



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-06221
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

07/19/2013

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline E (personal conduct), but failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On December 29, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 7, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F and E. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the

national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on April 22, 2012, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated April 9, 2013, was provided to him by letter dated April 10, 2013. Applicant received the FORM on April 11, 2013. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30 days after receipt of copy of the FORM. The case was assigned to me on June 21, 2013.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a through 1.c, and denied the remaining allegations in SOR ¶ 1.d and SOR ¶¶ 2.a through 2.c. He also provided an accompanying explanation for each of his answers. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 50-year-old logistics manager, who has worked for a defense contractor since April 2007. His December 2010 e-QIP indicates that he was granted a secret security clearance in July 1981 and a top secret security clearance in September 2003. (Items 4 and 5.)

Applicant married in May 1984 and separated in July 2010. During Applicant's February 2011 Office of Personnel Management (OPM) interview, he stated that final action on his divorce decree was pending. Applicant also stated in a December 16, 2011 letter to a creditor that he has "since completed (his) divorce." (Items 3 and 7.) The FORM does not provide a final divorce date. Applicant has four adult children. (Item 4.) He served in the U.S. Air Force from November 1980 to December 2000, and retired with 20 years of honorable service as an enlisted person. (Item 4.) The FORM does not contain any further information about Applicant's 20 years of military service.

Financial Considerations

The SOR alleges four separate debts totaling \$61,282. They are: SOR ¶ 1.a – credit card collection account for \$9,828; SOR ¶ 1.b – credit union charged-off account for \$8,782; SOR ¶ 1.c – home equity loan charged-off account for \$42,369; and SOR 1.d – cable TV collection account for \$303. Although the \$303

debt listed in SOR ¶ 1.d, apparently belonged to Applicant's ex-wife, he stated that he paid that account "to clear (his) credit records." Applicant documented his payment, dated February 10, 2012. This account is resolved. (Item 3, pages 14-16.)

However, the remaining three accounts are unresolved. Applicant attributes his financial problems to a contentious divorce. He stated in his February 2011 OPM interview that he made the conscious decision not to pay any of his joint debts until after their divorce was final. He stopped paying joint accounts "either in 7/2010 or 6/2010" stating that he did not want his ex-wife to reap the benefits of him making timely payments on their joint accounts. (Items 3 and 7, pages 3-4.)

In his SOR answer, Applicant acknowledged that the debts in SOR ¶¶ 1.a through 1.c were delinquent and past-due. He made several unsuccessful attempts to settle these three accounts, primarily in 2011. Regarding the creditor in SOR ¶ 1.a, Applicant sent an e-mail dated February 10, 2012 to the creditor offering to settle the debt, which had increased to \$9,991 debt as of January 11, 2012, for \$4,000. There is no record of further correspondence between Applicant and this creditor. (SOR answer.) The FORM contains no documentation that this debt has been resolved.

Regarding the creditor in SOR ¶ 1.b, Applicant sent a letter dated December 16, 2011 with a \$200 check towards payment on the debt which was then \$8,782. He stated that the check was not cashed or returned and "[b]ranch representatives deny they have an open account and state that it has been charged off but can't provide me a current owner of the account." (SOR answer.) The FORM contains no documentation that this debt has been resolved.

Regarding the creditor in SOR ¶ 1.c, Applicant stated that this debt was a home equity loan on his former home and he asserts that after the bank foreclosed on his home, "the disputed bill should now be between (home equity loan creditor) and (bank)." He provided two offers to settle this account from the home equity loan creditor dated June 23, 2011 and September 29, 2011 in the respective amounts of \$8,035.45 and \$4,017.73. Applicant stated, "If the amount owed was legit they would have never offered and I would have accepted." (SOR answer.) The FORM contains no documentation that that this debt has been resolved.

In short, the debts alleged in SOR ¶¶ 1.a through 1.c remain unresolved. The FORM contains no evidence that Applicant sought financial counseling or professional help in resolving his financial difficulties.

Personal Conduct

Three separate falsifications are alleged under this concern. The SOR states that Applicant deliberately failed to disclose a 1983 DUI offense when he completed his most recent December 2010 e-QIP and two separate security clearance applications (SF-86s) in October 2003 and in May 2004.¹ Applicant denied that he intentionally falsified these security clearance applications. Applicant explained in his SOR answer that he was pulled over on base in 1983 and was taken to the base hospital for a blood alcohol test (BAC). His BAC test results were .068 and at that time a BAC of .10 was required to qualify as a DUI. Applicant stated that he was never disciplined as a result of this incident nor was he ever charged with drunk driving.

Department Counsel asserts that Applicant's SOR answer is inconsistent with his February 2011 OPM interview statement. I do not concur with this characterization, but rather view Applicant's SOR answer as a more concise explanation of the one contained in his February 2011 OPM interview statement. Applicant's statement that he listed this incident on prior investigations is certainly plausible given the fact that he was granted and has successfully held a security clearance since 1981.

Problematic is that fact that the FORM contains no primary source documents pertaining to a 1983 DUI such as a base police report, preliminary investigation report, or report of disciplinary action that would have been prepared at the time, particularly if Applicant were charged or disciplined. The only source of a 1983 alcohol-related incident in the FORM is the investigator's summary of Applicant's February 2011 OPM interview. The facts in that interview were provided by the Applicant and are at best the Applicant's attempt to recall and the agent's attempt to record and summarize an incident that took place 28 years earlier. Even though Applicant "adopted" the agent's summary of his February 2011 interview, it lacks key details such as date, time, circumstances, and disciplinary follow-up. Absent source documents, I accept Applicant's explanation of what occurred and that he did not deliberately falsify his answers.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs list potentially disqualifying conditions

¹ The copy of Applicant's October 2003 SF-86 in the FORM does not have a signature page certifying that his answers were true, complete, and correct to the best of his knowledge. (Item 11.)

and mitigating conditions, which are useful 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, these guidelines are applied 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"² demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion for obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).³

² See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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

Applicant’s indebtedness has been ongoing since 2010, around the time he decided not to pay his joint debts during his separation and divorce. The FORM contains insufficient evidence that three out of the four debts alleged have been resolved. AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports and in his OPM interview.

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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.

Considering the record evidence as a whole,⁴ I conclude none of the five financial considerations mitigating conditions fully apply. However, partial application of the mitigating condition in ¶ 20(b) is warranted as a result of Applicant's separation and divorce. To receive full credit under this mitigating condition, the Applicant must demonstrate that he also "acted responsibly under the circumstances." Although, not paying bills to preclude an estranged spouse from benefiting from your responsible behavior is perhaps a behavior not

⁴ See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

uncommon in divorce; it is nevertheless not responsible behavior. Creditors still expect payment and as Applicant found out, his failure to make continued payments adversely affected his credit standing. Additionally, Applicant's limited attempts to settle with his creditors two or three years ago without proof of resolution does not qualify as a "good-faith effort to repay his creditors or otherwise resolve debts" as contemplated in ¶ 20(d). Applicant presented limited evidence before receipt of his FORM documenting efforts taken to contact creditors and no evidence after receipt of FORM to resolve his debts.

Personal Conduct

AG ¶ 15 articulates the security concern relating to personal conduct:

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

The Government's evidence does not establish that Applicant deliberately falsified his October 2003, May 2004, December 2010 security clearance applications. As noted, there are no source documents that address the purported 1983 DUI, and the FORM does not contain an October 2003 SF-86 signature page. Based on Applicant's denial and explanation, I find that Applicant did not deliberately falsify his security clearance applications as alleged. Having reached that conclusion, there is no need to discuss disqualifying or mitigating conditions under this concern.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the financial considerations security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

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
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge