



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-04430
)
 Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

August 29, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 8, 2010. On March 28, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines F and E. DOHA 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.

Applicant received the SOR on April 4, 2011; answered it on April 18, 2011; and requested a decision on the record without a hearing. DOHA received the request on

April 20, 2011. Department Counsel requested a hearing and was ready to proceed on May 28, 2011. The case was assigned to me on June 3, 2011. DOHA issued a notice of hearing on June 15, 2011, scheduling the hearing for July 19, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through U, which were admitted without objection. I kept the record open until August 5, 2011, to enable Applicant to submit additional documentary evidence. He did not submit any additional evidence. DOHA received the transcript (Tr.) on July 27, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, and 2.b. He denied SOR ¶ 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 39-year-old computer program developer employed by a federal contractor since August 2009. His supervisor describes him as an "excellent developer," who "continues to build his technical skills and is an integral part of [two] project teams."

Applicant graduated from college in May 1994 with a bachelor's degree. He attended post-graduate classes from September 1995 to December 1996 but did not obtain a post-graduate degree. He worked for several private-sector employers until April 2009, when he was laid off because of a business downturn. He was unemployed in May and June 2009, worked during July 2009, and was unemployed for a short time in August 2009 until he began his current job. (GX 1 at 13-20.) He has never held a security clearance.

Applicant married in August 1988. He and his spouse have three daughters, ages ten, seven, and three. His spouse is not employed outside the home.

Applicant's federal income tax returns reflect that his gross income was about \$95,767 in tax year 2007, and then decreased to about \$67,439 for tax year 2010 in his current job. (AX C, F.) He is now earning about \$76,000 per year. (Tr. 50.)

When Applicant submitted his SCA, he answered "No" to question 26h, asking if during the last seven years, he had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed. The SOR alleges that he answered "Yes" to this question but failed to disclose the \$15,422 debt to a home-improvement store alleged in SOR ¶ 1.a; however, the copy of his SCA admitted as GX 1 reflects that he answered "No" to question 26h but "Yes" to the preceding question, asking if he had bills or debts turned over to a collection agency. (GX 1 at 43.)

Applicant answered "Yes" to question 26n on his SCA, asking if he was currently more than 90 days delinquent on any debts. He disclosed three delinquent debts: a delinquent student loan for \$1,311; a delinquent medical bill for \$524 (alleged in SOR ¶ 1.b); and a delinquent tax bill for \$74. He did not disclose a charged-off debt of \$15,422,

owed to a home-improvement store (alleged in SOR ¶ 1.a). (GX 1 at 44-47.) The home-improvement debt was reflected in his credit report dated January 28, 2010 (GX 5 at 7.) In his answer, he admitted omitting the debt from his SCA.

The debt alleged in SOR ¶ 1.a was incurred during a major remodeling of a bathroom in Applicant's residence. In March 2010, he told a security investigator that he fell behind on paying the debt because he was laid off from work. He described the project in detail, and he told the investigator his spouse contacted the creditor, but the creditor wanted the entire balance paid in full. (GX 2 at 4.)

The home-improvement debt became delinquent in July 2009 and was charged off in December 2009. (GX 2 at 35.) Applicant testified that he believed his spouse had contacted the creditor and that the creditor had sent them a letter offering several lump-sum payoff options. He did not bring the letter to the hearing. There is no evidence that Applicant accepted any of the payoff options, and no payments to the creditor had been made as of the date of the hearing. (Tr. 51.) I kept the record open to enable Applicant to submit additional evidence of movement toward settling the home improvement debt. (Tr. 87.) He did not submit any additional evidence.

In his December 2010 response to DOHA interrogatories, Applicant explained his failure to disclose all his delinquent debts on SCA as follows: "I didn't have other accounts in mind at the time I completed the eQIP. I don't recall being aware that other accounts were delinquent. My intent was to answer completely, based on what I understood to be the case, at that time." (GX 2 at 16.) On the personal financial statement submitted in response to the same DOHA interrogatories, he listed the debt alleged in SOR ¶ 1.a. (GX 2 at 29.)

At the hearing, Applicant testified that being laid off in 2009 was a "horrible experience." Although his spouse handled the family finances, he was generally aware that they were in financial trouble. (Tr. 53.) Regarding his failure to disclose the home-improvement debt, he testified: "I honestly don't think I was even thinking about that debt or had it in mind. I wish I had an answer, because losing a job is embarrassing." (Tr. 56.) When asked how he could forget about a large debt for a major home-improvement project, he responded, "I don't know how I failed in that regard." (Tr. 74.)

The delinquent medical bill and tax bill have been resolved. (GX 2 at 54; AX P-R.) The student loan is in forbearance until January 2012. (AX K.) Applicant is making payments on another delinquent credit card account not alleged in the SOR. (GX 2 at 69; AX G-J.) His home mortgage payments and two car payments are current. (GX 3 at 1; AX A, B.) Applicant's spouse had a delinquent credit card account that was charged off in the amount of \$15,048. Applicant was an authorized user on the account. He does not believe that his spouse is making any payments on the account. (GX 2 at 5; GX 4 at 1; Tr. 64, 78.)

Applicant's two older daughters have been attending a private school, at a cost of more than \$10,000 per year. (GX 2 at 28.) To save money, they withdrew their daughters from the school in June 2011. (AX L.)

Applicant and his spouse received an income tax refund of \$6,689 for tax year 2010. (AX F, N.) In July 2011, Applicant withdrew about \$1,762 from his 401(k) retirement account. (AX S, T.) They used these funds to pay delinquent debts, including the medical bill alleged in SOR ¶ 1.b. (Tr. 42-43.)

Applicant's personal financial statement submitted in response to DOHA interrogatories in December 2010 reflected a net monthly shortfall of about \$200. It reflected the home-improvement debt, his spouse's delinquent credit card account, and the private school tuition. It did not reflect any payments on the home improvement debt and delinquent credit card account. (GX 2 at 28-29.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance is merely an indication the applicant 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 therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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

The SOR alleges a \$15,422 debt to a home-improvement store (¶ 1.a) and a delinquent medical bill for \$524 (¶ 1.b). The concern under this guideline 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.

Applicant admitted both debts alleged in the SOR, and his admissions are corroborated by the evidence. At the hearing, he produced evidence that the medical debt was paid. His admissions and the evidence of record establish two disqualifying conditions under this guideline: AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) and AG ¶ 19(c) (“a history of not meeting financial obligations”).

The record includes evidence of several delinquent debts that were not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate

evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the debts not alleged in the SOR for these limited purposes.

Security concerns based on financial problems can be mitigated by showing that “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.” AG ¶ 20(a). Applicant’s delinquent debts are ongoing. Although only two delinquent debts were alleged in the SOR, the evidence reflects that other debts became delinquent after he was laid off and suffered a substantial income reduction. The debts were not the result of circumstances making them unlikely to recur. Business downturns, layoffs and underemployment are facts of life in the current economy; I cannot conclude that another layoff or income reduction is unlikely for Applicant. I conclude that AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Both prongs, *i.e.*, conditions beyond the person’s control and responsible conduct, must be established. Applicant’s loss of employment and his substantial income reduction upon reemployment were conditions beyond his control. However, he did not adjust his lifestyle to his reduced income. He kept his children in an expensive private school for two years after his income was significantly reduced and he was in financial distress. He did not contact the home-improvement store until the debt was charged off and referred for collection. He did not involve himself in resolving his financial situation, but left his spouse solely responsible for resolving it. I conclude that AG ¶ 20(b) is not established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). This mitigating condition is not established because there is no evidence that Applicant sought or received financial counseling.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

“A security clearance adjudication is not a proceeding aimed at collecting an applicant’s personal debts. Rather, a security clearance adjudication is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness in order to

make a decision about an applicant's security eligibility." ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.)

An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has been minimally involved in the resolution of his debts, entrusting that responsibility to his spouse. He had little grasp of his overall financial situation at the hearing. He did not produce evidence of any settlement efforts of the debt in SOR ¶ 1.a, even after he was given additional time to do so. I conclude that AG ¶ 20(d) is not established.

Security concerns under this guideline also can be mitigated by showing "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." AG ¶ 20(e). This mitigating condition is not established because Applicant has not disputed any of the debts alleged in the SOR.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his response to question 26h of his SCA, by answering "Yes" to question 26h ("Have you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?") and question 26n (Are you currently over 90 days delinquent on any debt(s)?"), but deliberately failing to disclose the home-improvement debt alleged in SOR ¶ 1.a. His answer to question 26h is alleged in SOR ¶ 2.a and his answer to question 26n is alleged in SOR ¶ 2.b.

The concern under this guideline is set out in AG ¶ 15 as follows:

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 relevant disqualifying condition in this case is "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 ¶ 16(a).

Applicant denied answering “Yes” to question 26h, and the copy of his SCA submitted by Department Counsel shows that he answered “No” to the question. The record reflects, however, that the home-improvement debt alleged in SOR ¶ 1.a was charged off, and the correct answer to question 26h was “Yes.” The home-improvement debt should have been disclosed in response to questions 26h and 26n. Nevertheless, the drafting error in SOR ¶ 2.a raises a question whether Applicant had fair notice of the specific allegation regarding his answer to question 26h. I will moot that issue by resolving SOR ¶ 2.a for Applicant.

Applicant admitted SOR ¶ 2.a. in his answer to the SOR, but his explanation reflects that he admitted only the omission, not an intentional falsification. When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is well-educated and obviously intelligent. The record reflects that his loss of employment and subsequent financial problems were very embarrassing. He has no experience with the security clearance process and may not have appreciated the security significance of an intentional omission of a material fact. At the hearing, he was unable to offer a plausible explanation for failing to disclose a large, relatively recent debt for a major home improvement. I conclude that he was embarrassed by his debts and sought to minimize them by disclosing only the debts that he could resolve quickly. His intentional failure to disclose the home-improvement debt is sufficient to establish the disqualifying condition in AG ¶ 16(a).

Security concerns raised by false or misleading answers on an SCA may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct the omission until he was confronted with the evidence by a security investigator three months later.

Security concerns raised by personal conduct may be mitigated if “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.” AG ¶ 17(c). Applicant offense was not minor, because it undermined the integrity of the security clearance process. It was recent and did not occur under unique circumstances. It happened only once, but it raises serious doubt about his 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 the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature, well-educated adult. He is embarrassed by the downturn in his career and his financial problems. He and his spouse have taken some significant steps to conform their lifestyle to their reduced income, but they waited two years to do so. Their concern about the quality of their daughters' education is understandable, but their actions were not financially responsible. There has been virtually no movement toward settlement of the home-improvement debt. Applicant seemed genuinely remorseful for intentionally omitting material information from his SCA, but I am not satisfied that he understands the security significance of his conduct.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge