



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



In the matter of:)
)
 REDACTED) ISCR Case No. 10-09368
)
 Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: David Prince, Esq.

04/20/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Financial Considerations and Personal Conduct concerns. He accumulated over \$20,000 in bad debt over the past seven years and did not attempt to address this substantial debt until recently. He intentionally failed to disclose on his security clearance application that he had been charged in the past with a drug-related offense. Clearance is denied.

Statement of the Case

On September 26, 2011, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR), setting out security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).¹ On October 17, 2011, Applicant submitted his Answer and requested a hearing.

¹ DOHA took this action acted under Executive Order (EO) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended; Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On January 4, 2012, Department Counsel advised the Hearing Office that the Government was ready to proceed with a hearing. After coordinating with the parties, I scheduled the hearing for February 29, 2012.

At hearing, Department Counsel offered Government Exhibits (GE) 1 through 9, which were admitted into evidence without objection. Applicant appeared at the hearing with counsel, testified, and offered Applicant's Exhibits (AE) A through D. These exhibits were admitted without objection. I granted Applicant's request to keep the record open to provide him additional time to submit matters for my consideration. He timely submitted a letter from a credit counseling firm, a dispute resolution form from a credit reporting agency, and a pay stub. These documents were marked and admitted as AE E – G. The transcript (Tr.) was received on March 9, 2012.

Findings of Fact

Applicant is in his forties, married, with one child. He ran his own construction business from 1992 to 2007. He changed ownership of the business to his wife in about 2003 because she had a better credit rating, which allowed her to secure financing for the business on more favorable terms. This move did not pay off as his mismanagement of the business and the downturn in the economy resulted in the business's failure in about 2007. Applicant had been working for a private company as a carpenter for about two years before his business failed. He continued working for this private company until February 2010, when he started working for his current employer – a federal contractor. Applicant submitted a security clearance application (SCA) in April 2010, because access to classified information is a condition of his employment.²

Applicant wrote a number of bad checks between 1995 and 2006. He explained that the checks were related to his former construction business and the lack of funds was due to financial mismanagement, not any intent on his part to defraud his creditors. He was criminally charged and convicted on three separate occasions for issuing bad checks. He received suspended sentences ranging from 90 days to 12 months in jail.³ (SOR ¶¶ 1.a – 1.e)

Applicant filed for Chapter 7 bankruptcy on behalf of his former business in 2007. The bankruptcy petition lists over \$110,000 in liabilities and less than \$53,000 in assets. The liabilities included over \$69,000 to the IRS for federal taxes dating back to 1998. Applicant was only able to pay about \$3,000 of this federal tax debt. Applicant's business was liquidated and its debts were discharged in 2008.⁴ (SOR ¶ 1.f)

² Tr. at 21-24; GE 1; GE 4; GE 5; GE 7.

³ Tr. at 21-24, GE 1 – GE 3; GE 7.

⁴ GE 4; GE 5; GE 7; GE 8.

The SOR lists 18 bad debts totaling over \$28,000. The alleged debts range from a delinquent \$34 telephone bill to a judgment for nearly \$6,000. Ten of the alleged debts are for judgments secured against Applicant by his creditors and date back to 2005. These ten judgments total over \$18,000.⁵ (SOR ¶¶ 1.g – 1.p) Applicant established that he paid three of the judgments, including a 2007 judgment for \$138 that was satisfied after his pay was garnished in December 2011.⁶ Seven judgments, totaling over \$13,000, remain unsatisfied.⁷

Applicant recently secured the services of a credit counseling firm to help him resolve the remaining seven judgments and other debts listed on the SOR.⁸ He claims that a majority of the debts alleged in the SOR relate to his failed construction business. He was asked by DOHA about his finances and his delinquent debts in May 2011. At the time, Applicant reported having over \$1,600 a month in disposable income. At hearing, Applicant admitted that he had not taken any action to resolve his debts until recently.⁹

Applicant disclosed his two most recent bad check convictions and several of his bad debts on his SCA. He failed to list the bankruptcy he filed on behalf of his former business because he thought the SCA only asked for information related to personal bankruptcies. He also did not list all his delinquent debt because he was unaware of the magnitude of the debt he had outstanding. He only listed those debts that he knew were delinquent.¹⁰ (SOR ¶¶ 2.a and 2.c – 2.f)

Applicant also omitted from his SCA that he had been charged by State A with a drug-related offense in 1989. He initially told a Government investigator that he did not list the drug-related charge “because he was falsely accused and had forgotten about the incident.”¹¹ At hearing, Applicant initially stated that he omitted the 1989 drug-related charge because he had forgotten about it when he filled out his SCA.¹² He later admitted, however, that the arrest and subsequent imprisonment on the drug-related

⁵ Tr. at 24-31; GE 6 (eight of the ten judgments were default judgments).

⁶ SOR ¶ 1.g (Tr. at 24-26, 39; AE A); SOR ¶ 1.l (Tr. at 28-30, 41-42; GE 6 at 112-113; AE G); and SOR ¶ 1.n (Tr. at 30-31, 42; AE C).

⁷ Applicant submitted a letter from a credit reporting agency that the 2008 judgment, alleged in ¶ 1.k, had been removed from his credit report. However, he did not submit proof demonstrating that the judgment had been satisfied or otherwise resolved, i.e., canceled check or satisfaction of judgment. The Government submitted a court document establishing that this judgment is still outstanding. GE 6 at 111.

⁸ Tr. at 30-33, 43-45; AE B; AE E. Applicant has brought the charged off credit card account for \$394, alleged in ¶ 1.r, current by accepting a new credit card from the creditor. (AE D)

⁹ Tr. at 39-46; GE 8. See also GE 7.

¹⁰ Tr. at 33-38; GE 8.

¹¹ GE 7, *Subject Interview*, June 2, 2010 at 3.

¹² Tr. at 35.

charge was an unforgettable experience, only surpassed in gravity by his parents' death. He emotionally detailed the purported brutality he suffered at the hands of the police when he was arrested and the time he spent languishing in jail due to the false accusation. He then changed his explanation for failing to list the drug-related charge on his SCA. He claimed that, while filling out the SCA, he thought he only had to list drug-related offenses for which he had been convicted, not simply charged.¹³ The relevant SCA question asked Applicant to disclose if he had "EVER been charged with an offense(s) related to alcohol or drugs?"¹⁴

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 Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15.¹⁵ An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b).

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. "A clearance adjudication is an applicant's opportunity to demonstrate that, prior to being

¹³ Tr. at 48-56.

¹⁴ GE 1 at 39 (capitalization in original).

¹⁵ ISCR Case No. 11-00391 (App. Bd. Dec. 1, 2011) ("Once an applicant's SOR admissions and/or the Government's evidence raise a security concern, the burden of persuasion shifts to the applicant to mitigate the concern.").

awarded a clearance, he (or she) actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country.”¹⁶

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.

Analysis

Guideline F, Financial Considerations

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

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

One aspect of the concern is that an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Applicant’s accumulation of over \$20,000 in bad debt since approximately 2005 directly implicates this concern. It also establishes the following disqualifying conditions under AG ¶ 19:

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

However, an applicant’s past or current indebtedness is not the end of the analysis, because “[a] security clearance adjudication is not a proceeding aimed at collecting an applicant’s debts. Rather, it is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness.”¹⁷ Accordingly, Applicant may mitigate the financial considerations concern by establishing one or more of the mitigating conditions listed under AG ¶ 20. The relevant mitigating conditions are:

¹⁶ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

¹⁷ ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See also ISCR Case No. 09-07916 at 3 (App. Bd. May 9, 2011).

(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's financial problem began about seven years ago and continues to the present day. AG ¶ 20(a) does not apply.

The failure of Applicant's business was a matter partially outside of his control. However, the businesses' debts were discharged in 2007. Applicant failed to responsibly address his delinquent debts, including several judgments, until recently.¹⁸ AG ¶ 20(b) does not apply.

Applicant did satisfy three of the debts listed in the SOR, but only after the creditors were forced to secure judgments against him. He recently secured the services of a credit counseling firm and brought one of his debts current, but this belated action is insufficient to demonstrate that his financial situation is under control. AG ¶¶ 20(c) and (d) do not apply. In short, Applicant's financial situation remains a security concern.

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

¹⁸ See generally ISCR Case No. 07-09304 at 4 (App. Bd. Oct. 6, 2008) ("the second prong of MC 20(b) requires that an applicant act responsibly under the circumstances").

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA. An applicant should disclose any potential derogatory information. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.¹⁹

Applicant's failure to list his bankruptcy, and all his bad check convictions and delinquent debts, was not intentional. His explanation for failing to list this adverse information was reasonable, consistent throughout the security clearance process, and credible.

On the other hand, Applicant's omission of the 1989 drug-related charge from his SCA was a deliberate falsification. It was abundantly clear at hearing, from the detail he provided and the emotion generated in recounting the events, that this was a singular event in Applicant's life that he will never forget. Applicant's initial explanation to a Government investigator that he had had forgotten about the false accusation was implausible. An applicant, especially under the circumstances of the arrest and subsequent incarceration as testified to by Applicant, would not simply forget about being charged with such a serious drug-related offense. Applicant's later explanation that he misconstrued the SCA as only requiring disclosure if only he had been *convicted* of a drug-related offense, although plausible, was contradicted by his earlier statements. In light of the evidence and Applicant's contradictory statements, I find that he falsified his SCA when he omitted the 1989 drug-related charge.²⁰ AG ¶ 16(a) applies.

An applicant may mitigate the personal conduct concern by establishing one or more of the mitigating conditions listed under AG ¶ 17. I have considered all the listed mitigating conditions and find that none apply. Applicant not only falsified his SCA, but also lied at hearing; when he claimed the omission was due to an innocent misunderstanding of what was required to be disclosed. The summary of the background interview, which Applicant certified as accurate, and the verbatim transcript

¹⁹ See generally ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

²⁰ See generally ISCR Case No. 07-16511 (App. Bd. Dec. 4, 2009) (an applicant's inconsistent and contradictory explanations for failing to disclose information on a SCA undercuts the applicant's credibility and supports a finding that the applicant intentionally omitted the information).

establish that Applicant initially attempted to explain away his omission by claiming that he had forgotten about the drug-related charge. (GE 7; Tr. at 35) It was only after he was questioned as to how he could have forgotten such a life-altering event that Applicant changed his story to claim that he was confused. Applicant's falsification of his SCA and misleading testimony leaves none of the mitigating conditions under AG ¶ 17 applicable. Applicant failed to mitigate the personal conduct concern.²¹

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).²² I gave due consideration to Applicant's work history, the circumstances surrounding his business's failure, and that the omission at issue was as to an old accusation for which he was not even convicted. However, Applicant has amassed a substantial amount of delinquent debt that remains unresolved. Further, it is not up to an applicant to decide what information that is responsive to a question in a SCA to reveal. His concealment of potentially adverse criminal information calls into question his trustworthiness. Consequently, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

Formal Findings

I make the following formal findings regarding the SOR allegations:

Paragraph 1, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h – 1.m:	Against Applicant ²³
Subparagraph 1.n:	For Applicant

²¹ In his opening statement, Applicant's counsel stated that Applicant had forgotten about the 1989 drug-related charge and that was the reason he had omitted the information from his SCA. (Tr. at 13) After Applicant testified, both sides were under the mistaken impression that it was Applicant's counsel, not Applicant, who first claimed that Applicant's lack of memory led to the omission. After a thorough review of the evidence and transcript, it is clear that it was Applicant, not his counsel, who initially claimed that Applicant's purported lack of memory led to the omission.

²² (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.

²³ Although Applicant recently satisfied the 2007 judgment alleged in ¶ 1.h, this debt was only satisfied through garnishment of his pay, which does not constitute a good-faith resolution of the debt.

Subparagraphs 1.o – 1.x:	Against Applicant ²⁴
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a and 2.c – 2.f:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

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

Francisco Mendez
Administrative Judge

²⁴ Applicant's acceptance of another credit card to bring his charged off account, alleged in ¶ 1.,r current does not mitigate the financial considerations concern.