



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 09-02007  
)  
)  
Applicant for Security Clearance )

For Government: Paul M. Delaney, Esquire, Department Counsel  
For Applicant: *Pro se*

April 16, 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 February 1, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On October 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), 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 30, 2009, and requested a hearing before an administrative judge. On December 4, 2009, DOHA assigned the case to me. On December 18, 2009, DOHA issued a Notice of Hearing, setting the case for January 26, 2010. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 13 into evidence without objection. Applicant testified. DOHA received the hearing transcript on February 3, 2010.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the allegations contained in ¶¶ 1.c, and 2. b through 2.f. He denied the allegations contained in ¶¶ 1.a and 1.b. He denied with explanations the allegations contained in ¶¶ 1.d, 2.a, and 2.g.

Applicant is 40 years old. He served in the U.S. Marine Corps from December 1988 until he was honorably discharged in August 1992. (Tr. 105-106.)

Applicant married his first wife in 1992. They separated in April 2006 and were divorced in September 2009. He has three children from this marriage, 16-year-old twins and a 13-year-old. He has a 19-year old daughter from a previous relationship. His fiancé and her two children, ages 3 and 5, live with him in a home he rents.

In January 2001, Applicant started a business that supports military programs. The company employs between 40 and 50 people. He owns approximately 37% of the corporation's stock and is the senior vice president. He travels extensively for the company. He is developing a product that he hopes will significantly increase the company's profits. His company is solvent, but operates on a tight budget some months, depending on its receipts.

### **Guideline F, Financial Considerations**

Based on credit bureau reports (CBR) dated March 2008, January 2009, and March 2009, the SOR alleged that beginning at the end of 2007, Applicant accumulated four delinquent debts totaling \$64,289. The status of each of the debts is as follows:

- (1) Applicant denied owing the \$150 medical debt alleged in SOR ¶ 1.a, which became due in December 2007. He believes the debt relates to care his daughter received for which he is not responsible under his divorce decree. During an April 2008 interview with a Department of Defense investigator, he indicated that he would attempt to contact the creditor. He agreed to pay the bill if it related to his medical care, but not if it related to his daughter's care. (GE 2 at 9.) At the hearing, he stated that he did not contact the creditor. (Tr. 37.) The debt is unresolved.
- (2) Applicant denied owing the child support debt of \$8,084, alleged in SOR ¶ 1.b and noted on a CBR as delinquent as of January 2008. He asserted that he did not owe the money because his oldest daughter lived with him

from September 2006 until June 2007. During the April 2008 interview with the investigator, he stated that he intended to petition the court to amend the amount alleged based on the time she lived with him. (GE 2 at 8.) As of the hearing, he had not resolved the problem with the state agency that monitored his support payments. (Tr. 42-44.) The matter is unresolved.

- (3) Applicant admitted that he owes a bank \$50,439 for the debt alleged in SOR ¶ 1.c. In 2000 or 2003, he purchased a \$65,000 airplane for his business and obligated himself for the debt in his personal capacity. Sometime in January 2008, the debt became delinquent. After conversations with the bank, the plane was recently sold through a short sale. Applicant is waiting for the final transaction papers to determine the deficiency amount he owes. He believes the debt will be reduced to \$30,000 and he intends to work out a payment plan with the bank. (Tr. 50-55.) The debt is unresolved.
- (4) Applicant denied the \$5,616 debt alleged in SOR ¶ 1.d, which involved a three-year car lease that he obtained in August 2004. He returned the car three weeks beyond the lease term in 2007, but asserted that he obtained the company's authorization to do so. He stated that he does not owe the amount alleged and has tried to work out a settlement with the creditor. (Tr. 55-62.) The debt is unresolved.

Applicant generally receives a monthly income of about \$15,000 from the company, from which he pays \$5,000 in child support to his former wife. (Tr. 64.) He pays his household expenses and additional costs involved in caring for his fiancé's disabled child. His estimated gross income for 2009 was about \$200,000. (Tr. 71.) Prior to October 2008, he had financial difficulties as a result of the separation from his wife. Those difficulties affected his ability to resolve some of his ongoing financial obligations. (Answer.) Currently, he does not have any personal credit cards or car loans. (Tr. 107.)

In addition to discussing the debts with an investigator in April 2008, he also responded to interrogatories regarding the debts in both January and May 2009. Applicant admitted that he did not make the resolution of the above debts a priority in his life, given his hectic work schedule and personal obligations. He is willing to resolve them in order to maintain a clearance. (GE 2, 3, 4; Tr. 65-67.)

#### Guideline J, Criminal Conduct

Applicant has a history of criminal arrests and convictions, beginning in 1989, while on active duty with the Marines. In May 1989, when he was 20 years old, he was arrested and charged with Driving while Intoxicated. He pleaded guilty to the lesser charge of Reckless Driving and was fined \$125. (GE 13.) In February 1990, he was arrested and charged with (1) Driving Under the Influence, and (2) Furnishing, Purchasing, and Possession of Alcoholic Beverages by Persons Below Legal Age. He pleaded *Nolo Contendere* to both counts and was fined \$350. (GE 12.) In June 1990, he

received Non Judicial Punishment (NJP), under Article 15 of the Uniform Code of Military Justice (UCMJ), after he was charged with Assault of another Marine. He was awarded seven days of extra duty. (GE 12.) In September 1990, he was arrested and charged with wrongful appropriation of a bicycle. He received NJP and was awarded seven days of extra duties. (GE 12.) He consumed alcohol prior to that incident.

In February 2004, Applicant was arrested and charged with Public Intoxication, a misdemeanor. He pleaded guilty and was fined \$90. In January 2007, he was arrested and charged with Assault-Cause Fear of Physical Injury, a misdemeanor, after he became involved in a verbal argument with his oldest daughter who was living with him. The charges were later dismissed. He admitted that he had consumed alcohol before the altercation. (Tr. 89.) In July 2008, he was charged with Disorderly Conduct/Language/Gesture, after he kicked another person's car that came close to striking his children in a parking lot. He was not arrested at the time of incident. (Tr. 83.) In August 2008, an arrest warrant was issued because he failed to appear in court for the July 2008 charge. In March 2009, he pleaded guilty to Disorderly Conduct/Language/Gesture and was fined.

Applicant disclosed while testifying that in September 2009, he was arrested and charged with Assault and Disorderly Conduct after becoming embroiled in an argument with his former wife's boyfriend. He pleaded guilty to the Disorderly Conduct charge, a misdemeanor, and was placed on probation for a year and ordered to attend Anger Management courses. He has found the courses that he has taken to-date helpful in managing his stress and reactions to situations. He remains on probation until September 2010.<sup>1</sup> (Tr. 93-94.)

#### Guideline E, Personal Conduct

In February 2008, Applicant completed a SF 86. In response to "*Section 28. Financial Delinquencies: Your Financial Delinquencies: a. In the last 7 years, have you been over 180 days delinquent on any debt(s),*" and "*Section 28: b. Are you currently over 90 days delinquent on any debts(s),*" he answered "No." He did not list the medical debt, delinquent child support, or the automobile debt, which were alleged in the SOR. At the time, he did not believe he was responsible for the medical bill or owed monies on the car loan. (Tr. 99.) He asserted that he did not owe child support for his oldest daughter. He denied that he intentionally falsified the SF 86. (Tr. 99; Answer.) In response to questions on these allegations, he stated, "I can assure you that's probably the stupidest thing to lie about is any kind of indebtedness you have. Obviously you can pull a credit report." (Tr. 99.)

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<sup>1</sup>This criminal incident was not alleged in the SOR; hence, it will not be considered for disqualifying purposes, but will be considered under the Whole-Person Analysis.

## 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 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 as 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 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.

AG ¶ 19 sets forth a disqualifying condition that could potentially raise a security concern:

(a) an inability or unwillingness to satisfy debts.

Applicant admitted that he did not resolve four debts listed on the SOR because he failed to make the issues his priority, despite indicating to a government investigator in April 2008 that he would contact the creditors to do so. The evidence supports the application of this disqualification.

AG ¶ 20 provides conditions that could mitigate security concerns, three of which may be potentially applicable:

(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 did not present evidence that he obtained financial counseling, or provide documentation that the four financial obligations are resolved, paid, or under control, as required under AG ¶ 20(c). There is no evidence that he made a good-faith effort to pay the creditors, which is necessary for the application of AG ¶ 20(d). Applicant denied that he owed three of the four debts, but failed to present evidence to

corroborate his statements or substantiate the basis of his dispute and actions to resolve them. Hence, AG ¶ 20(e) has limited application.

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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 two conditions that could raise a security concern and may be disqualifying:

- (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 admitted that he has been charged with seven offenses since May 1989. The evidence is sufficient to raise the above potentially disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate those security concerns:

- (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.

Four of the criminal incidents alleged in the SOR occurred between May 1989 and September 1990 while Applicant was 20 years old and in the early years of his military service. All of them involved alcohol. About fourteen years later, in February 2004, he was charged with an alcohol-related misdemeanor. Three years later, he was arrested for a domestic violence incident that occurred after he consumed alcohol. A year later, in July 2008, he was charged with disorderly conduct. The first four criminal offenses could have been mitigated under AG ¶ 32(a) because they occurred when Applicant was young, in the service, and possibly under unusual circumstances. However, the three additional charges, occurring in 2004, 2007, and 2008, raise questions about his current judgment and consumption of alcohol. While Applicant submitted evidence of a successful employment record and remorse over his misconduct, he did not present sufficient evidence of other rehabilitation, in particular

the passage of time without the recurrence of criminal activity, given the September 2009 charges and probation requirement. Neither of the above mitigating conditions is applicable.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The Government alleged in SOR ¶¶ 3(a) and 3(b) that Applicant falsified his answers to two questions on the SF 86 because he did not disclose four debts. The 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 omitted information about the delinquent debts. When a falsification allegation is controverted or denied, the Government has the burden of proving it. 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))



During his testimony, Applicant credibly explained that he did not believe that he was delinquent or responsible for the debts alleged in the SOR. He emphasized that he knew the Government could easily obtain a credit report and that he had no reason to falsify his SF 86. Based on that explanation and his candid disclosure of his September 2009 offense that was not alleged in the SOR, he demonstrated his intent to be truthful during the security clearance process. Hence, the Government did not establish a disqualifying condition as to SOR ¶¶ 3(a) and 3(b). The omission of the information may have been negligent, but it was not intentional. The evidence does not establish deliberate falsification. This Guideline is found in favor of 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 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 the facts and circumstances surrounding this case. Applicant is a 40-year-old married man, who honorably served his country for four years in the military and continues to assert his loyalty and dedication to this country. Since his discharge from the Marines, he has built a successful business that provides programs for the military, for which he needs a security clearance. After completing his SF 86, Applicant was put on notice by the Government as early as April 2008 and on two other occasions that his delinquent debts were creating a security concern. However, to date he has not resolved them. His dilatory behavior and pattern of minor offenses over the past 20 years, including an incident that occurred in September 2009 for which he remains on probation until September 2010, raise significant questions about his on-going lack of self control, good judgment, and ability to abide by rules and regulations.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole person, I conclude that Applicant mitigated the security concerns pertaining to personal conduct, but not those arising under the financial considerations and criminal conduct guidelines. Overall, the record evidence

leaves me with questions as to Applicant's eligibility and suitability for a security clearance.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a through 2.g:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a and 3.b:	For Applicant

### **Conclusion**

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

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SHARI DAM  
Administrative Judge