve unit, he willingly broke rules and failed to abide by the regulations. Applicant failed to acknowledge his behavior and demonstrate a change in his behavior. He failed to show remorse for his most recent criminal conduct. Applicant has a long history of poor judgment and making poor choices and has failed to demonstrate positive steps to convince me that future inappropriate behavior is unlikely to recur. I find none of the above 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):

(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. I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis.

I have considered Applicant's character, as attested to by his two witnesses and through the 13 letters from personal and professional colleagues; his volunteer work with the Boy Scouts and other organizations; his evaluation reports; letters of commendation; and award certificates. However, the serious nature of his criminal conduct, especially his 1991 UCMJ violations and his 2005 conviction, lead me to conclude he does not demonstrate the good judgment, reliability, and trustworthiness required of one who has access to classified information. He was a mature adult when he committed these offenses. Applicant has failed to demonstrate genuine rehabilitation or remorse for his actions.

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 Criminal Conduct, Financial Considerations, and Personal Conduct security concerns.

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 J:	AGAINSTAPPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant

Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	For Applicant
Subparagraph 2.c.:	For Applicant
Subparagraph 2.d.:	Against Applicant
Subparagraph 2.e.:	For Applicant
Subparagraph 2.f.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant
Subparagraph 3.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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge