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



In the matter of:)	
)	
)	ISCR Case No. 10-03898
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/14/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant falsified his 2006 and 2009 security clearance applications (SCAs) and made false statements to a government investigator. He was less than candid and forthcoming at his hearing. He was irresponsible in complying with his legal and financial obligations. His lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on September 14, 2009. The Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) and Guideline F (financial considerations) on November 8, 2013.¹ Applicant answered the

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

SOR on December 3, 2013, and requested a hearing before an administrative judge. Applicant's attorney entered his appearance on December 3, 2013. The case was assigned to me on February 20, 2014. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on February 20, 2014, scheduling a hearing for March 13, 2014.

At the hearing, the Government offered 12 exhibits (GE 1 through 12). Applicant testified, presented the testimony of two witnesses, and submitted two exhibits (AE 1 with Tabs A through CC, and AE 2). Tab DD was timely submitted post-hearing. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 21, 2014.

Procedural Issues

At the hearing, Department Counsel withdrew the allegation in SOR ¶ 1.g. (Tr. 19) He also moved to amend SOR ¶ 1.n by deleting from the last line of the paragraph the number and letter "1.m," and substituting therefore the number and letter "1.l." Applicant did not object and I granted the amendment. (Tr. 18-19)

Findings of Fact

In his response to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.a and 1.v. He denied all remaining SOR allegations. At his hearing, Applicant admitted the following SOR allegations: 1.o (Tr. 58), 1.p through 1.t (Tr. 61-64), 1.w and 1.x (Tr. 66), and 2.a and 2.b (Tr. 67-68). Applicant's admissions are hereby incorporated as findings of fact. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 34-year-old security administrator employed by a defense contractor. Applicant is married and his wife is pregnant with twins. He also has a six-year-old daughter, and a six-month-old son. After graduating from high school, he attended college from August 1997 to May 1998, but did not complete a degree. Instead, he enlisted in the U.S. Air Force where he served on active duty from June 1999 to November 2002. He submitted his first SCA while attending basic training. Shortly thereafter, he was granted access to classified information. He has continued to possess a security clearance to present.

While in the service, Applicant received non-judicial punishment in December 2001 for the charge of dereliction of duty – sleeping on duty. He also received non-judicial punishments on May 16 and May 28, 2002, for his failure to obey an order to vacate his off-post residence and return to live on base. He was administratively discharged from the service because of misconduct in November 2002. His service was characterized as "under honorable conditions," and he was issued a general discharge. When he enlisted, Applicant received a \$6,000 enlistment bonus. Because of his discharge for misconduct, he was required to reimburse the enlistment bonus to the Government. The Government debt is depicted as delinquent and in collection in the

2006 and 2009 credit reports. (GE 11, 12) At his hearing, Applicant testified that he is making payments.

After his discharge, Applicant was unemployed from November 2002 until July 2003. He worked as a security officer for a company from July 2003 until November 2003. He worked for a government contractor (M) from November 2003 to July 2004. While in this position, Applicant assisted in the review of SCAs, produced final reports of investigations, and advised contract investigators concerning their investigations.

After a period of unemployment and two short-term jobs, he worked for a government contractor (J) as a personnel security assistant from September 2005 to March 2007. In this position, he reviewed and updated personnel security paperwork to verify that all required data was provided, obtained information from applicants, and updated security databases. Company J terminated Applicant from his position because of allegations of time sheet falsifications. Applicant acknowledged the allegations against him, and that he was terminated as a result of those allegations. (Tr. 55-56) Applicant explained that he did not disclose his termination and the allegations against him on his 2009 SCA because he did not engage in time sheet falsifications. (Tr. 55)

Applicant worked for government contractor (C) from November 2007 to March 2008. His employment was conditioned on Applicant's eligibility for a security clearance. He was determined ineligible for a clearance by a Government agency, and he was terminated from his employment. However, his employer considered Applicant eligible for rehire, provided he would meet employment requirements. (AE 1, Tab E; GE 5) At his hearing, Applicant acknowledged that he should have disclosed in his 2009 SCA that he was terminated from his job because he was determined ineligible for a clearance. (Tr. 89, 101-102)

Applicant worked for a government contractor (S) from March 2008 to November 2011. In this position, Applicant reviewed employees' SCAs, assisted facility security officers (FSOs) with their duties, and fingerprinted employees applying for clearances.

Applicant has been working for his current employer (I), a government contractor since November 2011. He is the security administrator for a security database, tracks SCAs, and manages 19 cleared facilities. His duties include helping FSOs with their duties, including the review and processing of SCAs, interviewing applicants, and assisting his employer with the review of background investigations.

Applicant submitted SCAs in February 2006 and September 2009. He answered "No" to Section 19 (Your Military Record) of the February 2006 SCA asking: "Have you ever received other than an honorable discharge from the military?" SOR ¶ 1.b alleged that Applicant falsified Section 19 of his 2006 SCA because he answered "No" knowing he was discharged with a general discharge. Applicant credibly explained that he believed that his general - under honorable conditions - discharge was an honorable discharge.

Section 15 (Military History) of the September 2009 SCA asked Applicant to state the type of discharge he received upon separation from the Air Force. Applicant stated that he received an “honorable” discharge. However, in the explanation section of Section 15, he stated - “under honorable conditions.” Section 15(c) asked: “Have you ever received a discharge that was not honorable? Applicant answered “No.” He believed a general discharge is also an honorable discharge.

Applicant was interviewed by government investigators in November and December 2009. The November 2009 report of interview indicates that Applicant told the investigator he was separated from the Air Force with a general – under honorable conditions discharge. I find that both an honorable and a general discharges entitle a service member to full Federal rights and benefits provided by law. A general discharge is considered to be less than an honorable discharge. Notwithstanding, both are discharges under honorable conditions.

During his November 2009 interview, Applicant discussed his employment history with the investigator. He told the investigator that he was laid off from his employments with companies J and M. (GE 4) Applicant also disclosed to the government investigator that he had failed to timely file his Federal and state income tax returns and to pay his taxes for tax years 2006 through 2008. He explained that he believed that if he did not owe any money, he did not have to file income tax returns. He filed the 2006 through 2008 income tax returns in 2009. At his hearing, Applicant admitted that he failed to timely file his 2009 and 2010 Federal and state income tax returns and to pay taxes. As of the day of his hearing, Applicant had filed his late Federal and state income tax returns. He had paid his state taxes, and established a payment plan with the IRS in 2012. (AE 1(c), 1(q), and 1(dd).

Section 23(f) (Your Police Record) of the February 2006 SCA and Section 15(d) of the September 2009 SCA asked Applicant whether “in the last seven years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain’s mast, etc.)” Applicant answered “No” to both questions. He deliberately failed to disclose in his 2006 SCA the three non-judicial punishments he received between 2001 and 2002. He was not required to disclose in his September 2009 SCA the three non-judicial punishments he received in 2001 and May 2002, because they occurred outside of the seven year period asked in Section 15(d). At his hearing, Applicant admitted he received the non-judicial punishments and that he should have disclosed his non-judicial punishments in his 2006 SCA.

SOR ¶¶ 1.i and 1.m alleged that Applicant falsified Section 13(c) (Employment Record) of the September 2009 SCA. Section 13(c) asked Applicant: “Has any of the following happened to you in the last seven years? 1. Fired from a job; 2. Quit a job after being told you would be fired; 3. Left a job by mutual agreement following charges or allegations of misconduct; 4. Left a job by mutual agreement following notice of unsatisfactory performance; 5. Left a job for other reasons under unfavorable circumstances; 6. Laid off from job by employer?” Applicant answered “Yes” and stated

that he was laid off in 2004. Applicant deliberately failed to disclose that he was terminated from his job with company C because he was considered ineligible for a security clearance in 2008, a condition for his employment. Applicant also deliberately failed to disclose that he was terminated from his job with company J in 2007, because of allegations of time sheet falsifications. At his hearing, Applicant acknowledged that he should have stated in his 2009 SCA that he was terminated from his job with company J because of the time sheet falsification allegations. (Tr. 89, 101-102)

Section 25(a) (Investigations and Clearance Record) of the September 2009 SCA asked Applicant: "Has the U.S. Government . . . ever investigated your background and/or granted you a security clearance?" Applicant answered "Yes" and disclosed he was investigated for a clearance in 2000 and 2005. However, Applicant deliberately failed to disclose that he was investigated for a clearance and considered ineligible in 2008. (SOR ¶ 1.g)

Section 25(b) of the September 2009 SCA asked Applicant: "To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked." Applicant deliberately answered "No" and failed to disclose that he was denied clearance eligibility in 2008, which resulted in the termination of his employment with C. Applicant explained that he did not disclose the 2008 investigation and denial of his clearance, because he believed the investigation was never completed because he was never interviewed by a government investigator. (SOR ¶ 1.k)

Applicant was interviewed by a government investigator in November 2009. During the interview, Applicant told the investigator that he was laid off from company J. (GE 4) Applicant deliberately made a false statement to the government investigator when he misrepresented the facts concerning his termination from company J because of time sheet falsification allegations.

Section 28 (Your Financial Delinquencies) of the 2006 SCA asked Applicant to disclose whether "in the last seven years have you: (a) been over 180 days delinquent on any debt, and (b) are you currently over 90 days delinquent on any debt." Applicant answered "No" and failed to disclose that he had a number of debts that were currently over 90 days delinquent or charged off, or that had been over 180 days delinquent. Applicant's delinquent debts were established by the March 2006 credit report (GE 11) and his 2009 statements to a government investigator. (GE 4)

Section 26 (financial record) of the 2009 SCA asked Applicant to disclose whether in the last seven years: (c) he had failed to pay Federal or state taxes, or to file a tax return as required by law, (e) had a judgment entered against him, (f) defaulted on any type of loan, (g) had bill or debts turned over to a collection agency, (h) had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed, (m) had been over 180 days delinquent on any debt, (n) was currently over 90 days delinquent on any debt, and (p) was currently delinquent on any Federal debt. Applicant answered "No" to all the above questions. However, Applicant added a comment to his

answers in which he stated that he should have answered “Yes” to questions f, g, m, and n, but that he needed a credit report to fully answer those questions.

Applicant’s background investigation addressed his financial situation and revealed that he had failed to timely file Federal and state income tax returns and to pay taxes for tax years 2006 through 2010. As a result, Applicant acquired a significant Federal and state tax debt. When asked why he failed to file his income tax returns, Applicant stated that someone advised him not to file his income taxes, and he made the mistake of following that advice.

Additionally, the background investigation revealed that as of the filing of his 2009 SCA, Applicant had 11 delinquent debts in collection or charged off (including one judgment), some of which were at the time over 90 days delinquent, and others were over 180 days delinquent. Applicant’s delinquent debts were established by the September 2009 credit report (GE 12) and his 2009 statements to a government investigator. (GE 4)

Applicant deliberately failed to disclose in Section 26 of his 2009 SCA that: (1) he failed to timely file and pay Federal and state income taxes for tax years 2006 through 2010, (2) he had a judgment filed against him in 2007, (3) he had delinquent and charged off accounts and credit cards, and (4) he was delinquent on his Federal taxes.

At his hearing, Applicant presented the testimony of two witnesses and submitted numerous character statements from service members, supervisors, colleagues, and friends. He is considered to be trustworthy, reliable, and a person with good character and integrity. Additionally, his references lauded his professionalism and work ethic. He is considered to be a great addition to any team and a productive employee. He also submitted numerous certificates of training. Most of his training occurred in 2010.

At his hearing, Applicant acknowledged that many of his answers to the 2009 SCA were wrong. He explained that he answered “No” because he wanted to complete the electronic SCA as soon as possible. He did not want to take the time to answer the additional questions that he anticipated would be raised by his positive answers. He knew that there was going to be a background investigation and that at some point he would talk to a government investigator. He claimed that he wanted to personally disclose the information to the investigator. (Tr. 45-47, 61-62)

Applicant does not consider himself to be a risk to national security. He averred that he served his country proudly in the Air Force, and he continues to serve the United States as a security administrator for a government contractor. He stated: “I am the frontline of defense for anyone that is filling out an e-QIP. I do security interviews to make sure someone is suitable to have a security clearance. And by going through this entire process it has helped me a lot with my day-to-day job.” (Tr. 68) Applicant claimed he has learned a valuable lesson and promised never to repeat the same mistakes he made filling out his 2006 and 2009 SCAs. (Tr. 69)

Policies

Eligibility for access to classified information may be granted “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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

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 made numerous falsifications on his 2006 and 2009 SCAs, and he made false statements to a government investigator in 2009. Additionally, the non-judicial punishments he received while in the service, his separation for misconduct, his failure to disclose his terminations of employment from two government contractors and the reasons for the terminations, his financial delinquencies, and his failure to timely file Federal and state income tax returns and to pay taxes show his lack of judgment and unwillingness to comply with rules and regulations.

Applicant's behavior triggers the applicability of the following disqualifying conditions under 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;

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

(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 six 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; and

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

Considering the evidence as a whole, and having observed Applicant's demeanor while testifying, I find that none of the mitigating conditions apply. Applicant made little or no effort to correct his numerous omissions and falsifications. Even at his hearing, Applicant continued with his selective memory, minimized his questionable behavior, lacked candor in his testimony, and provided less than credible explanations.

Additionally, Applicant's failure to timely file his tax returns for four different tax years indicates poor self-control, lack of judgment, and an unwillingness to comply with the law. Applicant's illegal behavior raises questions about his reliability, trustworthiness, and his ability to protect classified information.

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)

Applicant failed to timely file his Federal and state income tax returns for tax years 2006 through 2010. He established a payment plan with the IRS, and paid his state back taxes. Financial considerations disqualifying condition AG ¶ 19(g): "failure to file annual Federal and state, or local income tax returns as required or the fraudulent filing of the same," applies.

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.

Financial considerations mitigating condition AG ¶ 20(a) does not apply. Applicant failed to timely file his income tax returns for four different years, and he is still paying his debt to the IRS.

AG ¶ 20(b) does not apply. Applicant should have been more diligent concerning his legal obligation to timely file his income tax returns. He was confronted with his failure to file tax returns and to pay taxes, and about his delinquent financial obligations in 2009. Notwithstanding, he failed to file income tax returns for 2009 and 2010.

Applicant claimed he was under the mistaken belief that he did not have to file income tax returns because he did not owe any money. Considering his time in the service, his age, his work experience, and his years possessing a security clearance, Applicant should have known better.

AG ¶ 20(c) partially applies, but does not fully mitigate the security concerns. Applicant recently showed some responsibility when he filed his delinquent income tax returns and established payment plans.

AG ¶ 20(d) partially applies, but does not fully mitigate the concerns. Applicant recently started a payment plan with the IRS, and paid his state tax debt. His actions so far are a good start and steps in the right direction.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant served three years in the Air Force and was administratively separated with a general (under honorable conditions) discharge for misconduct. He has worked for numerous defense contractors since 2003. He is considered to be a good worker with good character. In his references' opinion, Applicant is dependable, reliable, and trustworthy.

Nevertheless, Applicant falsified numerous entries in his 2006 and 2009 SCAs and made false statements to a government investigator. He was less than candid and forthcoming at his hearing. Applicant's failure to timely file his income tax returns was not due to circumstances beyond his control. He was irresponsible in complying with his legal and financial obligations. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information.

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 E:	Against APPLICANT
Subparagraphs 1.a and 1.h-1.y:	Against Applicant
Subparagraphs 1.b-1.f, and 1.g:	For Applicant
Paragraph 2, Guideline F:	Against APPLICANT
Subparagraphs 2.a, and 2.b:	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 denied.

JUAN J. RIVERA
Administrative Judge