



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 09-06549
)
 Applicant for Security Clearance)

Appearances

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

April 29, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). The Guideline E concerns are mitigated, but the Guideline F concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on June 9, 2009. On August 27, 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 answered the SOR on October 27, 2010, and requested a determination on the record without a hearing. Department Counsel submitted the Government's written case on November 23, 2010. On the same day, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 7, 2010.

On January 3, 2011, Applicant requested and received an additional 30 days to respond to the FORM. He requested and received a second extension of time on February 15, 2011. On March 11, 2011, his bankruptcy attorney submitted a copy of a draft Chapter 13 bankruptcy petition. The case was assigned to me on April 4, 2011.

Procedural Rulings

Request for Additional Time to Submit Evidence

On March 11, 2011, Applicant telephonically asked Department Counsel for another extension of time. Department Counsel did not object to Applicant's response to the FORM, but he objected to any further extensions of time for further submissions. Applicant's request for additional time to respond is hereby denied.

Administrative Notice

Department Counsel requested that I take administrative notice of a training brochure explaining how to interpret credit reports. (Government Exhibit (GX) 10.) Department Counsel's request is granted.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR except ¶¶ 1.t, 1.u, and 1.v. His admissions are incorporated in my findings of fact.

Applicant is a 55-year-old electronic technician employed by a federal contractor. He has worked for his current employer since February 2009. He worked for the same employer from October 1993 to May 2008. In April 2008, he was reprimanded for viewing pornographic material on his company computer. In his response to the SOR, he explained that he did not know that viewing pornography on a company computer was prohibited. On May 2008, he was terminated for sleeping on duty, but he filed a union grievance on the ground that his sleeping on duty was caused by a medical disorder. He was rehired in February 2009. He has held a security clearance since July 2006.

Applicant served in the U.S. Air Force from December 1976 to June 1978 and was separated from active duty under honorable conditions. He did not receive any awards or decorations. (DD Form 214, attached to Applicant's answer to SOR.)

Applicant has never married, but he has cohabited with the same woman since March 2004. He has no children.

Of the 27 delinquent debts alleged in the SOR, 18 are owed to the same creditor, and Applicant has admitted all 18. Twelve of the 18 are for less than \$100. Two other debts (§§ 1.t and 1.u) are home mortgages with balances of \$98,789 and \$111,000 respectively, and Applicant has denied them, asserting that they were paid off. In his answer to the SOR, Applicant stated that he paid off the two mortgages by refinancing to a more affordable mortgage. He did not provide any documentation to support his statements. He did, however, reflect the consolidation of his home mortgages in his draft bankruptcy petition submitted in response to the FORM. He stated that he intended to pay down or pay off all his debts beginning on his next payday, October 29, 2010. He did not submit any evidence of payments in his response to the FORM. His draft bankruptcy petition includes the creditors alleged in the SOR, except for the creditors alleged in SOR §§ 1.v, 1.x, 1.y, and 1.aa.

In his answer to the SOR, Applicant disputed the \$390 telephone bill alleged in SOR § 1.u, but he provided no documentation of the basis for his dispute. He asserted that he had made payments on the \$5,559 debt alleged in SOR § 1.w, but he provided no documentary proof of payments.

In his answer to the SOR, Applicant attributed his financial problems to the unjust firing in May 2008. He submitted a Social Security Administration statement reflecting that he earned \$73,225 in 2007, but his income declined to \$27,105 in 2008 and \$25,448 in 2009. His draft bankruptcy petition reflects current net monthly income of \$3,506 and expenses of \$3,221, leaving a monthly remainder of \$285.

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, an administrative judge applies these guidelines 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 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).

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 SOR alleges 27 delinquent debts. Applicant admitted 24 of them, and his admissions are corroborated by his credit reports. The delinquent debts alleged in SOR ¶¶ 1.t, 1.u, and 1.v, which Applicant denied, are established by his credit reports and are included in his draft bankruptcy petition.

The concern under this guideline is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's financial history, established by his admissions and his credit reports, raises two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

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's debts are recent, numerous, and did not occur under 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). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established. Applicant's unemployment from May 2008 to February 2009 was a condition beyond his control. However, this mitigating condition is not established because he has not acted responsibly. He has been employed for more than two years, but he has taken virtually no action to resolve his delinquent debts, even though many are for small amounts, less than \$100.

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 presented evidence of any counseling and his delinquent debts are not resolved or under control. Although he has retained a bankruptcy attorney, he presented no evidence that he has filed his Chapter 13 bankruptcy petition and no evidence that any debts have been otherwise resolved.

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). This mitigating condition is not established

because Applicant presented no evidence that his debts have been paid, compromised, or otherwise settled. Even if he follows through with his Chapter 13 bankruptcy petition, he will need to establish a track record of making the required payments.

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 denied three debts alleged in the SOR, but he produced no evidence to document the basis of the dispute.

Guideline E, Personal Conduct

Applicant admitted the allegation under this guideline that he was reprimanded for viewing pornography on his company computer. At the time of his violation, he had worked for his employer for almost 15 years. I am not convinced that he could work for the same employer for 15 years without knowing that viewing pornography on a company computer was prohibited. I find his explanation implausible and not believable.

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.” Applicant’s conduct raises the following disqualifying conditions under this guideline:

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations; [and] (4) evidence of significant misuse of Government or other employer's time or resources; 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.

There is no evidence that Applicant viewed pornography on his company’s computer on any occasions other than the one for which he was reprimanded. Thus, I conclude that the “pattern” of rule violations encompassed by AG ¶ 16(d)(3) is not established. However, Applicant’s violation of his company’s prohibition against viewing

pornography at work is sufficient to establish the “significant misuse” of his employer’s time and resources encompassed by AG ¶ 16(d)(4).

Although pornography is offensive to many members of society, it is also acceptable or at least tolerable to many. There is no evidence that what Applicant viewed was illegal, such as child pornography. Based on the limited evidence in this record, I conclude that AG ¶ 16(e) is not established.

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). This mitigating condition is established because the evidence shows only a single incident that happened three years ago.

Security concerns under this guideline also may be mitigated if “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.” AG ¶ 17(d). Applicant has admitted his behavior but has attempted to excuse it on the basis of being ignorant of the rules regarding use of company computers. There is no evidence of measures to change his behavior, but the threat of disciplinary action has apparently been sufficient to deter any further violations. I conclude this mitigating condition is partially 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 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. Some of the factors

in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult with many years of service as a contractor's employee. He has held a security clearance for many years, apparently without incident. He has suffered some debilitating illnesses that have interfered with his job performance and his personal financial management. His answer to the SOR paints a picture of someone who is overwhelmed with his delinquent debts and has been unable to formulate a plan to address them. He appears to have moved recently toward filing a Chapter 13 bankruptcy, but it remains to be seen whether he will follow through and file his petition and whether he will comply with whatever payment schedule is required. My ability to assess his sincerity and credibility is limited because of his request for a decision based on the record.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on personal conduct, but he has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his 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**

Subparagraphs 1.a-1.aa: **Against Applicant**

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

Subparagraph 2.a: **For 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