



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



In the matter of:)
)
) ISCR Case No. 09-07830
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

June 23, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the financial considerations security concerns. However, he deliberately falsified his security clearance application. Personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On June 30, 2009, Applicant submitted a request for a security clearance required as part of his employment with a defense contractor. On December 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised; and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

The SOR alleges security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). It detailed reasons why DOHA could not make the

preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

On January 4, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge.¹ The case was assigned to me on February 2, 2010. DOHA issued a notice of hearing on February 22, 2010. The hearing was convened as scheduled on March 23, 2010. The Government offered Government Exhibits (GE) 1 through 4, which were admitted over Applicant's objection and made part of the record. Applicant objected to GEs 3 and 4 (credit reports) claiming they were inaccurate. Applicant testified and submitted Applicant Exhibits (AE) 1 through 9, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 29, 2010.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a-1.c, and 1.i. He denied the allegations in SOR ¶¶ 1.d-1.h, 1.j, 1.k, and 2.a. His admissions are incorporated in this decision as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 46-year-old senior analyst and network engineer employed by a defense contractor. After graduating from high school, he enlisted in the U.S. Air Force, where he served for 10 years. He achieved the pay grade of E-5, and was honorably discharged in 1990. While in the Air Force, he possessed a top secret security clearance because of his military occupational specialty. He completed his bachelor of science degree in 1981. He started working for his current employer providing service to a government agency in July 2009, and was granted interim access to classified information at the secret level in August 2009. There is no evidence that Applicant has compromised or caused others to compromise classified information.

He married his first wife in 1985, and they were divorced in 1988. He has a grown-up son of this marriage. His court-ordered child support obligation to his son recently ended. He married his second wife in August 1990, and they were divorced in April 1996. He has a 17-year-old daughter of this marriage for whom he still provides child support. He currently lives with his girlfriend. She works full-time and contributes financially to the household expenses.

Applicant filed for Chapter 7 bankruptcy protection and was discharged of his dischargeable debts in July 2000. He explained that as a result of his 1988 divorce, he lost his home, was awarded responsibility for many of the marital debts, and acquired two child support obligations. He was not earning sufficient money and could not afford

¹ Applicant's undated response was received by DOHA on January 4, 2010.

to pay his legal obligations and his day-to-day living expenses. His debts became delinquent, and he filed for bankruptcy protection.

In his June 2009 security clearance application, Applicant stated he was fully employed from June 2000 until April 2009. He was unemployed from April 2009 until July 2009, when he was hired by his current employer. At his hearing, Applicant clarified that between 2000 and 2009, he also was unemployed at least twice when he was between jobs for approximately two months at a time. He received unemployment benefits during these three periods of unemployment.

Applicant's background investigation addressed his financial situation and discovered the following delinquent debts alleged in the SOR:

SOR ¶ 1.b (\$566). (This debt is duplicated in SOR ¶ 1.i.) This was a debt for Applicant's cellular telephone services that became delinquent around 1999. In 2007, the creditor obtained a judgment against Applicant and collected the debt through garnishment of his wages. The garnishment was fulfilled in September 2008.

SOR ¶ 1.c (\$1,208). This was a debt for Applicant's credit card that became delinquent around 2002. Applicant used his credit card to pay for his day-to-day living expenses. He was not making enough money and the debt became delinquent. In 2003, the creditor obtained a judgment against Applicant and collected the debt through garnishment of his wages. The garnishment was fulfilled in August 2004. He claimed he never received any bills or collection notices regarding this debt, and that if he had received a collection notice he would have paid it. Applicant failed to disclose this delinquent debt and the subsequent judgment in his security clearance application.

SOR ¶ 1.d (\$235) alleges a delinquent debt to a bank. Applicant admitted he had a checking account with the bank prior to his filing for bankruptcy. He claimed he contacted the bank after he received the SOR and was told the bank had no record of this debt. At his hearing, Applicant claimed this was not his debt and that he intended to dispute it. He presented no documentary evidence to show he contacted the bank, or that he disputed the debt. I find this is Applicant's unresolved debt.

SOR ¶¶ 1.e-1.h allege four collections for medical services (\$235 total). The information in the credit reports is insufficient to determine the identity of the original creditors. Applicant denied these were his debts. He did not disclose them in his application because he was not aware of the debts.

SOR ¶ 1.j (\$13,365) alleges a charge off debt resulting from the repossession of Applicant's truck. He purchased a used truck and was not able to make the scheduled payments because of his low income, and he had problems meeting his two child support obligations. At the dealer's request, he turned over the truck to an auction company in 2007. He claimed he believed he had no further financial responsibility for the truck because he never received any bills or collection notices for the balance of the truck loan. He did not disclose on his security clearance application the truck

repossession because he did not believe it was repossessed. (GE 4) He did not disclose in his application the delinquent truck loan because he was not aware he owed any money. In December 2009, Applicant contacted the creditor and established a payment plan. He made six \$150 payments: two in December 2009, two in January 2010, and two in February 2010.

SOR ¶ 1.k (\$1,023) alleges Applicant is indebted to a state for \$1,023 in unpaid taxes, and that the state filed a judgment against him in 2005. At his hearing, Applicant admitted he owed the state income taxes, and that the state filed a tax lien against him in 2005. Applicant paid the debt and the lien was released in March 2006.

Applicant attributed his financial problems to his 1998 divorce, his periods of unemployment and underemployment, and not making sufficient money to pay for his child support obligations and his day-to-day living expenses. As of December 2009, Applicant had a net income of \$4,000; with monthly expenses of \$1,800; for a net remainder of \$2,000. He listed no monthly debt payments in his personal financial statement.

Applicant testified he is currently doing well financially because he has a nice paying job, one of his child support obligations was completed, and he shares living expenses with his girlfriend. She works full time and contributes financially to the household paying 50% of the expenses. He repeatedly stated that if the creditors had provided with the bills or collection notices he would have paid the debts. Applicant received financial counseling from his sister who is a bank manager. He also claimed he follows a budget.

Section 26 of Applicant's June 2009 clearance application, asked in the relevant questions whether in the last seven years he had:

b. Any of his possessions or property voluntarily or involuntarily repossessed or foreclosed?

d. A lien placed against his property for failing to pay taxes or other debts?

e. A judgment entered against him?

f. Defaulted on any type of loan?

g. Any bills or debts turned over to a collection agency?

k. His wages, benefits, or assets garnished for any reason?

m. Been over 180 days delinquent on any debts?

n. Whether he was currently over 90 days delinquent on any debts?

Applicant answered “No” to all the above financial questions. He deliberately failed to disclose the delinquent debts and or judgments alleged in SOR ¶¶ 1.b-1.d, 1.j, and 1.k. He also deliberately failed to disclose that his truck was repossessed (SOR ¶ 1.j), he defaulted on his truck loan, his wages were garnished twice, he had a tax lien filed against him (SOR ¶ 1.k), and he had at least five debts in collection.

During his August 2009 interview with a government investigator and at his hearing, Applicant admitted that, in hindsight, he should have disclosed his delinquent debts, judgments, garnishment of wages, the repossession, and the tax lien. He claimed he never intended to mislead the Government or to falsify his application. He explained he did not disclose the tax debt and lien because the debt was paid and the lien removed. At his hearing, he testified that, at the time he submitted his application, he was aware of the tax debt, but not of the tax lien.

Applicant averred he did not disclose the other delinquent debts and the judgments because he was not aware of them. He claimed he believed he had paid the debts years ago, and he had received no recent bills or collection notices. He did not disclose the two garnishments of wages because at the time he submitted his application he did not remember having his pay garnished. He did not disclose the repossession of his truck because he was not sure whether the voluntary sale of his truck at auction was a repossession. He did not disclose the truck debt because he was not getting any bills and he was not aware he owed any money. Considering the evidence as a whole, Applicant deliberately falsified his June 2009 security clearance application as alleged in the SOR.

Applicant credibly testified he is a loyal and proud American. He loves the United States and he would never do anything to intentionally jeopardize his country. Applicant considers himself to be a good father and a good worker. He highlighted his 10 years of honorable military service to the United States. He considers himself to be a reliable and trustworthy person. He averred he has been honest and truthful about everything he stated in his security clearance application and during his hearing. He considers himself worthy of a security clearance.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. They provide explanations for each guideline and list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s goal is to achieve a fair, impartial, and commonsense decision. 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. AG ¶ 2(c).

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 the decision-making process, the government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence.”² Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government.³

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

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.

² See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Applicant has a history of financial problems dating back to 2000, when he filed for bankruptcy protection. Since 2000, he acquired five debts that became delinquent. He paid three of the debts through garnishment of wages and a tax lien. Two debts remain unpaid. He established a payment plan for the largest debt totaling \$13,365. AG ¶ 19(a): “inability or unwillingness to satisfy debts;” AG ¶ 19(c): “a history of not meeting financial obligations;” and AG ¶ 19(g): “failure to file annual Federal, state, or local income tax returns as required or fraudulent filing of the same,” apply.

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 established some circumstances beyond his control, which contributed to his inability to pay his debts, i.e., his divorce and his periods of unemployment and underemployment. I find AG ¶ 20(b) partially applies, but does not fully mitigate the financial concerns. Applicant should have been more diligent in his efforts to resolve his delinquent debts especially after legal action was initiated against him to collect the debts.

Although Applicant should have been more diligent in the resolution of his debts, his current financial situation is good. He paid three of the SOR debts, and he is making payments on the largest alleged SOR debt. He received financial counseling, is following a budget, and seems to be in control of his financial situation. He is making

sufficient money to take care of his financial obligations, one of his child support obligations has been completed and the second should end soon. He is in a stable relationship and his girlfriend contributes financially to the household expenses. Applicant mitigated the financial considerations security concerns.

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.

Applicant deliberately falsified material facts on his June 2009 security clearance application when he failed to disclose his delinquent debts, judgments, garnishments, tax lien, and repossession. Considering the record evidence as a whole - including his age, education, military experience, his years working for government contractors, and his demeanor and testimony, his statement that his falsification was not deliberate is not credible.

His behavior triggers the applicability of disqualifying conditions 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 of status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;" 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."

AG ¶ 17 lists seven conditions that could 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find none apply. Applicant falsified his security clearance application. His falsification is a serious offense (felony-level),⁴ is relatively recent, and casts doubt on his reliability, trustworthiness, and judgment. There is insufficient evidence of rehabilitation, counseling, or steps taken to reduce his vulnerability to exploitation or duress.

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.

⁴ 18 U.S.C. 1001.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant honorably served 10 years in the Air Force. During his service he possessed a top secret security clearance. He worked for a government contractor since July 2009 and was issued interim access to classified information. He is a mature man, good father, and a good worker. There is no evidence he has ever compromised or caused others to compromise classified information. These factors show some responsibility, good judgment, and mitigation. Applicant also established some circumstances beyond his control, which contributed to his inability to pay his debts. Although he waited for creditors to bring legal action against him and to garnish his wages to secure payment for some of his debts, his financial situation is now under control.

Notwithstanding, Applicant deliberately falsified his 2009 security clearance application when he failed to disclose his financial problems. His falsification is a serious offense (felony-level), is relatively recent, and casts doubt on his reliability, trustworthiness, and judgment.

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:	FOR APPLICANT
Subparagraphs 1.a-1.k:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge