



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04185
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: William O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

October 29, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on January 5, 2009. On May 28, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines F and E. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on July 21, 2010; answered it on July 22, 2010; and requested a hearing before an administrative judge. DOHA received the request on July 23, 2010. Department Counsel was ready to proceed on August 4, 2010, and the case was assigned to me on August 10, 2010. DOHA issued a notice of hearing on August 12, 2010, scheduling the hearing for September 7, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 11 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I kept the record open until September 8, 2010, to enable him to submit additional documentary evidence. He timely submitted AX E through J, which were admitted without objection. On September 16, 2010, he submitted AX K. Department Counsel did not object to AX K as untimely, and it was admitted. Department Counsel's comments regarding AX E through K are attached to the record as Hearing Exhibits (HX) I and II. DOHA received the transcript (Tr.) on September 14, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d. His answers to SOR ¶¶ 2.a-2.d were ambiguous, and I have treated them as denials. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 39-year-old security officer employed by a defense contractor. He has worked for his current employer since July 2007. He has never married, but he has a child for whom he is obligated to pay child support. He has never held a security clearance.

Before his current employment, Applicant was employed as a security officer by another defense contractor. The company records reflect that he was terminated in August 2007 for insubordination and rules violations. The company records include two employee counseling reports dated June 9, 2007, for incidents that happened about four hours apart on that day. The first counseling report was for having a personal laptop computer at his guard post, in violation of company rules. The second counseling report was for parking in an unauthorized space and then falsely denying that the vehicle was his. The third counseling report, dated August 7, 2007, was for wearing an incomplete uniform on the previous day and using profane and insubordinate language when he was informed that he would not be issued a weapon until he was in a proper uniform. (GX 2 through 5.) The documentation of Applicant's termination was forwarded to the company's human resources department, but there is no indication that a copy was delivered to Applicant. Applicant testified he did not receive a copy of the document. (Tr. 83.) His termination is alleged in SOR ¶ 2.b.

Applicant denied that he was terminated. He testified he voluntarily left this job for a better job, but he admitted he had a disagreement with his supervisor about uniforms. (Tr. 36, 44.) He submitted a sworn statement from his former supervisor stating that they had a disagreement about the company's uniform requirements, but

they remained friends. The former supervisor also stated that Applicant was “a model employee who went beyond the call of duty for his job assignments.” (AX C.)

When Applicant submitted his security clearance application in January 2009, he answered “no” to question 22, asking if during the last seven years he had been fired, quit after being told he would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. (GX 1 at 24.) He did not disclose his termination in August 2007 for insubordination and rules violations because he believed he voluntarily left the job. His failure to disclose his termination on his security clearance application is alleged in SOR ¶ 2.c.

In February 2009, Applicant was terminated from another job as a security officer for abandoning his post without being properly relieved and making a false statement. (GX 6.) During an interview with a security investigator in March 2009, he told the investigator he left this job for a better opportunity, and “there were no problems or issues” with this employer. (GX 7 at 9.) At the hearing, Applicant submitted a statement from a fellow security officer, stating that Applicant’s post was never unattended because he relieved Applicant at their supervisor’s request after Applicant told him he needed to leave work. (AX B.)

An internal investigation by the company determined that Applicant told his supervisor he needed to leave his post because his apartment was flooded, but he actually left to perform duties for another security company for whom he also worked. Evidence from the apartment manager established that Applicant’s apartment flooded a month before the date he asked to leave his post. Applicant admitted that he performed duties for his other employer after being relieved from his post, but he testified that his statement was not false because he was still cleaning up from the previous flooding. (Tr. 77-80.) Applicant’s termination notice gave him a choice of resigning or being fired. (GX 6 at 2.) He did nothing because he already had another job. (Tr. 81-82.) This termination is alleged in SOR ¶ 2.a.

During an interview with a security investigator in March 2009, Applicant falsely stated that “there were no problems or issues” with the employer who terminated him for leaving his post and making a false statement. Applicant’s false statement to the security investigator is alleged in SOR ¶ 2.d.

Applicant has experienced financial problems in addition to his employment problems. The SOR alleges four delinquent debts. The evidence concerning these debts is as follows:

SOR ¶ 1.a alleges a collection account on behalf of a bank, in the amount of about \$141. Applicant’s credit report dated February 26, 2010, reflects the debt, which was placed for collection in March 2009. It also reflects that this debt is disputed. (GX 11 at 1.) Applicant testified that he signed up for a credit report monitoring service, for

which he was charged \$29 per month, which was deducted automatically from his bank account. He contacted the monitoring service and told them he did not want the service, but they continued to collect the fee from his bank account, even after he closed the account, resulting in overdrafts. According to Applicant, the monitoring service promised to refund the fees, but have not. (Tr. 47-50.) There is no evidence that Applicant instructed his bank to stop processing the automatic withdrawals. In Applicant's last email exchange with the monitoring company in October-November 2009, the monitoring company told him they were not responsible for overdraft charges, and Applicant threatened to sue them if they did not refund the fees. (AX J.) Applicant's dispute is with the monitoring company, but the debt for the overdraft is owed to the bank. The debt to the bank is unpaid.

SOR ¶ 1.b alleges a child support arrearage, in the amount of about \$21,535. Applicant's federal tax refunds in the amounts of \$484 and \$932 were applied to this debt. (AX E and F.) Applicant testified the child support payments were deducted from his paycheck while he was working for a previous employer, but he now pays the court directly by money order. (Tr. 58-59.) He did not submit any receipts, cancelled checks, money order receipts, or similar documentation of payments; but he submitted a document dated September 1, 2010, reciting that he is in compliance with the child support order. The document enabled him to have his driver's license reinstated. (AX A.) The arrearage appears to have been resolved.

SOR ¶ 1.c alleges a collection account for a credit card account, in the amount of about \$845. In September 2009, the collection company accepted an offer to settle this debt for \$200, payable in two installments. (GX 7 at 13.) The account has been paid in full. (AX D; Tr. 51.)

SOR ¶ 1.d alleges a debt to the state for overpayment of unemployment benefits, in the amount of about \$2,326. Applicant's credit report dated February 21, 2009, reflected that the debt was referred to an attorney for collection in July 2005. Applicant's state tax refunds for 2007 (\$94), 2008 (\$104), and 2009 (\$88) were applied to this debt. (AX G, H, and I). He testified that, other than the seizure of his tax refunds, he made only one or two payments of about \$50 on this debt. (Tr. 62.) Applicant was not sure how much he owed on this debt, but he admitted that it is unresolved. (Tr. 89-90.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The concern under this guideline 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.

Applicant resolved the delinquent debts alleged in SOR ¶¶ 1.b and 1.c, but the unresolved delinquent debts in SOR ¶¶ 1.a and 1.d raise two disqualifying conditions: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). Since the Government produced substantial evidence to raise these disqualifying conditions, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). This mitigating condition is not established because Applicant has multiple unresolved debts that are ongoing and not the result of circumstances making them unlikely to recur.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). This mitigating condition is not established because Applicant did not show that the delinquent debts were the result of conditions beyond his control.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). This mitigating condition is not established because Applicant has not sought or obtained financial counseling.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve

debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.* This mitigating condition is established for the debts alleged in SOR ¶¶ 1.b and 1.c, both of which have been resolved. It is not established for the debts alleged in SOR ¶¶ 1.a and 1.d. Applicant has an ongoing dispute with the credit monitoring agency, but he has not resolved the debt to the bank for the overdraft. He has reacted passively to the debt alleged in SOR ¶ 1.d, allowing his tax refunds to be seized, but he has taken virtually no affirmative action to satisfy the debt.

Security concerns under this guideline also can be mitigated by showing “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.” AG ¶ 20(e). Applicant has disputed the credit monitoring company’s continued collection of fees, and he has contacted his bank regarding the overdraft. He admits the overdraft but is unwilling to pay it until he receives a refund from the credit monitoring company. Although Applicant appears to be focused on the wrong party in resolving this dispute, he receives some credit under this mitigating condition because of the circumstances in which the debt arose and his continuing contacts with the credit monitoring company. However, he has not documented a legitimate basis for his dispute with the bank. Thus, I conclude that AG ¶ 20(e) is not fully established.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15 as follows:

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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

SOR ¶ 2.c alleges that Applicant falsified his security clearance application by deliberately failing to disclose his unfavorable termination of employment in August 2007. Applicant denied being fired in August 2007. The company records clearly reflect that he was fired, but there is no evidence that he was notified that he had been fired. The sworn statement from his supervisor suggests an amicable termination of employment. I conclude that SOR ¶ 2.c is not established by substantial evidence.

On the other hand, the record clearly establishes that Applicant left his employment in February 2009 following allegations of misconduct. Thus, his misleading statement to the security investigator that “there were no problems or issues” with this employer, alleged in SOR ¶ 2.d, raises the disqualifying condition in AG ¶ 17(b) (“deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative”).

Applicant’s two instances of being separated from employment under unfavorable circumstances, alleged in SOR ¶¶ 2.a and 2.b, raise two disqualifying conditions:

AG ¶ 16(c): credible adverse information in several adjudicative issue 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; and

AG ¶ 16(e): personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.

Security concerns raised by false or misleading answers during a security interview may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct his misleading statement.

Security concerns raised by personal conduct may be mitigated if “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.” AG ¶ 17(c). Applicant’s uniform violations and insubordinate conduct during his first period of employment are arguably “minor,” but his falsifications during his security interview and false statements to his employers are not “minor” within the meaning of this guideline. His multiple violations of company rules were recent, and they did not occur under unique

circumstances. I conclude AG ¶ 17(c) is not established. No other enumerated mitigating conditions are established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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 have incorporated my comments under Guidelines F and E in my whole-person analysis. After weighing the disqualifying and mitigating conditions under those guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Paragraph 2, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge