



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



In the matter of:)
)
) ISCR Case No. 10-01024
)
Applicant for Security Clearance)

Appearances

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

March 31, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant owes three delinquent debts, totaling nearly \$97,000, all of which are unresolved. He presented no documentary evidence to show financial responsibility in the acquisition of the debts, good-faith efforts in the resolution of the debts, or a current track record of financial responsibility. There are no clear indications that his financial problems are being resolved or are under control. Moreover, he deliberately failed to disclose his delinquent debts in his security clearance application. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 8, 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's request for a security clearance.

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.

On August 19, 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

Applicant answered the SOR on September 7, 2010. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated October 26, 2010, was provided to him by transmittal letter dated October 27, 2010. Applicant received his copy of the FORM on November 4, 2010. He was allowed until December 26, 2010, to submit a response to the FORM. He responded to the FORM with a two-page letter, dated December 21, 2010, with no attachments. (Hearing exhibit (HE) 1) The case was assigned to me on February 16, 2011, to determine whether a clearance should be granted or denied.

Findings of Fact

In his answer to the SOR, Applicant did not specifically admit any of the SOR allegations. I considered all SOR allegations denied. After a thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 78-year-old senior logistician employed part-time by a defense contractor. He enlisted in the U.S. Navy in December 1953, and retired in December 1977. His service was characterized as honorable. He remained in the Fleet Reserve until completion of his 30 years of service. Applicant married his wife in March 1956, and they raised five children, all of whom are college educated and gainfully employed. One of his sons is a Navy captain and his grandson is currently a midshipman at the U.S. Naval Academy. (HE 1)

Applicant worked part-time with a government contractor from March 2001 until at least December 2010. He disclosed no other employment from December 1977, when he retired from the Navy, until March 2001, when he was hired by his current employer. Applicant stated he had access to classified information at the secret level since 1999. It is not clear whether he has possessed his clearance without interruptions from 1999 to present.

Applicant submitted his SCA in October 2009. Section 26 of his SCA (financial record), required Applicant to disclose whether during the preceding seven years he had defaulted on any loan; had debts turned over to a collection agency; had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; had been over 180 days delinquent on any debts; and whether he was currently 90 days delinquent on any debts. Applicant answered "NO" to all these questions. He deliberately failed to disclose the three debts alleged in the SOR.

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

In December 2009, Applicant was interviewed by a background investigator about his delinquent and charged-off debts and his overall financial situation. During the interview, he explained that his financial problems were the result of his participation in a lottery scam. Since 2007, he has been sending money (\$100, \$350, or more) to people in Jamaica, presumably to participate in the lottery scam. He received his "winnings" by check payments of \$9,000 to \$22,000, which he deposited in his bank accounts. Some of these checks were not honored, and he acquired the resulting debt. Applicant believes he has spent over \$100,000 on this lottery scam. Although he believes this to be a lottery scam, as of December 2009, he was still sending money and willingly participating in it.

Applicant believes the people running the lottery scam are going to pay him for the checks they failed to honor. He claimed to have the financial means to pay all of his delinquent debts; however, he is waiting for the lottery people to pay what they owe him. He believes he may receive \$500,000 because he recently received a letter from the general counsel to the United Nations advising him of that fact. (FORM, Item 5)

Applicant indicated he and his wife have a combined gross monthly income of approximately \$12,500. However, this includes \$1,714 in anticipated income from a future job, and \$2,500 rental property income, presumably from one of his properties pending foreclosure. Not considering those entries, he and his wife have a combined gross income of around \$8,000. (FORM, Item 6)

SOR ¶¶ 1.a (\$38,500) and 1.b (\$41,000) alleged two charged-off credit cards. Applicant admitted he used the two credit cards to pay for, among other things, his travel and vacation expenses, gifts, cash advances, and for his gambling expenses. Applicant and his wife take almost yearly vacation trips to the Philippines. They travelled to the Philippines in 2001, 2003 through 2007, and in 2009. A portion of the cash advances he took on his credit cards was used to participate in the Jamaica lottery scam.

Concerning the debt alleged in SOR ¶ 1.c, Applicant claimed he communicated with the previous and current mortgage holders seeking a settlement. He asked for a voluntary foreclosure of the real estate and offered a deed to convey the property, but he has not received a response. He presented no documentary evidence to support his claims.

Applicant acknowledged receiving collection and delinquency notices from his creditors, but he has not paid on the accounts because the lottery scam people promised to pay the dishonored checks. Applicant could not estimate the amount of money he spends gambling, except for stating that it was not much. In addition to participating in the lottery scam, he gambles in a local card club. In his personal financial statement, Applicant also disclosed owing \$754,000 and \$88,000 on two real estate mortgages, \$14,000 on past-due federal income taxes, and \$3,000 on a car note.

In his answer to the FORM, Applicant claimed he contacted and made payment arrangements with both agencies collecting the debts alleged in SOR ¶¶ 1.a and 1.b, and that he was making consecutive monthly payments since April 2010. He averred such information was provided to DOHA adjudicators. Notwithstanding, there was no documentary evidence in the FORM supporting Applicant's assertions. Except for those documents specifically outlined in the FORM, there is no documentary evidence in the FORM showing any efforts by Applicant to contact creditors, settle his debts, make payments, or otherwise resolve his financial obligations. Applicant provided no information about his participation in financial counseling or about him and his wife following a budget.

Applicant claimed that his failure to disclose his delinquent debts in his SCA was not deliberate or made with the intent to mislead the Government, and that it was an innocent mistake. Applicant stated he always lived within his means and never engaged in questionable acts to support his family. He highlighted his 24 years of honorable, active naval service to the United States. In over half a century of service to the United States, there has never been a question of his integrity, loyalty, and patriotism. He is 78 years old and expects to retire in the near future.

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.

The SOR alleges and the evidence established that Applicant owes three delinquent debts, totaling nearly \$97,000, all of which are unresolved. AG ¶ 19(a) “inability or unwillingness to satisfy debts” and AG ¶ 19(c) “a history of not meeting financial obligations” 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's sparse favorable evidence fails to fully raise the applicability of any mitigating condition. 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, or good judgment. AG ¶ 20(a) does not apply.

Applicant presented no evidence to establish circumstances beyond his control contributing to his inability to pay his debts. Nor did he present any documentary evidence showing that he acted responsibly in the acquisition of his debts, that he made good-faith efforts to resolve his debts, or that he has a track record of financial responsibility. AG ¶¶ 20(b) and (d) do not apply.

AG ¶ 20(c) does not apply because there are no clear indications that his financial problem is being resolved or is under control. He has not participated in financial counseling, and there is no documentary evidence he follows a budget. Considering the number of delinquent debts, the date the debts were acquired, the aggregate value of the debts, and the limited evidence of efforts to resolve his financial obligations, Applicant's information is insufficient to establish that his financial problems are unlikely to recur. The remaining mitigating conditions are not reasonably raised by the facts in this case.

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.

Applicant claimed that his failure to disclose his delinquent debts in his SCA was not deliberate or made with the intent to mislead the Government, and that it was an innocent mistake. Considering the number and total value of the debts, how the debts were acquired, Applicant's military service experience, his many years working for a Government contractor, and his experience with the security clearance process, I find Applicant's claims of innocent mistake not credible.

Applicant's deliberate falsification triggers 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 ¶ 17 lists seven 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;

(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 2009 SCA. His falsification is a serious, recent offense (felony level).³ He made no effort to correct his falsification. His behavior shows questionable judgment, untrustworthiness, unreliability, and lack of candor.

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

³ See 18 U.S.C. 1001.

many years of honorable service in the defense of the United States and for his good work for a government contractor. By all accounts, he is a loyal, patriotic American, and a good father and husband. These factors show some responsibility.

Notwithstanding, security concerns remain about Applicant's current financial responsibility. Applicant's documentary evidence failed to show financial responsibility in the acquisition of the debts, good-faith efforts to resolve his financial problems in a timely manner, or a current track record of financial responsibility. His failure to address any of the SOR debts indicates he is probably financially overextended. The sparse mitigating 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. Moreover, considering his many years of military service, his years of experience working for a government contractor, and his familiarity with the security clearance process, I find Applicant deliberately falsified his SCA.

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.c:	Against 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 to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge