



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 10-02333
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

02/29/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Criminal Conduct, Personal Conduct, and Financial Considerations concern. He has a long track record of criminal conduct, to include stealing Government money and falsifying his security clearance application. He recently had his debts discharged through bankruptcy, but failed to demonstrate that his financial situation is under control. Clearance is denied.

Statement of the Case

On March 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), notifying Applicant that it was unable to find that it is clearly consistent with the national interest to grant his request for access to classified information due to the concerns under Guideline J (Criminal Conduct), E (Personal Conduct), and F (Financial Considerations).¹

¹ DOHA took this action 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) implemented by the Department of Defense on September 1, 2006.

On July 20, 2011, Applicant submitted his Answer. He admitted all the SOR allegations and requested a decision on the administrative record.

On September 26, 2011, Department Counsel submitted its File of Relevant Material (FORM).² Applicant received the FORM on October 6, 2011. He had 30 days within which to file a response and any objections to the FORM. He did not submit a response or objections. I was assigned the case on January 23, 2012.

Findings of Fact

Applicant is 51 years old. He is separated from his wife and has two children, ages 17 and 20. He received his master's degree in 2003, and has been working for a local community college since October 2009.³

Applicant served on active duty in the Marine Corps from 1978 to 1984, and then as an officer in the Army National Guard (ANG) from 1984 to 2003. He was placed in charge of payroll for his ANG unit. He abused his position by stealing over \$9,400 between May and July 2004. He used the money to pay debts he had accumulated. He was charged and convicted in federal district court in 2005 with theft of Government money. He was sentenced to a month in prison and three years probation.⁴

Applicant was arrested in 2008 for soliciting a prostitute. He claims that he did not give an undercover police officer, who was posing as a prostitute, money for sex. Instead, Applicant claims he gave the undercover officer money, so she would go with him to another location to continue their conversation. He was having marital problems at the time and was enjoying the undercover officer's company. He was subsequently arrested and convicted of prostitution. He claims the prosecuting attorney told the judge that he had reviewed the transcript of the conversation between Applicant and the undercover officer, and Applicant had done nothing wrong. Applicant claims the judge still convicted him of prostitution based on his prior conviction for theft.⁵

Applicant's arrest and conviction for soliciting a prostitute was a violation of the terms of his probation. He was personally served by his probation officer with a criminal summons to appear in federal court to answer the probation violation.⁶ In November

² The FORM contains the Government's summary of facts, argument, and twelve documentary exhibits. Government Exhibits (GE) 1 through 12 are hereby admitted into the record.

³ GE 1; GE 11, Schedule I.

⁴ GE 1; GE 6; GE 7.

⁵ GE 7 and GE 9. *But see*, GE 6 at 121, *Petition for Summons and Order to Show Cause* (Applicant "was arrested August 22, 2008, for Prostitution by (police). He agreed to pay \$80 to an undercover female officer if she engaged in sexual activity with another woman while he watched. During an interview with a detective following his arrest, (Applicant) admitted he intended to physically touch the undercover officer. When asked if that meant sex he responded, "Yeah, probably.").

⁶ GE 6 at 125.

2008, he appeared in federal court with counsel and “admitted he had violated the conditions of supervised release by committing a new law violation.” He was found guilty of violating the terms of his supervised release, which amounted to “a Grade C violation” under federal sentencing guidelines. He was sentenced to a day in jail and an additional two years of probation.⁷

In November 2009, Applicant submitted his security clearance application (SCA). He disclosed his conviction for theft of Government money, but did not reveal his conviction for soliciting a prostitute. When asked about this omission during his background interview, Applicant stated that he pled guilty to soliciting a prostitute because “he did not want his spouse to find out about the charge” and he has not told anyone about this conviction.⁸ Applicant also omitted from his SCA his probation violation. When asked about this omission during background interview, Applicant “stated he did not know the (prostitute) incident led to a probation violation . . .”⁹

Applicant and his wife separated in December 2009, and they decided to file for bankruptcy to discharge the debts they had amassed. In April 2010, they filed a Chapter 7 bankruptcy petition. As part of the bankruptcy, Applicant received financial counseling via the internet and telephone. The bankruptcy documents reflect that, as of the time of filing, Applicant and his wife had over \$16,000 in credit card debt, and had a negative \$445 net monthly income. His wife made far more income than Applicant. The bankruptcy court granted a Chapter 7 discharge in October 2010. Applicant is currently past-due on his student loans.¹⁰

Applicant has been unable to maintain gainful employment due to his federal conviction for stealing Government money.¹¹ He did not submit evidence that he has resolved or is attempting to resolve his past-due student loans, or that he is currently living within his means. He also did not submit evidence as to his military service, current work performance, or outside activities.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

⁷ GE 9, *Order Revoking Supervised Release and Reimposing Supervised Release Term*.

⁸ GE 7, 1/8/10 Subject Interview at 2.

⁹ *Id.*

¹⁰ GE 8-10; Answer.

¹¹ GE 1; GE 9.

disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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 Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15.¹² An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b).

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. "A clearance adjudication is an applicant's opportunity to demonstrate that, prior to being awarded a clearance, he (or she) actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country."¹³

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.

¹² ISCR Case No. 11-00391 (App. Bd. Dec. 1, 2011) ("Once an applicant's SOR admissions and/or the Government's evidence raise a security concern, the burden of persuasion shifts to the applicant to mitigate the concern.").

¹³ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

Analysis

Guideline J, Criminal Conduct

The criminal conduct concern is addressed at AG ¶ 30, as follows:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant's convictions for stealing Government money, soliciting a prostitute, and violating the terms of his probation directly implicate this concern. This criminal history also establishes the following disqualifying conditions under AG ¶ 31:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (e) violation of parole or probation . . .

An applicant may mitigate the criminal conduct concern by establishing one or more of the mitigating conditions listed under AG ¶ 32. I have considered all the mitigating conditions and only the following were potentially raised by the evidence:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal convictions occurred some time ago. However, he continues to demonstrate that he is unreliable, untrustworthy, and lacks the requisite judgment to be granted a security clearance. During the course of the current background investigation, Applicant falsified his SCA and then compounded his lack of candor on the SCA, by providing misleading information to the Government investigator about the convictions for prostitution and probation violation. Applicant's falsification of his SCA constitutes a criminal offense. His dishonesty during the course of the background investigation undercuts the mitigating value of the passage of time since his last criminal conviction. Under the circumstances, AG ¶ 32(a) and (d) do not apply. Applicant failed to mitigate the criminal conduct concern.

Guideline E, Personal Conduct

The personal conduct concern is set forth at AG ¶ 15:

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.

The guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 16, and only the following warrant discussion:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA. An applicant should disclose any potential derogatory information. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.¹⁴

Applicant's omission from his SCA of his convictions for prostitution and probation violation constitutes a deliberate falsification. After falsifying his SCA, Applicant intentionally misled a Government investigator by claiming he was unaware that the prostitution conviction led to the probation violation. This statement to the investigator was a clear lie. A year before submitting his SCA, Applicant was personally served by his probation officer with a criminal summons to appear in federal court to answer a petition to find him guilty of violating the terms of his probation. He appeared in federal court with counsel and was found guilty. This is not an event an individual, especially one with Applicant's background, would simply forget or confuse. Applicant

¹⁴ See generally ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

wanted to keep this adverse criminal information secret, because he did not want his wife to find out about his conviction for soliciting a prostitute. Applicant's attempt to keep this information hidden also left him vulnerable to coercion. In his Answer, Applicant admits he deliberately falsified his SCA and misled the Government investigator. His admissions are fully corroborated by the record evidence. AG ¶¶ 16(a), (b), and (e) apply.

An applicant may mitigate the personal conduct concern by establishing one or more of the mitigating conditions listed under AG ¶ 17. I have considered all the listed mitigating conditions and find that none apply. Applicant's track record of criminal behavior and dishonesty leaves me with serious reservations as to his reliability, trustworthiness, and good judgment. He failed to mitigate the personal conduct concern.

Guideline F, Financial Considerations

The security concern relating to financial problems is articulated at AG ¶ 18, as follows:

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.

Applicant's theft of Government money and accumulation of a substantial amount of consumer debt, which eventually led to his recent bankruptcy filing, directly implicates this concern. It also establishes the following disqualifying conditions under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (b) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft . . . and other financial breaches of trust; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness , significant negative cash flow, . . .

An applicant may mitigate the financial considerations concern by establishing one or more of the mitigating conditions listed under AG ¶ 20. I have considered all the mitigating conditions and only the following were potentially raised by the evidence:

- (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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's periods of unemployment and underemployment over the past several years is related to his federal conviction for stealing Government money, which is not a matter outside of his control. Although Applicant received financial counseling through the bankruptcy filing, he failed to submit any proof that such counseling had any positive effect, as evidenced by currently being past due on his student loans. Applicant's filing for bankruptcy is a valid legal avenue through which he could resolve his debts. However, he failed to submit any evidence that, following the bankruptcy discharge, he has responsibly managed his financial affairs. In short, Applicant failed to mitigate the serious security concerns raised by his history of financial trouble and theft. None of the mitigating conditions under Guideline F apply. Applicant's financial situation continues to cast doubt on his current reliability, trustworthiness, and good judgment.

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 the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁵ I have considered all the favorable and extenuating factors in this case, to include Applicant's military service. However, this favorable evidence does not outweigh the security concerns at issue. Security clearance adjudications are predictive judgments, where an applicant's past history is the best indicator of future conduct. Applicant's past conduct continues to raise serious concerns about his ability to safeguard classified information. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

¹⁵ (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.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST APPLICANT

 Subparagraphs 1.a – 1.c: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

 Subparagraphs 2.a – 2.d: Against Applicant

Paragraph 3, Guideline F (Financial Considerations): AGAINST APPLICANT

 Subparagraphs 3.a – 3.c: Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is therefore denied.

Francisco Mendez
Administrative Judge