



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



In the matter of:)
)
) ISCR Case No. 09-07448
)
Applicant for Security Clearance)

Appearances

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

February 6, 2012

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record in this case, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. His eligibility for a security clearance is denied.

Statement of the Case

On June 8, 2009, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). On July 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant provided a notarized answer to the SOR, dated August 5, 2011, and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on October 19, 2011. The FORM contained documents identified as Items 1 through 13. By letter dated October 27, 2011, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections within 30 days of receipt. Applicant received the file on November 7, 2011. His response was due on December 7, 2011. Applicant did not file any additional information within the required time period. On January 23, 2012, the case was assigned to me for a decision.

Findings of Fact

The SOR contains 19 allegations of disqualifying conduct under AG F, Financial Considerations (SOR ¶¶ 1.a. through 1.s.), and two allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 2.a. and 2.b.). In his Answer to the SOR, Applicant admitted 15 AG F allegations (¶¶ 1.a. through 1.c.; ¶¶ 1.e., through 1.h.; ¶¶ 1.j. through 1.p; and ¶ 1.s. He denied four AG F allegations (¶¶ 1.d., 1.i., 1.q., and 1.r.), and he admitted both AG E allegations (¶¶ 2.a. and 2.b.). Applicant's admissions are admitted as findings of fact. (Item 1; Item 4.)

The facts in this case are established by the record provided by the Government. The record evidence includes Applicant's June 2009 e-QIP; official investigation and agency records; Applicant's responses to DOHA interrogatories; his personal subject interview;¹ and his credit reports of April 28, 2011, September 30, 2010, and July 11, 2009. (See Items 5 through 13.)

Applicant, who is 60 years old, has been employed since July 2008 as a business analyst and general manager by a defense contractor. He seeks a security clearance for the first time. (Item 5; Item 9.)

Applicant has been married twice. He was married for the first time in 1971. He and his first wife divorced in 1999. Three children were born to the marriage. From 1999 to 2007, Applicant paid \$3,300 in monthly child support to his first wife. In 2001, Applicant married for a second time and contributed to the support of his second wife's two children. (Item 5; Item 9.)

In 1976, Applicant earned a law degree, and for 32 years, he was self-employed as an attorney. Applicant told the authorized OPM investigator that his annual gross income during the time of his remarriage was between \$225,000 and \$250,000. He told the investigator that he was living beyond his means, was unable to pay his state and

¹ Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM) on August 4, 2009. On February 19, 2010, in response to a DOHA interrogatory, Applicant signed a notarized statement affirming that he had read the summary of the interview and found it to be true and correct. He added a paragraph of information about financial stresses on his law practice between 1998 and 2005. (Item 9.)

federal income taxes, and found it necessary to take out a line of credit in order to meet his personal and professional expenses each month. (Item 9.)

Applicant's personal financial problems caused him to carry out illegal or deceptive financial practices. Applicant's conduct was reported to his state administrator of attorney registration and disciplinary commission. That body prepared a Statement of Charges against Applicant alleging that he had violated his state's rules of attorney professional conduct by engaging in (1) conversion of client funds; (2) conduct involving dishonesty, fraud, deceit, or misrepresentation; (3) conduct in which he failed to maintain and appropriately safeguard client funds; (4) a criminal act which reflected adversely on his honesty, trustworthiness, or fitness as a lawyer; and (5) conduct which tended to defeat the administration of justice or to bring the courts or legal profession into disrepute. (Item 6.)

The attorney registration and disciplinary commission further described the conduct that led to the Statement of Charges and stated:

that between November 2006 and January 2007, Applicant withdrew more than \$160,000 of a client's funds deposited in his law firm's trust account and used the funds for his own personal and business purposes, including using more than \$89,900 to pay a federal tax lien pending against him;

that in 2004 Applicant withdrew more than \$50,000 of another client's funds deposited in his law firm's trust account and used the funds for his own personal and business purposes;

that in late 2002 or early 2003, Applicant signed, without his law partner's knowledge or authority, the law partner's name to an assignment of accounts receivable for the law partnership, as collateral for a loan he sought to pay his personal income taxes; and,

that in 2004 Applicant signed, without her knowledge or authority, an estate executor's name to an estate account check to pay his legal fees.

(Item 6.)

Through counsel, Applicant answered the Statement of Charges and admitted the conduct specified in the allegations. He agreed to voluntary disbarment from the practice of law for three years. On March 17, 2008, the Supreme Court of his state issued an order of disbarment against Applicant, and he was directed under the rules of the state supreme court to terminate his law practice. (Item 6.)

Applicant has a history of financial delinquency. The SOR alleges that Applicant is responsible for delinquent debts totaling \$300,627. Included in that total are three unpaid federal tax liens totaling \$219,000: one for \$55,734 (SOR ¶ 1.i.), entered in 2002; one for \$74,174 (SOR ¶ 1.b.), entered in 2007; and one for \$89,242 (SOR ¶ 1.a.),

entered in 2009. Applicant admitted he owed the three tax liens and that they had not been satisfied. He stated that he had a payment plan in place with the Internal Revenue Service (IRS) to satisfy the tax liens. (Item 1; Item 4.)

Applicant provided documentation showing he had a payment plan in place to satisfy federal tax liens for tax years 2005, 2006, and 2007. In December 2010, in response to DOHA interrogatories, Applicant provided documentary evidence corroborating ten monthly payments of \$1,060 to the IRS between June 2009 and April 2010. Additionally, he provided documentary evidence corroborating eight monthly payments of \$2,120 to the IRS between May 2010 and December 2010. (Item 7.)

Applicant also provided documentary evidence showing he had sold his home in July 2009 and had assigned \$29,741 of the proceeds from the sale of his home to the IRS in partial satisfaction of his 2005, 2006, and 2007 federal tax liens. He also applied an overpayment of \$2,789 on his 2009 federal taxes to his tax lien debt. Applicant provided documentation corroborating that he was current on his payment plan as of December 2010 and owed a balance of \$197,242. He also provided documentation showing he owed \$260,353 on his tax lien debt as of September 15, 2009. The record does not reflect that Applicant made any payments on his 2005, 2006, and 2007 federal tax liens after December 2010. It is not clear from the record that all of Applicant's federal tax liens are incorporated into his current payment plan. (Item 7; Item 8.)

The SOR also alleges that Applicant is responsible for nine charged-off accounts totaling \$75,264 (SOR ¶¶ 1.c., 1.d., 1.f. through 1.k., and 1.m.). Applicant denied two charged-off accounts (SOR ¶¶ 1.d. and 1.i.). Both of these accounts appear on Applicant's credit bureau report of April 28, 2011. (Item 1; Item 4; Item 11.)

Additionally, the SOR alleges that Applicant owes creditors for four accounts, totaling \$3,732, in collection status (SOR ¶¶ 1.e., 1.n., 1.q., and 1.r.) Applicant denied two of the collection accounts (SOR ¶¶ 1.q. and 1.r.), both of which appear on his credit bureau report of July 11, 2009. (Item 1; Item 4; Item 13.)

Finally, the SOR alleges that Applicant is 120 days or more past due on two debts (SOR ¶¶ 1.o. and 1.p.). In his response to the SOR, Applicant stated that he was making payments on the debts alleged at SOR ¶¶ 1.c., 1.e., 1.f., 1.g., 1.h., 1.j., 1.k., 1.m., 1.n., 1.o., and 1.p. However, he failed to provide documentation to corroborate payment, payment plans, or satisfaction of the debts. The record does not reflect that Applicant has received credit counseling. (Item 1; Item 4.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 Applicant’s 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 and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline 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.

The guideline notes several conditions that could raise security concerns in this case. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Additionally, security concerns arise under AG ¶ 19(d) when there is evidence of “deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expenses account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.”

Applicant, a licensed attorney for 32 years, told an OPM investigator that in 2001, when he married for the second time, he was living beyond his means. The record reflects that in 2002, 2007, and 2009, federal tax liens were filed against Applicant. For several years, from 2002 to 2007, Applicant violated his professional and ethical responsibilities as an attorney to acquire money to pay his federal income taxes and his personal debts. When he responded to the SOR, Applicant stated that he was paying all his debts. While he provided documentation showing he had a payment plan with the IRS and made monthly payments through December 2010, he failed to provide evidence of payment since that time. Moreover, Applicant asserted that he was paying off his charged-off and collection accounts, but he failed to provide documentation to corroborate his assertions. For several years, Applicant accumulated delinquent debt, and he was unwilling or unable to pay his creditors. This evidence is sufficient to raise security concerns under AG ¶¶ 19(a), 19(c), and 19(d).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. Unresolved financial delinquency might be mitigated if it “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)). Additionally, unresolved financial delinquency might be mitigated if "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)). Still other mitigating circumstances that might be applicable include evidence 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)), or "the individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts" (AG ¶ 20 (d)). Finally, security concerns related to financial delinquencies might be mitigated if "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 a history of financial delinquencies that dates to at least 2001. His delinquencies are recent and ongoing. They have occurred under circumstances that are likely to recur.

Applicant admittedly lived beyond his means, and he illegally and unethically acquired money to pay his federal taxes and personal debts. The record does not support a conclusion that his failure to satisfy his creditors is the result of circumstances beyond his control. The record does not reflect that Applicant has had financial counseling.

Applicant provided documentation to show he had a payment plan with the IRS, and he provided evidence of payment until December 2010. However, the record is silent regarding payments since December 2010. Additionally, Applicant failed to provide documentation to support payment of his accounts that were more than 120 days past due as well as for his charged-off and collection accounts. He disputed two charged-off accounts and two collection accounts that were listed on his credit reports, but he failed to provide documentation to corroborate his disputes.

Applicant failed to provide credible documentation that he had made good-faith efforts to satisfy his creditors. He failed to provide documentation to support his assertions that he was continuing to pay his federal tax debts. His deceptive and illegal financial practices raise serious concerns about his reliability, trustworthiness, and ability to protect classified information. I conclude that none of the financial considerations mitigating conditions fully applies to the facts of Applicant's case.

Guideline E, Personal Conduct

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

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.

Applicant, a lawyer, was disbarred for breaching his fiduciary responsibilities to his clients and law partners by engaging in multiple acts of dishonesty. These acts included misappropriating his clients' assets and forging his law partner's name to an assignment of accounts receivable for the law partnership. Applicant's personal conduct raises security concerns under AG ¶¶ 16(d)(1) and (d)(3). The pertinent parts of AG ¶ 16(d) read:

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 a consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality. . . [or] (3) a pattern of dishonesty or rule violations.

Additionally, Applicant's personal conduct raises a security concern under AG ¶16(e), which reads, in pertinent part:

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.

Applicant lived beyond his means, and he was unable to manage his financial affairs so that he had sufficient funds to pay his federal tax obligations. He also lacked sufficient funds to pay his just debts. He resorted to illegal and unethical means to acquire money to satisfy his creditors. In doing so, he violated the trust of his clients and his law partner. His conduct not only affected his own personal and professional standing, but it also had the potential to dishonor the courts and the administration of justice.

Several Guideline E mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(c) 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 [his] reliability, trustworthiness, or good judgment."

AG ¶ 17(d) might apply 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(e) might apply if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

Applicant's deceptive and illegal behavior is recent, occurred repeatedly over a period of several years, from at least 2002 to 2007, and is likely to recur. His behavior continues to cast doubt on his current reliability, trustworthiness, and good judgment. Moreover, Applicant failed to provide documentation that he obtained counseling or had taken other positive steps that might alleviate the circumstances that caused his unreliable conduct and, as a result, such behavior was unlikely to recur. Nothing in the record suggests that Applicant took positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress that his behavior caused. I conclude, therefore, that neither AG ¶¶ 17(c), 17(d), nor 17(e) applies in mitigation to the facts of Applicant's case.

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 an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant lived beyond his means

and sought illegal and unethical solutions to his financial problems. He admitted numerous ongoing financial delinquencies, and he failed to provide documentation to establish that those debts had been paid, settled, or otherwise resolved. He failed to provide documentation to support his assertions that he was continuing to follow a payment plan to satisfy his federal tax liens. He provided no documentation to establish that he had established a plan to pay his debts and remain solvent in the future.

Overall, the record evidence leaves me with serious doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies 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.s.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.b.:	Against Applicant

Conclusion

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

Joan Caton Anthony
Administrative Judge