



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



In the matter of:)	
)	
)	ISCR Case No. 10-04638
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

02/11/2014

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated personal conduct, financial considerations, and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 6, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), F (financial considerations), and J (criminal conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant submitted an undated response to the SOR. On May 22, 2013, he requested a hearing before an administrative judge. The case was assigned to another administrative judge on September 14, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 9, 2014, scheduling the hearing

for January 22, 2014. The case was reassigned to me on January 22, 2014. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 9 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence. The record was held open until February 7, 2014, for Applicant to submit additional information. He submitted documents that were marked Applicant's Exhibits (AE) A through E and admitted without objection. E-mail correspondence about the exhibits is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on January 28, 2014.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. He has worked for his current employer since May 2009. He served in the U.S. military from 1995 until he received a General Under Honorable Conditions Discharge in 2006. He is applying for a security clearance. He held a security clearance in the military, but it lapsed. He is a high school graduate. He married in 1998 and divorced in 2005. He married again in 2008 and divorced in 2013. He recently married for the third time. He has three children from his first marriage and two children from his second marriage.¹

Applicant received nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) in 2001 for lying to an officer.² He was ordered to serve 45 days of extra duty. Applicant admits he received the NJP, but he denies that he lied to his commanding officer (CO). He stated his CO asked him if he had made any major purchases. He had recently bought a television for about \$150 to \$200. He did not consider that a major purchase so he told the CO that he had not. His CO thought Applicant lied to him and imposed NJP.³

Applicant received NJP again in 2004 for failure to obey an order/dereliction of duty under Article 92 of the UCMJ. He was ordered to forfeit half of his pay for one month. Applicant stated that he never received the order that was the basis for the charge.⁴

Applicant received a third NJP in March 2006 for dereliction of duty under Article 92 of the UCMJ, and larceny under Article 121 of the UCMJ. The grounds for the charges were that Applicant failed to notify the finance office that he was divorced, which would have stopped his basic allowance for housing (BAH), and by receiving

¹ Tr. at 32, 48-50, 59; Applicant's response to SOR; GE 1, 3, 4; AE B, D, E.

² There is no "lying to an officer" offense under the UCMJ. There is a false official statement offense under Article 107 of the UCMJ.

³ Tr. at 37-40; Applicant's response to SOR; GE 3.

⁴ Tr. at 40-44; Applicant's response to SOR; GE 3.

\$5,041 in BAH that he was not authorized.⁵ He was reduced a pay grade, restricted to limits for 45 days, ordered to perform extra duties for 45 days, and forfeited part of his pay. Applicant admits that he neglected to stop the BAH, but he denies that he intended to steal the money he received for BAH.⁶ He testified:

So as far as the BAH, yes sir, I do admit I did forget and it wasn't intentional. It was constantly every day slipped my mind, have to go back and get it, and get caught up doing something else. But it was not used for personal gain. It was sent to the kids.⁷

In June 2006, Applicant was notified that he was being processed for separation from the military for commission of a serious offense, in that he stole \$5,041 in BAH. Applicant waived an administrative discharge board contingent upon receiving a characterization of service no less than General Under Honorable Conditions. In June 2006, he received a General Under Honorable Conditions Discharge for misconduct.⁸

The SOR alleges seven delinquent debts, including a \$973 charged-off debt for a credit card (SOR ¶ 1.a); a \$321 charged-off debt to a credit union (SOR ¶ 1.b); a \$512 delinquent debt to a telecommunications company (SOR ¶ 1.c); \$780 owed to a collection company (SOR ¶ 1.d); child support arrearages of \$6,459 (SOR ¶ 1.e); a \$4,117 charged-off loan (SOR ¶ 1.f); and \$17,145 owed on a car loan (SOR ¶ 1.g). Applicant admitted responsibility for the debts, and all of the debts appear on at least one credit report. He has not paid any of the debts alleged in the SOR.⁹

Applicant's financial problems started while he was in the military, and several of his delinquent debts were incurred before his discharge. He had a large child support obligation, and he had to pay back the money he fraudulently received for BAH. Except for a short period of unemployment after his discharge, Applicant has been steadily employed since he left active duty. He went to work for his current employer on a military base in August 2006. There was a contract change, and in 2008, he started work for a different contractor at the same location. In 2009, he returned to work for his current employer. In 2011, while continuing to work for the same employer, he moved from working on a military base in one state to a base in another state.¹⁰

⁵ The SOR alleged that Applicant was punished under Article 132 of the UCMJ for fraud against the United States and under Article 134 of the UCMJ for adultery. The same conduct of stealing the BAH could have been charged under Article 121 or 132. Applicant was never charged with adultery.

⁶ Tr. at 20-21, 45-46; Applicant's response to SOR; GE 1, 3, 4.

⁷ Tr. at 20.

⁸ Tr. at 46-48; Applicant's response to SOR; GE 1, 3, 4.

⁹ Applicant's response to SOR; GE 5-9.

¹⁰ Tr. at 19, 23-24, 33, 50-51; GE 1, 3.

Applicant has not made any efforts to contact the creditors or pay the \$973 charged-off debt alleged in SOR ¶ 1.a, or the \$4,117 charged-off loan alleged in SOR ¶ 1.f. The charged-off loan was incurred while he was in the military.¹¹

Applicant admitted that he had an account with the credit union that reported a \$321 charged-off debt (SOR ¶ 1.b), but he stated that the account was in good standing when he closed the account in 2005. He did not submit any documentation that he contacted the creditor or disputed the debt.¹²

SOR ¶ 1.d alleges a \$780 delinquent debt owed to a collection company. The original creditor is not identified in the SOR or the two credit reports in which the debt appears. Applicant accepted responsibility for the debt, but he could not identify the original creditor. He made no effort to identify the creditor or dispute the debt.¹³

Applicant has a \$600 per month child support order for his three oldest children. He stated that he is current on that order. He is delinquent on his child support order from another state for his two youngest children (SOR ¶ 1.e). His child support obligation for his two youngest children is \$1,500 per month. His pay is garnished \$400 every two weeks for those two children. Because the garnished amount is less than his monthly obligation, his arrearages increase every month. Applicant estimated that he currently owes about \$13,000 to \$14,000 in arrearages.¹⁴

Applicant was unable to maintain the payments on his car loan in March 2006. He was going to ask the creditor to take the car back as a voluntary repossession, but his second wife was in a car accident and wrecked the car before he could complete the repossession. Applicant had let the car insurance lapse because he anticipated returning the car. He has made no effort to pay the \$17,145 balance (SOR ¶ 1.g).¹⁵

Applicant stated that he helped his second wife financially after she went through an expensive divorce. His second wife was also unemployed for a period. He stated that his finances suffered after his discharge and move in 2006, and again when he moved in 2011. He has not received financial counseling. With his child support obligations, he has been unable to address his delinquent debts.¹⁶

Applicant served in Kuwait and Iraq while he was in the military. He has not been arrested or charged with any criminal offenses since he left the military. He submitted

¹¹ Tr. at 24-25, 31-32; Applicant's response to SOR; GE 3, 5-9.

¹² Tr. at 27-28; Applicant's response to SOR; GE 1, 3, 5-9.

¹³ Tr. at 29-30; Applicant's response to SOR; GE 8, 9.

¹⁴ Tr. at 26-27, 30-31, 52; Applicant's response to SOR; GE 1-3, 5-9.

¹⁵ Tr. at 34-35; Applicant's response to SOR; GE 1, 3, 5-9.

¹⁶ Tr. at 33-37; GE 2, 3.

several letters praising his work performance, trustworthiness, dependability, judgment, and honesty.¹⁷

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 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 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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).

¹⁷ Tr. at 50; AE A, C.

Analysis

Guideline F, Financial Considerations

The security concern 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 under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. The evidence is sufficient to raise the above disqualifying conditions.

The debt alleged in SOR ¶ 1.d may be a duplicate of another debt alleged in the SOR. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). SOR ¶ 1.d is concluded for Applicant.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- (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; and

(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.

Applicant's two divorces constitute conditions that were beyond his control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances.

Applicant's financial problems began before he was discharged from the military. Except for a short period of unemployment, he has been steadily employed since his discharge. He has made no payments toward any of the debts alleged in the SOR, some of which were accrued before his discharge.

There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances, or that he made a good-faith effort to pay his debts. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a), 20(b), 20(c), and 20(d) are not applicable.

Applicant questioned the legitimacy of the \$321 debt alleged in SOR ¶ 1.b, but he never contacted the creditor or disputed the debt. AG ¶ 20(e) is not applicable.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant received Article 15 nonjudicial punishment on three occasions while in the military. Of particular note is his criminal receipt of more than \$5,000 in unauthorized BAH. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) evidence that the person did not commit the offense; 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 admitted receiving NJP in 2001 and 2004, but he denied committing the underlying offenses. His explanations are reasonable; the offenses are minor in nature; and they occurred long ago. AG ¶¶ 32(a) and 32(c) are applicable to those allegations.

Applicant received NJP in 2006 for stealing more than \$5,000 in BAH. He admits that he failed to notify the finance office that he was divorced, but he denies that he intended to steal the BAH. Applicant's denial is not credible. Despite the length of time since the criminal conduct, without candor and acceptance of fault, I cannot find rehabilitation. Applicant's criminal conduct occurred when he was financially strained, much as he is today. I am unable to find that criminal conduct is unlikely to recur. It continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are applicable to Applicant's BAH fraud.

Guideline E, Personal Conduct

The security concern for personal conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

SOR ¶ 3.a cross-alleges Applicant's criminal conduct and failure to pay his debts. That conduct showed poor judgment and an unwillingness to comply with rules and regulations. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

SOR ¶ 3.b alleges that Applicant received a General Under Honorable Conditions Discharge for misconduct. That allegation does not allege conduct that is not already included under the criminal conduct alleged in SOR ¶ 3.a. As a duplicative allegation, SOR ¶ 3.b is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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.

Applicant has been open about his financial problems, which reduces his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable toward Applicant's failure to pay his debts. He has not been candid about his BAH fraud. There are no mitigating conditions applicable to Applicant's BAH fraud under the same rationale discussed for Guideline J.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E, F, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence, and his military service, particularly his service in Kuwait and Iraq. However, his finances have been in disarray for years, with no sign of improvement in the foreseeable future. Additionally, Applicant committed BAH fraud of more than \$5,000 when he was in financial distress, and he was not candid about his conduct. I have concerns about his judgment, trustworthiness, and honesty.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated the personal conduct, financial considerations, and criminal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e-1.g:	Against Applicant

Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

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.

Edward W. Loughran
Administrative Judge