



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



In the matter of:)
)
) ISCR Case No. 11-00168
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

11/20/2012

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 August 3, 2012, the Defense Office of Hearings and Appeals (DOHA) 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; 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 answered the SOR on August 22, 2012, and requested a hearing before an administrative judge. The case was assigned to me on September 20, 2012. DOHA issued a notice of hearing on October 3, 2012, scheduling the hearing for

October 25, 2012. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on November 2, 2012.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 19 were admitted in evidence without objection. The Government also offered a demonstrative exhibit that was marked Hearing Exhibit (HE) I. Applicant testified, called two witnesses, and submitted Applicant's Exhibits (AE) A and B, which were admitted without objection.

Motion to Amend SOR

Upon motion by Department Counsel, and without objection by Applicant, I made two minor amendments to the SOR by changing "1.f" to "2.f" in SOR ¶ 1.e, and by changing "December 1, 2005" to "December 21, 2005" in SOR ¶ 2.i.

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor. He has worked for his current employer or a predecessor defense contractor on the same contract since 2009. He is on administrative leave pending the result of this decision. He is applying for a security clearance for the first time. He is attending college. He has never married, and he has no children.¹

Applicant has an extensive record of criminal actions and traffic infractions. He worked for a bank in 2004. He stole about \$2,000 from the bank. He was charged with and convicted of the felony offense of embezzlement by bank employee. In February 2006, he was sentenced to four months in prison, supervised release for three years, and drug treatment as directed.²

Applicant was arrested in August 2004 and charged with concealing merchandise, a misdemeanor. He pleaded guilty, and the finding was deferred. He completed community service, and the charge was dismissed.³

In November 2004, Applicant stole the wheels off a car. He was arrested and charged with grand larceny. He pleaded guilty to petit larceny. In January 2005, he was sentenced to 180 days in jail, with 170 days suspended, and probation for one year. His probation was revoked in January 2006 for a probation violation.⁴

¹ Tr. at 23-26, 29, 43, 52; GE 1-3.

² Tr. at 21-22, 32-33; Applicant's response to SOR; GE 2, 7, 8.

³ Applicant's response to SOR; GE 2, 19.

⁴ Applicant's response to SOR; GE 2, 8, 11, 14, 18.

In August 2005, Applicant was cited for reckless driving, for driving 60 miles per hour (MPH) in a 25 MPH zone. He was tried *in absentia*, found guilty, and sentenced to a \$200 fine and \$87 in fees.⁵

Applicant was charged with assault in October 2005 and December 2005, stalking in December 2005, and impersonating law enforcement in May 2006. All the charges were eventually dismissed. He was cited in January 2006 for operating a vehicle with a radar detector/jamming device. The citation was dismissed.⁶

In December 2005, Applicant was cited for reckless driving. He was tried *in absentia* on February 1, 2006, and found guilty. He was sentenced to a \$200 fine, \$87 in fees, and his driver's license was suspended for 90 days.⁷

On December 20, 2005, Applicant violated a protective order that was issued against him. He pleaded guilty to the misdemeanor charge of violating a protective order. He was sentenced to 12 months in jail, with 11 months suspended for two years conditioned upon good behavior.⁸

Applicant was arrested in January 2006 and charged with the misdemeanor offenses of impersonating law enforcement, driving under revocation/suspension, and unlawful purchase/possession of alcoholic beverage. He pleaded guilty in May 2006 to impersonating law enforcement, and the other charges were dismissed. He was sentenced to 360 days in jail, with 340 days suspended for two years.⁹

In about March 2009, Applicant stole three or four laptop computers from his employer and sold them at a pawn shop. He was terminated from his job, but he was never prosecuted.¹⁰

A protective order was issued against Applicant in April 2010. It was rescinded upon the petitioner's request in May 2010. There is no evidence that Applicant ever violated the protective order.¹¹

⁵ Applicant's response to SOR; GE 17.

⁶ Tr. at 31; Applicant's response to SOR; GE 2, 5, 8, 9, 13, 14, 16.

⁷ Applicant's response to SOR; GE 17.

⁸ Tr. at 20, 31; Applicant's response to SOR; GE 2, 6, 8, 12.

⁹ Applicant's response to SOR; GE 2, 8, 10.

¹⁰ Tr. at 22, 33-35; Applicant's response to SOR; GE 2.

¹¹ Tr. at 31; Applicant's response to SOR; GE 2, 4.

In September 2010, Applicant was cited for speeding by going 100 MPH in a 55-MPH zone. He pleaded guilty to driving 84 MPH. He was sentenced to a \$207 fine and \$25 court costs.¹²

Applicant has had a troubled employment history. As discussed above, he lost jobs in 2004 and 2009 after stealing from his employers. He was terminated by his employer in December 2003 for deliberately entering inaccurate information on his time sheet, and he lost jobs in August 2004 and August 2005 for absenteeism.¹³

Applicant has had financial issues for a number of years. He filed Chapter 7 bankruptcy in 2008, and his debts were discharged in 2010.¹⁴

Applicant did not file his federal and state income tax returns or pay his taxes when they were due for tax years 2005, 2007, 2008, and 2010. He filed the returns in June 2012. He has been making payments to the state since 2010. He paid \$369 in 2010 and \$2,191 in 2011. As of June 2012, he owed the state \$9,408. In July 2012, he established a \$297 per month payment plan with the state. He has made five payments. He paid \$2,726 to the Internal Revenue Service (IRS) in October 2011. As of June 2012, he owed the IRS about \$11,994. In July 2012, he entered an installment agreement with the IRS to pay \$170 per month. He has made five payments. He has received financial counseling.¹⁵

It has been more than three and a half years since Applicant stole the laptop computers from his employer and more than two years since his last speeding violation. Applicant credibly testified that he has matured and moved beyond his reckless youthful actions. He lives with his grandparents and helps take care of them. He is striving to make his family proud of him. He has a good job where he is highly regarded, and he earns a good salary. He will remain employed with or without a clearance. He plans to complete his bachelor's degree and then continue his education and earn a master's degree.¹⁶

Two witnesses, including Applicant's grandfather and a police officer, testified on Applicant's behalf. Both testified that Applicant has matured and changed into a dependable, hard-working, honest young man. Applicant submitted a voluminous amount of character letters, including several from senior military officers. The authors praised his excellent job performance, professionalism, work ethic, intelligence,

¹² Applicant's response to SOR; GE 3.

¹³ Applicant's response to SOR; GE 2.

¹⁴ Tr. at 36-38; Applicant's response to SOR; GE 2.

¹⁵ Tr. at.38-53; Applicant's response to SOR; GE 2.

¹⁶ Tr. at 19-30, 44, 52-53.

dedication, competence, dependability, reliability, honesty, maturity, loyalty, and integrity.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 56-72; GE 2; AE A.

Analysis

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;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's multiple offenses, arrests, convictions, and probation violation are sufficient to raise the above disqualifying conditions.

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.

The criminal charges in SOR ¶¶ 2.c, 2.g, 2.h, and 2.j were all dismissed without a conviction. That is some evidence that Applicant did not commit the offenses. AG ¶ 32(c) is applicable to those allegations.

It has been more than three and a half years since Applicant stole the laptop computers from his employer and more than two years since his last speeding violation. Applicant credibly testified that he has matured and moved beyond his reckless youthful actions. He has a good job where he is highly regarded and he earns a good salary. I

was quite impressed with Applicant and how he presented himself. Despite his lengthy record, Applicant is still a young man. I believe he is on the right path to rehabilitation. However, his offenses were numerous and occasionally serious. Moreover, he did not fulfill his legal obligation to file his state and federal tax returns until June 2012. Applicant has not established a track record of responsible law-abiding behavior. He has started down that road, but he is not there yet. AG ¶ 32(a) is not applicable; AG ¶ 32(d) is partially applicable. I conclude that criminal conduct concerns remain despite the presence of some mitigation.

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:

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

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(3) a pattern of dishonesty or rule violations; 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.

Applicant has a history of dishonesty and an unwillingness to comply with rules, regulations, and the law. He failed to show up for work, lied to employers, and stole from them. He disregarded a protective order and the rules of the road. All of the above disqualifying conditions are applicable.

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

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

There is no evidence that Applicant ever violated the protective order issued against him in April 2010. It was rescinded upon the petitioner's request in May 2010. The citation for operating a vehicle with a radar detector/jamming device was dismissed. AG ¶ 17(f) is applicable to SOR ¶¶ 1.b and 1.d.

Applicant's efforts to modify his conduct are addressed under the criminal conduct discussion. Personal conduct concerns are not mitigated for the same rationale discussed under that guideline.

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. The following are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local tax returns as required or the fraudulent filing of the same.

Applicant had a number of debts discharged in bankruptcy. He did not file his state and federal tax returns and pay his taxes as required. The evidence is sufficient to raise the above disqualifying conditions.

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

Applicant filed his state and federal tax returns in June 2012. He has been making payments since 2010, and he entered installment agreements with the state and the IRS in July 2012. However, he still owes the state and the IRS about \$20,000. Applicant received financial counseling, but he has not yet established a track record of responsible fiscal behavior. His financial issues are recent and ongoing. I am unable to

determine that they are unlikely to recur. They continue to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 20(c) is partially applicable. There are no other applicable mitigating conditions.

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.

Applicant has an extensive history of criminal actions, traffic infractions, and irresponsible financial decisions. He clearly appears to be headed in the right direction. However, he has not yet established a track record of responsible behavior sufficient to warrant a security clearance.

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 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 E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e-1.i:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraphs 2.d-2.f:	Against Applicant
Subparagraphs 2.g-2.h:	For Applicant
Subparagraph 2.i:	Against Applicant
Subparagraph 2.j:	For Applicant
Subparagraphs 2.k-2.m:	Against Applicant
Paragraph 3, Guideline F:	Against Applicant
Subparagraphs 3.a-3.e:	Against 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