



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



In the matter of:)
)
) ISCR Case No. 09-07129
)
)
Applicant for Security Clearance)

Appearances

For Government: William O'Neill, Esquire, Department Counsel
For Applicant: *Pro se*

June 22, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant acquired 15 debts, totaling near \$25,000, some of which have been delinquent since 2003-2004. The debts became delinquent because he was spending beyond his financial means, and he was reduced in rank due to personal misconduct. He presented some recent evidence of payments and efforts to resolve them. Notwithstanding, he failed to establish financial responsibility in the acquisition of the debts, good-faith efforts to resolve the debts, or a current track record of financial responsibility. Moreover, he deliberately falsified his 2004 and 2009 security clearance applications. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 11, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant a security clearance.

On August 3, 2010, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision - security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).²

On September 27, 2010, Applicant answered the SOR and requested a decision based on the record – without a hearing. In January 2011, Applicant requested the case be converted into a hearing. The case was assigned to me on January 13, 2011, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on February 7, 2011, convening a hearing on February 23, 2011. At the hearing, the Government offered exhibits (GE) 1 through 11. Applicant testified, and presented exhibits (AE) 1 through 10. Both parties' exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 2, 2011.

Procedural Issue

In January 2011, Applicant requested his case be converted into a hearing. In early February 2011, he agreed to a hearing date on February 23, 2011. At his hearing, Applicant stated he had sufficient time to prepare and was ready to proceed. He affirmatively waived his right to 15 day advance notice of his hearing. (Tr. 16)

Findings of Fact

Applicant admitted the SOR allegations under ¶¶ 1.a through 1.f, 1.j, and 2.a through 1.d, with explanations. He denied the SOR allegations under ¶¶ 1.g through 1.i, 1.k through 1.o, and 2.e through 2.g. His admissions are incorporated as findings of fact. After a thorough review of the evidence, and having considered Applicant's demeanor and testimony, I make the following findings of fact.

Applicant is a 31-year-old information technology specialist working with a defense contractor since December 2008. He is currently attending his second semester of college, pursuing a bachelor's degree in information technology. He married his wife in November 2003, and they were divorced in October 2007. He has no children.

Applicant served in the U.S. Army from November 1998 until December 2008. A review of Applicant's Army and criminal records revealed the following:

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

(1) In September 1999, he was arrested and charged with rape and indecent assault of a female soldier. He was found not guilty of the charges at an Article 15 (non-judicial proceeding under the Uniform Code of Military Justice (UCMJ)) because there was insufficient evidence to establish the offenses.

(2) In January 2000, Applicant was involved in a fight. In April 2000, he was punished under a field grade Article 15 (UCMJ) for the offense of assault. He was reduced in grade from private first class (E-3) to private (E-2), and placed on 45 days restriction and extra duties.

(3) In October 2001, he was arrested and charged with negligent driving in the first degree. The prosecution of the charge was deferred. (GE 8)

(4) In April 2005, Applicant was charged with fleeing the scene of an accident. He was awarded probation before judgment. (See May 2009 SCA, section 22.)

(5) In October 2007, Applicant underwent a urinalysis test and the results were positive for methamphetamines. He was found guilty of using methamphetamines and punished under an Article 15 (UCMJ) proceeding. His punishment included a reduction to the pay grade of E-1. After his Article 15 proceeding, Applicant was referred to an Army separation board for reason of misconduct. The board retained him in the service. After he completed his time in service, he was separated with the pay grade of E-1. His service was characterized as honorable.

In December 2004, Applicant submitted a SCA in which he deliberately failed to disclose the September 1999 arrest, charges, and non-judicial proceeding against him for rape and indecent assault. He also failed to disclose his January 2000 arrest, charge, and non-judicial punishment for assault; and his October 2001 charge for negligent driving in the first degree.³ He disclosed that he had at least one debt over 180 days delinquent, and that his wages had been garnished.

When asked why he failed to disclose the required information, Applicant provided a number of explanations. He claimed that he had the mistaken belief that he did not have to disclose the arrests, charges, and non-judicial proceedings because he was acquitted, he did not know he was charged with any felony offenses, he misunderstood the questions, and at the time he completed the SCA, he did not remember that he was charged with indecent assault and rape.

Between 1998 and 2008, Applicant possessed a top secret security clearance. His security clearance was suspended in 2007, because he had financial problems and

³ See the 2004 SCA section 21 (asking whether he had ever been charged with a felony offense); section 25 (asking whether in the last seven years he had been subject to any UCMJ proceeding, to include non-judicial punishment); and section 26 (asking whether in the last seven years he had been arrested for, charged with, or convicted of any offense not listed in his answer to prior sections).

his 2007 use of methamphetamines. Prior to the adjudication of his clearance, Applicant was discharged. In December 2008, he was hired by his current employer and sponsored for access to classified information at the top secret level.

In May 2009, Applicant submitted the pending SCA. Because he was asking for a top secret security clearance, Applicant was required to answer some questions within the timeframe of the last 10 years. In his answers to section 22 (asking whether in the last 10 years he had been issued a summons, citation, or ticket to appear in a court in a criminal proceeding; arrested by any police officer or any other type of law enforcement officer; or ever charged with any felony offense); Applicant answered "yes" and indicated that in April 2005 he was arrested and charged with fleeing the scene of an accident.

Applicant failed to disclose the September 1999 arrest, charges, and non-judicial punishment proceeding against him for rape and indecent assault (acquitted); his January 2000 arrest, charge, and non-judicial punishment for assault; his October 2001 arrest and charge for negligent driving in the first degree, and his charge and non-judicial punishment proceeding for illegal use of methamphetamines. He explained that he did not disclose the 1999, 2000, and 2001 incidents because he believed they were outside the timeframe asked in the question. He did not disclose his methamphetamine use because his consumption was not illegal because it was not knowing or intentional. He averred that unbeknownst to him, he drank a beverage spiked with methamphetamine.

Section 23 asked Applicant (in pertinent part) whether in the last seven years he had illegally used, possessed, or handled any controlled substance; and whether he ever used a controlled substance while possessing a security clearance. Applicant answered "No" to all the above questions. He deliberately failed to disclose his use of methamphetamines in 2007, while possessing a top secret security clearance. Applicant initially explained that he did not disclose his methamphetamine use because his consumption was not illegal because it was not knowing or intentional. He later stated that he intended to disclose this information, but forgot about it. He disclosed the information after he was confronted by the government investigator.

In response to Section 26 (Investigations and Clearance Record) and Section 26 (Financial Record), Applicant stated that his access to classified information was suspended in 2007 due to financial problems, and that currently he was having financial problems. He failed to disclose his use of methamphetamine charge and resulting Article 15 punishment.

Applicant's background investigation revealed the 15 delinquent or charged-off debts alleged in the SOR, totaling approximately \$27,000. He admitted to seven of the alleged SOR debts (§§ 1.a – 1.f, and 1.j) totaling \$23,500, which include an unpaid judgment (SOR § 1.a – this is a 2007 debt for attorney fees to his divorce lawyer). Applicant established that the debts alleged in §§ 1.c, 1.d, and 1.j were paid. SOR §§ 1.c was paid in September 2010, and 1.d was paid in February 2011. The judgment

alleged in 1.j was paid through the garnishment of his income tax return. SOR ¶¶ 1.e (personal loan made for the purchase of a 2003 Cadillac in 2006 for \$28,000), 1.f (Cadillac note loan), and 1.h (pay day loan) were debts Applicant acquired as a result of the purchase of a Cadillac. The remaining debts are Applicant's unresolved delinquent debts as established by the credit reports. Based on GE 7, a 2005 credit report, SOR ¶¶ 1.k, 1.l, and 1.m were acquired when Applicant issued checks without sufficient funds. At his hearing, Applicant denied he ever issued checks without sufficient funds. He later clarified that if he issued checks without sufficient funds, he quickly covered the checks. He failed to submit documentary evidence to support his claims.

Applicant claimed that his financial problems were caused by his wife's reckless spending, his separation and divorce, and his low earnings. Notwithstanding, Applicant's 2004 SCA indicates that he had financial problems prior to his marriage. Additionally, in 2006, he acquired a car that was beyond his financial means. He then was involved in personal misconduct that led to his reduction in rank with the resulting reduction in pay. Because of his reductions in rank, Applicant did not have the financial means to pay for his financial obligations.

In March 2010, Applicant retained the services of a law firm to assist him to dispute most of his delinquent debts. He claimed that some of the debts were successfully disputed and removed from his credit reports. His evidence is insufficient to show his debts were removed because he paid them, or because he had a legitimate reason to dispute them. In February 2011, Applicant retained the services of a debt consolidation company to help him consolidate and pay three of his debts - SOR ¶¶ 1.a, 1.b, and 1.f. He made his first \$383 payment in February 2011, and his next payment was due in March 2011. He claimed he believed the consolidation company had negotiated payment arrangements with his creditors, that the company was making payments on his debts, and that he was no longer delinquent on these three accounts. Applicant's documentary evidence failed to establish his claims.

Applicant expressed remorse for his financial situation. He promised to pay his delinquent debts sometime in the near future, and claimed that he had been making efforts to resolve his delinquent debts. He was hired by his current employer in December 2008, and he has been earning approximately \$55,000 a year. However, he presented little evidence of contacts with his creditor, payments made, or of any other efforts to otherwise resolve his delinquent debts until March 2010.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S.

Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Under Guideline F, the security concern is that 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 ¶ 18.

Applicant has had financial problems since around 2003 to present. He acquired the 15 delinquent debts alleged in the SOR, which include two unsatisfied judgments. He admitted to at least seven of the delinquent debts, totaling over \$27,500, that have been delinquent for many years. AG ¶ 19(a): "inability or unwillingness to satisfy debts;" and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

In March 2010, Applicant started to take some action to resolve his delinquent financial obligations. He hired a law firm to assist him with disputing his delinquent debts. In February 2011, he hired another company to help him consolidate and pay three of his delinquent debts. He made one payment to the company pursuant to the consolidation agreement. He presented no documentary evidence to support any claims of agreements between the consolidation company and his creditors or of any payments to his creditors. Applicant's documentary evidence established that he paid three accounts (SOR ¶¶ 1.c, 1.d, and 1.j). The remaining 12 SOR allegations are Applicant's outstanding financial obligations as established by the credit reports and his testimony. He failed to present convincing evidence that these were not his debts.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

- (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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant's favorable evidence does not support the applicability of AG ¶ 20(a). His financial problems are ongoing and his evidence fails to show they occurred under such circumstances that they are unlikely to recur and do not cast doubt on Applicant's current reliability, trustworthiness, and good judgment.

Applicant presented some evidence of circumstances beyond his control that may have contributed to his inability to pay his debts, e.g., his separation and divorce. Notwithstanding, Applicant's documentary evidence is not sufficient to corroborate many of his claims and show that he acted responsibly in the acquisition of his debts, that he made good-faith efforts to resolve his debts prior to March 2010, or that he has a track record of financial responsibility. AG ¶¶ 20(b) and (d) do not apply. On the contrary, Applicant's financial problems are the result of his spending beyond his financial means and of his personal misconduct that led to his non-judicial punishments and his reductions in rank and pay.

Considering his age and work experience, Applicant should have been more responsible and diligent in addressing his delinquent obligations. In light of the number of delinquent debts, the date the debts were acquired, the aggregate value of the debts, the limited evidence of efforts to resolve his financial obligations, and his employment history, Applicant's information is insufficient to establish that his financial problems are unlikely to recur. He failed to show financial responsibility and good faith in addressing his legal obligations. AG ¶ 20(c) partially applies because in 2010-2011 he retained the services of two companies to help him resolve his delinquent debts.

AG ¶ 20(c) partially applies because he disputed most of his debts. It does not mitigate the financial security concerns because he failed to establish that he has a reasonable basis to dispute the debts.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

While serving in the Army, Applicant was involved in an altercation and was found guilty of assault (2000). In 2001, he was found guilty of negligent driving, and in 2005, he fled the scene of an accident. Additionally, in 2007 he illegally used methamphetamine.

Applicant deliberately failed to disclose in his December 2004 SCA his September 1999 arrest, charges, and non-judicial punishment proceeding for rape and indecent assault. He also failed to disclose his January 2000 arrest, charge, and non-judicial punishment for assault; and his October 2001 arrest and charge for negligent driving in the first degree.

Applicant claimed that he had the mistaken belief that he did not have to disclose the arrests, charges, and non-judicial proceedings because he was acquitted, he did not know he was charged with any felony offenses, he misunderstood the questions, and that at the time he completed the SCA, he did not remember that he was accused of indecent assault and rape. Considering the evidence as a whole, and having observed his appearance and demeanor while testifying, I find his explanations not credible. Applicant deliberately falsified his 2004 SCA.

I further find that Applicant falsified his May 2009 SCA when he deliberately failed to disclose his 2001 negligent driving in the first degree charge and his 2007 non-judicial punishment for methamphetamine use. Moreover, he failed to disclose his illegal use of methamphetamine while possessing a top secret security clearance.

Applicant's misconduct and deliberate falsifications trigger the applicability of the following disqualifying condition:

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;

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 (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 17 lists five conditions that could potentially mitigate the personal conduct security concerns:

(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 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.

After considering the above mitigating conditions, I find none apply. Applicant engaged in serious misconduct and then falsified both his 2004 and 2009 SCAs to cover his behavior. His falsifications are serious, recent offenses (felony-level).⁴ He made no effort to correct his falsifications until confronted by the background investigator. Furthermore, during his testimony he was not candid about his efforts to resolve or pay his debts. His overall behavior shows questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations.

⁴ See 18 U.S.C. 1001.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the 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.

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. AG ¶ 2(c). I have incorporated in my whole-person analysis my comments on the analysis of Guidelines F and E.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his military service to his country and his work for a government contractor.

Notwithstanding, security concerns remain. Applicant's evidence failed to show financial responsibility in the acquisition of the debts, good-faith efforts to resolve his legal obligations in a timely manner, or a current track record of financial responsibility. His behavior shows that he does not understand what is required of him to be eligible for access to classified information. Moreover, Applicant deliberately falsified both his 2004 and 2009 SCAs. The record evidence fails to convince me of Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial considerations and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, 1.e - 1.i, 1.k - 1.o:	Against Applicant
Subparagraphs 1.c, 1.d, 1.j:	For Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraphs 2.a – 2.g:

Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge