



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



In the matter of:)	
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)	ISCR Case No. 10-01400
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Bradley S. Cornelius, Esquire

September 12, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On February 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and F 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 April 1, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was first assigned to another Administrative Judge, and DOHA issued a notice of hearing on November 23, 2011, for the hearing to be held on January 12, 2012. The hearing was cancelled on January 10, 2012. The case was reassigned to me on April 13, 2012. DOHA issued a notice of hearing on April 30, 2012, and I convened the hearing as scheduled on May 23, 2012. The Government offered Exhibits 1 through 13, which were received without

objection. Applicant testified on his own behalf and submitted no exhibits at the time of hearing. Two additional witnesses also testified on behalf of Applicant.

DOHA received the transcript of the hearing (Tr) on June 11, 2012. I granted Applicant's request to keep the record open until June 4, 2012, to submit additional documents, and two character letters that were received, have been identified and entered into evidence without objection as Exhibit A. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and the other two witnesses, 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 55 years old. He is married, and he has three sons. He received an Associate of Arts degree in Electronics Technology. He served in the United States Army from 1974 to 1984, and he received an Honorable Discharge. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 Guideline E, Personal Conduct

The SOR lists 10 allegations (1.a. through 1.j.) under Adjudicative Guideline E. The allegations will be discussed below in the same order as they were listed on the SOR:

1.a. The SOR alleges that Applicant was court-martialed in about 1980 and charged with (1) Aggravated Assault, (2) Intention of Bodily Harm, and (3) Threatening. Applicant pleaded guilty to count (2) and was sentenced to a fine and disapproved for re-enlistment. Applicant testified that on this occasion he was consuming alcohol with his friend and at some point during an apparent blackout, he shot his friend with a gun. Applicant indicated that he was court-martialed but not discharged from the military as a result of this incident. (Tr at 119-122.)

1.b. The SOR alleges that Applicant was arrested in about 1998, and charged with (1) Drawing or Exhibiting a Firearm, and (2) Carrying a Loaded Firearm in a Vehicle. Applicant was found guilty of Assault with a Deadly Weapon and sentenced to three years of probation, suspended and 30 days in jail.

Applicant explained that this incident occurred when he got into an altercation with another driver over a parking space he believed the other driver had taken from him. Applicant brandished a gun that had been in his vehicle, and used it to threaten the other driver. Applicant testified that he entered a plea of no contest as a result of this arrest, and he was assigned to a work furlough program. He also was ordered to attend an anger management class. (Tr at 122-136.) Applicant confirmed that he never

informed the security officer or anyone else from his employer about this arrest. (Tr at 191-192.)

1.c. The SOR alleges that on or about December 2005, Applicant tested positive for amphetamines during a random drug test by his employer. He was suspended for three days and had to test negative for drugs before he returned to work. Applicant testified that he was surprised by the results of the test, because he contended that he only took drugs that had been prescribed to him. Applicant stated that he never tested positive after this one time. (Tr at 136-143.) Applicant claimed that he believed the drug may have been in something at a party that he had attended the night before the testing, but he never informed anyone at his employer about his belief. (Tr at 193-194.)

1.d. The SOR alleges that Applicant tested positive for amphetamines on or about December 2005, as alleged in 1.c., above, after he had been granted a Department of Defense security clearance in about February 2004. Applicant conceded that he did hold a security clearance when he tested positive for amphetamines. (Tr at 143.)

1.e. The SOR alleges that in about 2006, Applicant used a company credit card, which had been issued by his employer to be used for business only, for personal use on several occasions. The company reminded him that he was not to use the credit card for personal use.

1.f. The SOR alleges that in about 2007, Applicant again used his company credit card for personal use on several occasions, including withdrawing cash from ATMs and then using the money to gamble. Applicant testified that he had used the company credit card when he was not on travel, including withdrawing money from an ATM at a gambling casino, which he was aware was a violation of the company's policy. Applicant averred that since he would pay off the credit card, it was alright to use the credit card, even if it did violate the company policy. Applicant received a letter of reprimand from the company. The credit card was held by the company and only given to Applicant when he was on travel duty for the company. (Tr at .143-156)

Applicant was asked why he used the credit card while not on travel, after he had been instructed not to do so, and he replied, "Because I'm stupid, sir." He thereafter conceded that he purposefully and intentionally disobeyed the rules and regulations of his company. (Tr at 193-198.) Applicant received a three day suspension for his misuse of the company credit card. (Exhibit 3.) Applicant admitted that he has used the company credit card when he was not on travel, even after he received his counseling and suspension. When he was asked why he continued to use the card after the punishment and counseling, he stated, "I don't know. I'm just stupid." (Tr at 219-220.)

1.g. Applicant completed a security clearance application (SCA) on July 20, 2009. Question 13c asked Applicant if in the last 7 years he had been officially reprimanded, suspended or disciplined for misconduct in the workplace? Applicant answered "No." The SOR alleges that Applicant failed to disclose that information set forth in subparagraphs 1.e. and 1.f., above.

Applicant could give no explanation for his incorrect answer. He testified that he should have answered "Yes" to this question. He did not know why he answered "No." (Tr at 199-200.) Applicant conceded that he has completed approximately five or six SCAs in his life. (Tr at 185.)

1.h. Question 23a of the SCA asked Applicant if in the last 7 years he had illegally used any controlled substance. Applicant answered "No." The SOR alleges that Applicant failed to disclose that information set forth in subparagraph 1.c., above.

Applicant testified that he answered "No" to this question because he did not knowingly take any drugs. (Tr at 202-203.) However, nowhere in the question is the word "knowingly" used. Additionally, he made no attempt to explain his negative response to this question.

1.i. Question 23b of the SCA asked Applicant if he had ever illegally used any controlled substance while possessing a security clearance. Applicant answered "No." The SOR alleges that Applicant failed to disclose that information set forth in subparagraph 1.d., above.

1.j. Question 26 of the SCA asked Applicant if in the last 7 years he had been counseled, warned, or disciplined for violating terms of agreement for a travel or credit card provided by his employer. Applicant answered, "No." The SOR alleges that Applicant failed to disclose that information set forth in subparagraph 1.e. and 1.f., above.

Applicant again could give no explanation for his answer. He testified that he should have answered "Yes" to this question. He did not know why he answered "No." (Tr at 203-204, 208.)

Paragraph 2 Guideline F, Financial Considerations

The SOR lists six allegations (2.a. through f.) regarding financial difficulties under Adjudicative Guideline F. The allegations will be discussed below in the same order as they were listed on the SOR:

2.a. The SOR alleges that Applicant filed a Chapter 7 bankruptcy on or about July 1999. The bankruptcy was discharged on or about October 1999. Applicant testified that since his marriage to his wife in 1981 to the present, she has always been the one to pay the bills. He was surprised about the debts at the time that they filed the bankruptcy, because she applied for, received and used credit cards without his knowledge, although Applicant conceded that he might have been using some of the credit cards that were part of the debt that was discharged in bankruptcy. (Tr at 156-161.)

2.b. The SOR alleges that Applicant has an overdue debt for a collection account against Applicant in the amount of \$89,292. Applicant testified that his wife convinced him, although he was against the idea, to purchase a second house, in which they

would live, and the first house would be for an investment. After they moved into the second house, Applicant's wife lost one of her two jobs. Applicant's wife then informed him that she was having difficulty making the mortgage payments. Ultimately the house was foreclosed, and this debt, which was from the second mortgage on this home, remains unpaid. (Tr at 164-167.)

2.c. The SOR alleges that Applicant had a mortgage account that went into foreclosure with a deficiency balance in the amount of \$231,000. This debt is the first mortgage for their home that was foreclosed as reviewed in 2.b., above. No payments were made after the house went into foreclosure, and this debt remains unpaid.

2.d. The SOR alleges that Applicant has gambled one or two times a week since at least 2007. Applicant estimated that he gambled four or five times a month. He testified that he gambles with the money that is left after he has met his obligations. As a result of his using his company credit card to obtain money to gamble, his employer recommended that he seek counseling regarding his gambling. Applicant attended two sessions with a counselor and then he attended "a few sessions" at Gamblers Anonymous (GA). Applicant testified that he was told at GA that he did not have a gambling problem, and it was his belief that he does not have a problem with gambling. He estimated that the longest time he ever went without gambling was for one or two months. He also estimated that he used his company credit card to receive between \$200 to \$300 or more a month for gambling. (Tr at 167-171, 213-216.)

2.e. The SOR alleges that Applicant does not want to take responsibility for his household finances because of his belief that if he has access to his wife's bank account he may spend the money gambling.

2.f. The SOR alleges that the information set forth in subparagraphs 1.e and 1.f., above, should be considered under Financial Considerations.

Mitigation

Applicant submitted two positive character letters from co-workers. (Exhibit A.) He was described as "professional" and "a great asset to our team."

Testimony of Witnesses

Applicant's wife testified on Applicant's behalf. She confirmed that she has been and continues to be the one who is responsible for paying the bills. She conceded that she does not keep her husband apprised of the bills as they come and as they are paid. She also testified that it was because she lost her second job that their house was foreclosed. At this time neither of them has any personal credit cards. She also confirmed that it was her idea to purchase the second home as an investment property and that her husband had been against the idea. Applicant's wife indicated that they have not made any attempt to resolve the debts as a result of their home foreclosure. (Tr at 42-64.)

A good friend of Applicant also testified on his behalf. He averred that he has never been aware of Applicant using any illegal drugs. He also has gone gambling with Applicant, and he did not believe he was a big gambler. (Tr at 85-99.)

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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgement, 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.

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers on a SCA regarding his use of a company credit card, which violated his company policy, and the subsequent reprimand and suspension that he received. He also did not include on the SCA that he was tested positive for a drug while in his workplace. Additionally, Applicant did not reveal that he was found to have used an illegal substance while holding a security clearance. Applicant had no reasonable explanation for his failure to include this information on his SCA. All of this was information Applicant knew or should have known, and it should have been revealed.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation’s secrets. When such an individual intentionally falsifies material facts, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers to the Government on a SCA.

Additionally, Applicant’s conduct as a whole, including shooting an individual with a gun in 1980, brandishing and threatening an individual with a gun in 1998, being tested positive for the use of an illegal drug while holding a security clearance in 2004, using his company credit card in violation of his company’s policy in 2007, and then continuing to use the card more recently after he had received counseling and a suspension, shows questionable judgement and unreliability.

In reviewing the disqualifying conditions under Guideline E, I conclude that, because of Applicant’s “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire,” AG ¶ 16(a) applies against Applicant.

I also find that disqualifying condition AG ¶ 16(c) applies, “credible adverse information . . . when considered as a whole, supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor” I do not

find any Mitigating Condition under ¶ 17 is applicable. I, therefore, resolve Guideline E against Applicant.

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. I also find that AG ¶ 19 (i) "compulsive or addictive gambling" is a concern that is applicable in this case because of Applicant's using his company credit card to get money to gamble.

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 the loss of employment of his wife. However, I cannot find that he has acted responsibly. When Applicant and his wife filed for bankruptcy, he had been unaware of his overdue debts because only his wife was involved in paying the bills. The evidence is clear that the practice has continued to the present day that only she pays the bills and is aware of their finances. Because 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.

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