



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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 -----) ISCR Case No. 10-00833
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)
 Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

September 15, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On November 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F and E for Applicant. The action was taken 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.

On December 17, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on March 1, 2011. DOHA issued a notice of hearing on March 10, 2011, and I convened the hearing as scheduled on March 29, 2011. The Government offered Exhibits 1 through 21, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through F at the time of hearing, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on April 5, 2011. I granted Applicant's request to keep the record open until April 12, 2011, to submit

additional documents, and four additional documents that were received, have been identified and entered into evidence without objection as Exhibits G through J. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 40 years old. He is married, and he has two children. Applicant was married two previous times, from 1993 to 2001, and from 2007 to 2008. He served in the United States Navy from 1993 to 1996, when he was released early on a humanitarian Honorable Discharge. He also was a Navy drilling reservist from 2002 to 2008. Applicant is currently pursuing a Ph.D. Degree in Systems Engineering, and he has previously earned a Bachelor's degree and two Master's degrees. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline F, Financial Considerations

The SOR lists 10 allegations (1.a. through j.) regarding overdue debts under Adjudicative Guideline F. Applicant admitted all of the allegations in his RSOR. The allegations will be discussed below in the same order as they were listed on the SOR:

1.a. This overdue debt is cited in the SOR for a judgement filed against Applicant in the amount of \$9,784. At the hearing, Applicant testified that this debt remains unpaid (Tr at 47.) He further testified that this is one of three debts listed on the SOR to the same creditor, (1.a., 1.h., and 1.i.), an automobile company, but there should only two debts, and one is a duplicate. One of the debts is for a vehicle that he purchased and the other was for the purchase of a vehicle by a friend, for which he cosigned. He averred that he contacted the creditor to try to set up a payment plan to resolve the debt for the vehicle that he had purchased, but he has received no response. No action has been taken on the other debt.

1.b. This overdue debt is cited in the SOR for a judgement filed against Applicant in the amount of \$3,887. Applicant testified that this debt remains unpaid (Tr at 47.)

1.c. This overdue debt is cited in the SOR in the amount of \$164. Applicant testified that this debt remains unpaid (Tr at 48.)

1.d. This overdue debt is cited in the SOR in the amount of \$590. Applicant testified that this debt remains unpaid (Tr at 48.)

1.e. This overdue debt is cited in the SOR in the amount of \$1,055. Applicant testified that this debt remains unpaid (Tr at 48.)

1.f. This overdue debt is cited in the SOR in the amount of \$372. Applicant testified that this debt remains unpaid (Tr at 48.)

1.g. This overdue debt is cited in the SOR in the amount of \$65 Applicant testified that this debt remains unpaid (Tr at 48.)

1.h. This overdue debt is cited in the SOR in the amount of \$7,900. Applicant testified that this debt remains unpaid (Tr at 48.) This is the second debt owed to the vehicle company, referred to in 1.a., above.

1.i. This overdue debt is cited in the SOR in the amount of \$8,813. Applicant testified that this debt remains unpaid (Tr at 48.) This is the third debt owed to the vehicle company, referred to in 1.a., above. Although Applicant testified that there should only be two not three debts to this company, he could not identify which of the debts was a duplicate.

1.j. This overdue debt is cited in the SOR in the amount of \$126,000, for being in arrears for child support. In Exhibit 18 and during his testimony, Applicant confirmed that the amount he had actually owed had been \$141,000. From August 2010 until the time of the hearing, he reduced the overdue debt to \$134,800, the amount currently owed. Applicant testified that this debt has continued to increase because the amount he paid for child support did not include all of the amount owed, so that each month, despite paying approximately \$4,000 a month, his debt grew by about \$1,000 a month. It also increased during periods of unemployment when he made no payments. Applicant further testified that his current payment of \$4,000 a month has been modified to now include child support and arrearage. Applicant's son is now 15 and his daughter is 13. He anticipates being able to finally resolve this debt in 5 years when his daughter turns 18. (Tr at 41-44.)

Applicant testified that the majority of his financial problems occurred during two eight month periods after he left the Navy, when he was unemployed and was unable to make any payments toward his child support obligation. Applicant testified that he failed to attempt to have his child support payments modified while he was unemployed, and he had no reasonable explanation for this lack of action. He and his ex-wife also took out a loan on their home for \$40,000, of which they each received \$20,000 to help them pay the bills. The \$40,000 has also been added to the total arrearage for child support. (Tr at 44-47.) He also stated that he showed poor judgment by purchasing a new automobile in 2003 for \$23,000, an amount that was "more than I could really afford" so that the car was voluntarily repossessed in 2007. (Tr at 71-73.)

Applicant testified that he receives a loan for his graduate degree in the amount of \$20,000 a year. Since the cost of his education is \$18,000 a year, he would be willing to pay the additional \$2,000 towards his other outstanding debts. (Tr at 54-55.) Thus far he has not done this. Applicant's Personal Financial Statement, created by Applicant in July 2010, shows he had a monthly surplus of \$842, but Applicant could give no reasonable explanation for why with this remainder he had not reduced more of his debt. (Exhibit 16.)

Applicant also testified that in December 2010, he took a cruise with his wife and her two daughters. When asked the cost of the cruise, he estimated “a few hundred dollars.” (Tr at 129.) In Exhibit I, it is established that he actually paid \$868 for the cruise. He was asked if he had considered using some of that money to pay off some of his debts. He indicated that he wanted to use the money for his family, and it was “more fiscally responsible” to spend the money on the cruise and not spend it on other family pursuits. (Tr at 130.)

Paragraph 2 Guideline E, Personal Conduct

2.a. The SOR alleges that on or about May 15, 2001, Applicant was terminated from his employment for unsatisfactory performance, and that he was instructed to repay a signing bonus of \$25,000 that he had received. Applicant did not return the money and the matter was referred to collections. In his RSOR, Applicant averred that he received this bonus to pay for his moving expenses to another site for the company, and that he was let go because his services were not needed. The office to which he moved closed down three weeks later. He further wrote that he was informed by his former employer that he was not required to return the money, and after he was let go, he did receive unemployment compensation, which he could not have done if he had been dismissed for cause. Finally, he wrote that his former employer is no longer in business so there is no way he could return the money, even if he accepted that this debt was valid.

During Applicant’s testimony, he stated that he received a letter showing that he had been terminated for poor performance, and he was required to return the \$25,000 bonus, which disagreed with his RSOR reply in which he stated that he had never been contacted by his employer to collect the \$25,000. Applicant testified that he had disagreed with the reason for his termination, and although he signed the letter indicating that he would return the bonus, he did not intend to do so. He stated that he only signed the letter so that he could receive his final paycheck. Applicant stated that he had an oral agreement with his supervisor to work at home two days a week since there was not enough work to be done at the office so the claim for not reporting to work was not valid. (Tr at 59-61.)

Exhibits 1 and 2 are letters from his employer, in which they clearly informed Applicant that he had been terminated for poor performance and failing to report to work, and that he was required to return the \$25,000 bonus. Applicant contended that he had sent letters disputing Exhibits 1 and 2, but he no longer had them available to submit in the hearing. (Tr at 66.)

At the hearing, Department Counsel moved to amend the complaint adding the following allegations under paragraph 2 that had been sent to Applicant on January 12, 2011. Based on the notice, I have allowed the SOR to include these amended allegations.

2.b. Applicant used marijuana, at least 6 times, from approximately October 2000 until at least December 2001. Applicant admitted this allegation in writing on February 25, 2011.

2.c. On or about January 31, 2001, Applicant was arrested for False Report of Crime. Applicant admitted this allegation in writing on February 25, 2011.

2.d. On or about August 9, 2003, Applicant was arrested for Theft of Personal Property. Applicant admitted this allegation in writing on February 25, 2011.

Mitigation

Applicant submitted a number of documents to give more insight into him under the whole-person concept. These include, but are not limited to: a letter dated March 20, 2002, from a clinical psychologist indicting that Applicant would be attending 12 sessions of group therapy for depression from March 7, 2002, to May 23, 2002. (Exhibit B.) A Navy And Marine Corps Commendation Medal issued to Applicant on December 20, 2005; a copy of a diploma establishing that Applicant received a Master of Science degree in Systems Engineering in 2010; copies of Fitness Reports and Counseling Records for periods 2004-2005 and 2007-2008, for both of which he received excellent reviews; Performance Evaluations from his current employer establishing that his annual salary, when he began employment on July 12, 2004, was \$89,000, and by May 21, 2009, it had been increased to \$132,000. (Exhibit E.)

Finally, Applicant also submitted seven extremely positive character letters, in which he was described as “a loyal and dedicated citizen of the United States.” (Exhibit F.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 and could potentially apply 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. I find that both of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant has accumulated significant delinquent debt.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties: Under AG ¶ 20 (b), it may be mitigating where “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.” As noted above, Applicant testified that his financial problems resulted in part from his periods of unemployment. However, I cannot find that he has acted responsibly. First, he failed to attempt to adjust his child support during the time he was unemployed. Second, he purchased a vehicle, which he conceded he was not able to afford, and which was repossessed in 2007. Third, he took his family on a cruise in 2010, rather than use some of that money to reduce his debts. Fourth, while he testified that he had reduced the number of his debts, he failed to submit evidence to establish that he had resolved these past overdue debts. Finally, despite Applicant’s monthly surplus of \$842, he could give no reasonable explanation for not reducing more of his debt. Based on all of these reasons, I find that this mitigating condition is not a factor for consideration in this case.

I also do not find that AG ¶ 20(d) is applicable since Applicant has not contacted or “initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”

I conclude that Applicant has not significantly reduced or resolved his overdue debt, nor has he shown that he can maintain financial stability. Therefore, at this time he has not mitigated the financial concerns of the Government.

Guideline E, Personal Conduct

With respect to Guideline E, I find that Applicant was aware that his company had terminated him for cause, based on Exhibits 1 and 2 and that they requested he refund the \$25,000 bonus. He also testified that even though he signed the letter indicting he would return the bonus, he had no intention of doing so, and he only signed it so that he could receive his final paycheck. Applicant has indicated that the company may no longer be in business, but since the payment and request for a refund were made in 2001, Applicant had many years to return the \$25,000 that he received. I do not find that Applicant submitted any independent evidence to establish that he was not required to return the bonus of \$25,000.

Based on the significant time that has elapsed, and the limited introduced evidence regarding allegations 2.b. through 2.d., I find these allegations not security significant.

I find that Applicant’s failure to return the \$25,000 bonus exhibits conduct that supports Disqualifying Condition AG ¶ 16(d) “a whole-person assessment of questionable judgement, untrustworthiness, unreliability” under this guideline. I do not find any Mitigating Condition under ¶ 17 is applicable. I, therefore, resolve Guideline E against Applicant.

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 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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and the Mitigating Conditions do not apply under both Guidelines, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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 through 1.j.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a.:	Against Applicant
Subparagraphs 2.b.-d.:	For 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.

Martin H. Mogul
Administrative Judge