



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



In the matter of)
)
) ISCR Case No. 10-08840
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: *Pro se*

November 28, 2011

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for criminal conduct and financial considerations. His request for a security clearance is denied.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (Standard Form 86) on June 10, 2010, to request a security clearance required as part of his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals

(DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On May 16, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) citing security concerns focused on Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG).² In his SOR Answer, dated June 27, 2011, Applicant denied 3 of the 12 allegations under Guideline F. He also denied three the five allegations under Guideline J.

Department Counsel was ready to proceed on August 2, 2011. DOHA assigned the case to me on August 16, 2011, and issued a Notice of Hearing on August 30, 2011. I convened the hearing as scheduled on September 21, 2011. At the hearing, I admitted Government Exhibits (GE) 1 through 7. Applicant testified and offered three documents, which I admitted as Applicant Exhibits (AE) A through C. The transcript was received on September 28, 2011.

Procedural Matters

At the close of evidence at the hearing, the Government moved to amend the SOR by withdrawing the five allegations under Guideline E. The Government's motion is granted, and the SOR is so amended.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence presented by both parties, I make the following additional findings of fact.

Applicant is 28 years old. He is a high school graduate. He has also taken two years of college courses in business and criminal justice, but did not complete a degree. He is married, and has one two-year-old child, and a seven-year-old stepson. Applicant's wife has been employed intermittently since the birth of their child. She was about to start a position at a retail store soon after the hearing. Applicant was a department store supervisor from 2000 to 2006. He was unemployed for about five months in 2006 after he was terminated. He then worked as a mailroom clerk from 2006 to 2009. He began his current position with a defense contractor in May 2009. He is an administrative support courier, and also assists with security during new-hire orientations. (GE 1; Tr. 20-23, 37, 43, 49-50, 60-62)

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Adjudicative Guidelines (AG), which were implemented by the Department of Defense on September 1, 2006. The AG supersede the guidelines listed in Enclosure 2 to the Directive.

Guideline J, Criminal Conduct

Between 2001 and 2007, Applicant was charged with the following criminal conduct.

- **2001, Possession of Weapon on School Property, allegation 2.a** – In February 2001, Applicant was 18 years old, and a senior in high school. He was involved in a dispute between his friends and another group of students. Following the dispute, police searched his car, and found mace, a bat, and a stun gun. He was suspended from school for 10 days, and later expelled. He was also charged with misdemeanor possession of weapon on school property. The case was withdrawn prior to trial, but Applicant was fined, and testified that he also performed 20 hours of community service. He continued his courses at the Young Adult Program and completed his high school education on time. (GE 2, 5; Tr. 21-23, 56-57)
- **May 2006, Petit Larceny, allegations 2.b and 1.i** – From 2000 to 2006, Applicant worked for a large department store. In March 2006, he was 23 years old and the lead supervisor. However, he was experiencing financial difficulties. He testified that he was “young and dumb” and “kind of desperate” for money, and made a bad decision. He created a false transaction for a returned item, applying a \$500 to \$700 credit on his own credit card. After admitting his action, he was arrested and charged with felony embezzlement. On September 6, 2006, Applicant was found guilty. Through a plea agreement, the charge was reduced to misdemeanor petit larceny. He paid restitution, and was sentenced to six months incarceration, with five months suspended. He served 15 days of the remaining 30 days in jail. (GE 1, 2, 5, 6; Tr. 45-48, 57-58)
- **August 2006, Profane/Threaten Public Airway, allegation 2.c** – After arguing with his girlfriend (now his wife) at a shopping mall, Applicant left. His girlfriend called him, and they continued arguing over the telephone. Applicant believes he cursed at her during the argument. Later, his girlfriend contacted the police. Applicant was charged with using profane language over the telephone. During the hearing approximately one month later, his girlfriend declined to press charges. The charge was dismissed. (GE 2, 5, 6; Tr. 50-52, 56)
- **July 2007, Assault, allegation 2.d** - Applicant and his girlfriend (now his wife) were arguing in his car. He testified that she started to break items, and he asked her to leave. She refused and called the police. Applicant told the Office of Personnel management (OPM) agent during his security interview that no physical violence was involved. However, Applicant was charged with assault. In August 2007, the case was *nol pros* (not prosecuted). (GE 2, 5; Tr. 52-54)
- **July 2007, Possession of Marijuana, allegation 2.e** – Applicant was also charged with possession of marijuana on the same day as the assault charge,

above. Applicant testified that when the officer requested permission to search the car, "I told them yes because I didn't have anything in my car from my knowledge. And they searched my car and they found the marijuana in my car. I told them it wasn't mine because I didn't smoke at the time." Applicant's girlfriend also denied owning the bag of marijuana. In his security interview, Applicant stated it belonged to friends who had used his car. At the hearing, he testified that the marijuana belonged to his girlfriend (now his wife). It was *not pros* (not prosecuted) in September 2007. He stated at his security interview that the charge was not prosecuted because of lack of evidence. (GE 1, 2, 5; Tr. 54-55)

Applicant described his marijuana use to the OPM agent as 10 to 15 times in the period 1999 to 2000. He used it with friends at parties, but never purchased or sold it. At the hearing, he testified that it occurred "several years ago," before his incarceration. Drug use is not alleged in the SOR. (GE 1, 2; Tr. 55)

Guideline F, Financial Considerations

Other than a few months of unemployment after his incarceration, Applicant has been employed for the past 11 years. His debts, as listed in the SOR, total approximately \$17,500. They appear in his credit reports of 2010 and 2011, as well as in the printouts regarding Applicant's judgments. His credit reports show that some date back to 2005. Applicant met with an investigator in July 2010 to discuss these debts, as part of his security investigation. He plans to retain a debt consolidator to help him resolve them. In addition, his wife was about to begin a retail job after the hearing, and Applicant plans to use that income to pay his delinquencies. (GE 1, 3, 4, 7; Tr. 38-41)

The status of his SOR debts follows.

CREDIT CARDS

1.a (\$3,497) – The creditor filed a judgment against Applicant in May 2009 for payment of this credit card debt. Since August 2011, Applicant's salary has been garnished for \$512 per month. He testified that he called the creditor and was told that he would learn if he owed further monies at a hearing that was to take place in November 2011. (Tr. 33-35)

1.c (\$1,669) – A judgment was filed in January 2008 against Applicant for this account. Applicant has not made any payments on it. (Tr. 36-37)

1.h (\$6,847) and 1.i. (\$324) - Applicant has not paid the debt at allegation 1.h, or set up a payment plan. He testified he was "not paying close attention to my funds" and he did not have money to pay it because he was paying on a student loan. He was also concentrating on the payments to the credit card at 1.a and planned to do one debt at a time. He has not paid the debt at allegation 1.i. (Tr. 40-41)

RENT

1.b (\$1,100) – Applicant testified that he and his landlord disputed over the landlord's failure to repair items in his apartment. Applicant stated, "it was a verbal eviction" and Applicant and his wife left. In September 2008, the landlord prevailed in a judgment against Applicant for \$1,100, slightly less than one month's rent. Applicant began \$50 payments, but his landlord demanded the full payment, which Applicant could not afford. The landlord returned to court, and Applicant testified the case was dismissed at that time by the judge because Applicant did not have the money to pay it. However, the document he provided lists the case was, "Dismissed – No Funds." It appears the case was dismissed because the bank account that the court garnished had no funds in it. Applicant testified that he moved his account to another bank. However, there is no record evidence of when he moved his funds in relation to when the funds were to be garnished. The record also does not show that the case was dismissed on the merits, and the debt appears on Applicant's April 2011 credit report. (AE B; Tr. 27-30, 35-37)

MEDICAL

1d, 1e, 1f, 1g, 1k (five debts totaling \$1,091) – Applicant has not investigated these debts or made any payments. He testified he did not have the funds to pay them. (Tr. 37-40, 45)

TUITION

1.j (\$3,045) –Applicant had two student loans. He paid one with help from his mother. However, this debt loan for online classes at a distant university remains unpaid. Applicant spoke with the lender, and was told the debt could be postponed if he returned to school. However, at this point, he does not intend to continue his schooling. (Tr. 42-44)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.³ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline J (Criminal Conduct), Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

³ Directive 6.3

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the judgment, reliability and trustworthiness to protect the national interests as his or his 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.⁶

Analysis

Guideline J, Criminal Conduct

The security concern under Guideline J is that

Criminal conduct 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 was involved with the police on five separate occasions between 2001 and 2007. The charges included larceny, possession of a weapon on school property, assault, and possession of marijuana. In some instances, the charges were dismissed or not prosecuted. Disqualifying conditions AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31 (c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) apply.

Guideline J includes the following relevant mitigating conditions under AG ¶ 32:

(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; and

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(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.

AG ¶ 32(a) does not provide mitigation. The last criminal conduct occurred in 2007, approximately four years ago, and it is not recent. However, nothing in the record evidence indicates that Applicant's criminal conduct happened under unusual circumstances. Even though some charges were dismissed or not prosecuted, he was found guilty of larceny. His five arrests in six years cast doubt on his judgment, his reliability, and his willingness to abide by rules and regulations.

Applicant is now married, has two children, and is four years older than when he was last involved with the police. He also testified he has not smoked marijuana in years. These facts show rehabilitation. However, Applicant engaged in deliberate theft from his employer. In addition, the fact that marijuana was found in his car does not bode well, indicating that, at the least, he associates with people who use illegal drugs. These facts weigh against rehabilitation, and Applicant receives only partial credit under AG ¶ 32(d).

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern about financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds.

The relevant disqualifying conditions are AG ¶19 (a) (*inability or unwillingness to satisfy debts*) and AG ¶19 (c) (*a history of not meeting financial obligations*). Applicant has accrued numerous debts over the past several years. The SOR alleges more than \$17,000 in delinquent debt, indicated that Applicant has been either unable to unwilling to resolve them. AG ¶¶ 19(a) and (c) apply.

Under AG ¶ 20, the following potentially mitigating factors are relevant:

(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; and

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

Applicant was on notice that delinquent debts were a security concern when he completed his application in June 2010. He was reminded that debts were a security concern when he met with an investigator the following month. Again, when he completed his response to DOHA interrogatories in March of this year, he was reminded that delinquent debts are a concern. However, he took no significant steps to address them. He testified that he has not made any payments on the SOR debts because he has not had funds available to pay these debts. However, he has done little to even begin the process of resolving his debts. He has not contacted the creditors about settlements, or about low-payment plans. Despite testifying that he plans to seek help from a debt consolidator, he has taken no documented steps in that direction. With more than \$17,000 in delinquencies, Applicant's debts are both frequent and recent. His failure to take any steps to resolve them raises questions about his reliability and judgment. AG ¶ 20 a), (c), and (d) do not apply.

AG ¶ 20(b) mitigates financial problems that stem from unexpected events beyond an applicant's control. Here, Applicant experienced one period of unemployment that lasted only a few months; other than that, he has worked for the past 11 years. Although the evidence does not include specifics about his income, he has likely earned a modest income at the administrative and retail jobs he has held. His wife has worked only intermittently since his child was born two years ago. However, to apply this mitigating condition, an applicant must show that he acted reasonably under the circumstances. The record contains no evidence that Applicant made any substantial effort to resolve his debts. He receives only limited mitigation under AG ¶ 20(b).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guideline. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept. Under the appropriate guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant expressed his intent to begin resolving his debts. However, a promise of future action is insufficient without some demonstration that the promise will be fulfilled. He has taken no steps to initiate payment plans for any of the SOR debts. Currently, his debts are unresolved, and he has no plan in place to resolve them.

One of Applicant's criminal offenses occurred when he was young, approximately 18 years of age. However, two occurred five years later, when he was 23, and two when he was 24, only four years ago.

Most troubling is that fact that Applicant's most serious offense, for which he served a short amount of jail time, involved a lack of trustworthiness. He intentionally and fraudulently added \$500 to \$700 to his own credit card account. Applicant was a long-term employee. He violated the trust placed in him as a supervisor. Moreover, he engaged in criminal conduct because he was in financial straits. A central goal of the security clearance process is to deter access by those who are willing to use criminal methods to obtain funds because of financial pressures.

Overall, Applicant has not demonstrated the trustworthiness and good judgment requisite in those who are granted access to classified information. A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

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

Paragraph 1, Guideline F: Subparagraphs 1.a. – 1.l	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a – 2.l	AGAINST APPLICANT Against Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge