



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-09994
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: Barry M. Sax, Esquire

September 20, 2013

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on February 3, 2011. (Government Exhibit 1.) On February 22, 2013, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct) concerning Applicant. The action was taken under Executive Order 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on April 10, 2013, and requested a hearing before an administrative judge (Answer). Department Counsel was prepared to proceed on April 1, 2013. This case was assigned to me on May 23, 2013. DOHA issued notices of hearing on May 29, and June 25, 2013. I convened the hearing as scheduled on August 7, 2013. The Government offered Government Exhibits 1 through 14, which were received without objection. Applicant testified on his own behalf, and

submitted Applicant Exhibits A through I, which were also received without objection. Applicant was granted time to submit additional exhibits. Applicant submitted Applicant Post-Hearing Exhibits A through F. Applicant's counsel and Department Counsel also submitted letters, which I consider as written closing statements. DOHA received the transcript (Tr.) of the hearing on August 15, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 52 and divorced. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant admitted all the allegations in the SOR under this paragraph. Those admissions are findings of fact. He also submitted additional information to support his request for a security clearance.

The SOR lists 17 delinquent debts, totaling approximately \$125,125. The existence and amount of these debts is supported by credit reports dated August 22, 2005; February 9, 2011; February 17, 2012; August 9, 2012; February 12, 2013; June 15, 2013; and August 7, 2013. (Government Exhibits 4 at 22-34, 6, 7, 8, 9, and 14; Applicant Exhibit D.)

Applicant indicated that his financial problems began in approximately 2005, and were related to his marriage to his second wife. They separated in 2005 and were divorced in 2008. Applicant testified, "She [second wife] left me with five timeshares to do something with and also about \$70,000 worth of debt." (Tr. 32-34.)

Applicant filed a Chapter 13 bankruptcy petition (petition) on July 1, 2013. Applicant has submitted a plan, which provides for 100% payment to unsecured creditors over five years. The bankruptcy Schedule F, which lists creditors holding unsecured nonpriority claims, states that Applicant owes his unsecured creditors \$62,819. (Applicant Exhibits H and I; Tr. 34-39.) The meeting of creditors was set for August 9, 2013. Applicant's bankruptcy attorney expressed her confidence that the Applicant's 100% plan was likely to be approved at this meeting. (Applicant Exhibit H.)

Before filing for bankruptcy, Applicant had used two different private companies in an attempt to clear up his credit and resolve his debts. He stated that he did not contemplate filing bankruptcy due to the mistaken, if common, belief that he would automatically lose his security clearance if he did so. (Tr. 74-76.)

The current status of the debts is as follows:

1.a. Applicant admits that he is indebted to a creditor for a judgment in the amount of \$8,545. (Tr. 39-40, 98-101.) No payments have been made on this judgment. This judgment was not included in Applicant's petition. Applicant states in Post-Hearing Exhibit A, a letter dated August 21, 2013, "I am submitting this to my Bankruptcy lawyers so that it can be added to the case." This debt is being resolved.

1.b. Applicant admits that he is indebted to a security company in the amount of \$496. This debt is included in Applicant's petition. (Tr. 40-41.) The most recent credit report in the record indicates that Applicant is disputing this debt. (Applicant Exhibit D at 6.) It is being resolved.

1.c. Applicant admits that he is indebted to a credit card company in the amount of \$15,133.¹ This debt is included in Applicant's petition. (Tr. 41.) It is being resolved.

1.d. Applicant admits that he is indebted to a collection agency in the amount of \$399. He believes this to be a duplicate of the debt set forth under 1.b. However, this debt is included in Applicant's petition. (Tr. 41.) It is being resolved.

1.e. Applicant admits that he is indebted to a creditor for maintenance fees on a timeshare he owned with his ex-wife in the amount of \$9,061.² This debt is included in Applicant's petition. (Tr. 41.) It is being resolved.

1.f. Applicant admits that he is indebted to a creditor for a student loan in the amount of \$10,610.³ This debt is included in Applicant's petition. (Tr. 41-42.) It is being resolved.

1.g. Applicant admits that he is indebted to a creditor for a student loan in the amount of \$114. This debt is included in Applicant's petition. (Tr. 42.) It is being resolved.

1.h. Applicant admits that he was indebted to a creditor for maintenance fees on a second timeshare he owned with his ex-wife in the amount of \$5,744. According to Applicant, "I gave the property back, and that was supposed to be taken off." (Tr. 42.) This creditor is named in the petition, but for notice only, with no amount of claim cited. The debt is being resolved.

1.i. Applicant admits that he was indebted to a creditor in the amount of \$20,705. According to Applicant this debt also concerned the timeshare he owned with

¹The SOR states the debt is \$12,567. The amount in Applicant Exhibit I is the one that will be used.

²The SOR states the debt is \$8,914. The amount in Applicant Exhibit I is the one that will be used.

³The SOR states the debt is \$10,571. The amount in Applicant Exhibit I is the one that will be used.

his ex-wife discussed in 1.h. (Tr. 42.) This creditor is named in the petition, but for notice only, with no amount of claim cited. The credit report dated June 15, 2013, states concerning this debt, "Credit Grantor reclaimed collateral to settle defaulted mortgage." (Applicant Exhibit D at 9.) The debt is being resolved.

1.j. Applicant admits that he was indebted to a creditor for a student loan in the amount of \$8,420. According to Applicant, this debt has been transferred to the creditor in 1.f. (Tr. 42-43.) This debt is not named in the petition. The credit report dated June 15, 2013, states concerning this debt, "Claim filed with government for insured portion of balance on loan." (Applicant Exhibit D at 12.) Based on all available information, I find this debt is being resolved.

1.k. Applicant admits that he is indebted to a creditor on a past-due debt in the amount of \$4,078 for a credit card. According to Applicant, he has been making payments on this military credit card from his retired pay. (Tr. 43.) This debt is listed on his petition with a claim amount of \$1,000. It is being resolved.

1.l. Applicant admits that he was indebted to a city for an unpaid parking ticket for \$107. According to Applicant he paid this ticket, but he did not have proof of payment. (Tr. 43-45.) He states in Applicant's Post-Hearing Exhibit A that he has requested the city to send him a copy of the paid off ticket, but he had not received it by the time the record closed. The credit report dated June 15, 2013, states that this debt was, "Legally paid in full for less than the full balance." (Applicant Exhibit D at 22.) This debt is resolved.

1.m. Applicant admits that he was indebted to a creditor in the amount of \$8,249. According to Applicant this debt also concerned a timeshare he owned with his ex-wife. (Tr. 45-46.) This creditor is not named in the petition. The credit report dated June 15, 2013, indicates both that the account was transferred or sold, and that Applicant was paying account as agreed. (Applicant Exhibit D at 19.) Based on all available information, I find the debt is resolved as it is no longer owed to this creditor.

1.n. Applicant admits that he was indebted to a creditor in the amount of \$35,411. According to Applicant this debt also concerned a timeshare he owned with his ex-wife. (Tr. 46-47.) This creditor is not named in the petition. Applicant states in Post-Hearing Exhibit A that he has been in contact with this creditor. "They did state that the property was returned and that no monies [were] owed." The credit report dated June 15, 2013, indicates that the debt was, "Transferred to another lender or claim purchased." (Applicant Exhibit D at 11.) Based on all available information, I find the debt is resolved.

1.o. Applicant admits that he is indebted to a creditor in the amount of \$805. Applicant maintains that this is the same debt as that set forth in 1.b, and 1.d, above. This debt is not included in his petition. However, concerning this debt, Applicant testified, "I'm just going to clear it through the Chapter 13." (Tr. 47.) Based on all available information, I find that this debt is being resolved.

1.p. Applicant admits that he had not filed his Federal tax returns for tax years 2009, 2010, and 2011. The 2009 tax return was filed July 18, 2012. (Government Exhibit 11; Applicant Post-Hearing Exhibit C.) The 2010 tax return was filed April 8, 2013. (Government Exhibit 12; Applicant Post-Hearing Exhibit D.) The 2011 tax return was filed April 8, 2013. (Government Exhibit 13; Applicant Post-Hearing Exhibit E.) It appears that his 2012 Federal tax return was filed in a timely fashion. (Applicant Post-Hearing Exhibit F.) Applicant stated he did not file his Federal or state income tax returns for these years because he and his ex-wife were in a dispute over who was to use the mortgage interest deduction for a house they owned while married. The house has subsequently been foreclosed upon and sold. (Tr. 78-81.)⁴

1.q. Applicant admits that he had not filed his state tax returns for tax years 2009, 2010, and 2011. The 2009 tax return was filed on or around October 17, 2012. (Applicant Post-Hearing Exhibit C.) The 2010 tax return was filed on or around April 8, 2013. (Applicant Post-Hearing Exhibit D.) The 2011 tax return was filed on or around April 8, 2013. (Applicant Post-Hearing Exhibit E.) He testified that his 2012 state tax return was filed in a timely fashion. (Tr. 81.)

1.r. Applicant admits that he is indebted to the Internal Revenue Service (IRS) for unpaid taxes for tax years 2009, 2010, 2011, and 2012. Based on records from the IRS, and his 2012 tax return, the amount he owes appears to be \$41,802. (Government Exhibits 11, 12, and 13; Applicant Post-Hearing Exhibit F.) His petition does not currently include past-due taxes for 2009, which appear to total \$9,124. (Applicant Exhibit I; Applicant Post-Hearing Exhibit C.)

1.s. Applicant admits that he is indebted to his state taxing authority for unpaid taxes for tax years 2009, 2010, 2011, and 2012. His petition does not include past-due taxes for 2009, which appear to be \$2,669. Based on his tax returns, the amount he owes appears to be \$6,668. (Applicant Post-Hearing Exhibits C, D, and E.) His petition includes past-due taxes for 2012 in the amount of \$1,894. The total claimed for the state taxing authority is \$5,822. (Applicant Exhibit I.) According to Applicant, and confirmed by his pay records, there is a garnishment against his pay, which he states is for his state tax delinquency. (Tr. 51-52; Government Exhibit 4 at 11.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he made false statements to the Department of Defense during the clearance screening process.

Applicant filled out a Government questionnaire on February 3, 2011, in which he stated that he had not “received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace.” (Government Exhibit 1 at Section 13(c).) This was a true statement because Applicant actually received a letter of

⁴See “Marital Settlement Agreement.” (Applicant Exhibit E.)

reprimand in March 2011, after the date he filled out the questionnaire. (Tr. 54-56; Government Exhibit 4 at 14-15.) This subparagraph is found for Applicant.

Applicant filled out Government questionnaires on September 28, 1997, (while on active duty); May 20, 2005; and February 3, 2011. (Government Exhibits 3, 2, and 1.) Section 23(d) of Government Exhibit 3, and Section 24 of Government Exhibit 2 ask Applicant, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Section 22(e) of Government Exhibit 1 asks, "Have you EVER been charged with any offense(s) related to alcohol or drugs?" (Emphasis in original.) Applicant answered, "No," to each of the questionnaires. This was a false statement. In fact, Applicant had been cited for Driving Under the Influence (DUI) on June 17, 1983. He was eventually convicted for a charge of Reckless Driving and paid a fine and court costs of \$91. (Applicant Exhibit F.)

Applicant has consistently denied intentionally falsifying his answers to the questions. Applicant was not arrested, and after administering a breathalyzer to Applicant the officer drove Applicant back to his car and let him drive away. In addition, Applicant stated that he was never told of the breathalyzer results.⁵ Applicant testified, "I went to Court and it got dropped down careless and reckless. . . . That was my understanding that that's what the charge was since it wasn't a DUI. But when he wrote up the ticket, he wrote on it DUI. So, that was a misunderstanding on my part." (Tr. 57.)⁶

Mitigation

Applicant submitted three character reference letters. (Applicant Exhibits A through C.) A former project leader and manager, now retired, describes Applicant as "a consummate professional, loyal to his country, and dedicated to helping others in the community." (Applicant Exhibit A.) A department head and senior leader states Applicant "is a dedicated American and Defense Contractor with a reputation of being trustworthy, loyal, dedicated and of good integrity." (Applicant Exhibit B.) All of these people have known Applicant for over eight years in the work environment.

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant's eligibility for access to classified information.

⁵It is noted that the court record (Applicant Exhibit F) does not have a breathalyzer reading, even though space for one is provided.

⁶See Tr. 59-63, 85-89.

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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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).

Analysis

Paragraph 1 (Guideline F, Financial Considerations)

The security concern relating to the guideline 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(a), "an inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶19(c), "a history of not meeting financial obligations," may raise security concerns. The Applicant has over \$97,000 in past-due debts, according to his bankruptcy petition, all of which had been due and owing for several years. Finally, AG ¶19(g) applies, "failure to file Federal, state, or local income tax returns as required or the fraudulent filing of the same." The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Applicant's financial difficulties have been in existence since at least 2005, though really manifested itself in 2008.

AG ¶ 20(b) states that the disqualifying conditions may be mitigated where "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." Applicant stated, and the records support, that these debts were brought about during his second marriage, primarily due to the actions of his ex-wife. As further described below, he has acted responsibly with regards to his debts.

AG ¶ 20(d) states it can be mitigating where, "the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Applicant has submitted substantial evidence to show that he has filed a Chapter 13 bankruptcy, which will repay all of his past-due debts in full within five years. He has the financial ability to fulfill the plan and pay his recurring debts.

Applicant takes full responsibility for his failure to file state and Federal tax returns. All of the applicable returns have been filed, and Applicant has made arrangements to pay his tax indebtedness through the bankruptcy plan.

The DOHA Appeal Board has stated, “An applicant is not required to show that [he] has completely paid off [his] indebtedness, only that [he] has established a reasonable plan to resolve [his] debts and has taken significant actions to implement that plan.”⁷ Applicant has done so.

In conclusion, as stated above, looking at Applicant’s entire financial situation at the present time, I find that “there are clear indications that the problem is being resolved or is under control,” as is required by AG ¶ 20(c). Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(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.

Applicant acknowledged that he did not disclose his arrest for DUI, but denied that he intentionally misled the Government regarding it. When a falsification allegation is controverted or denied, as in this case, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

⁷ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006)).

The record shows that Applicant has been fully forthcoming with the Government in many areas, including his financial record and the fact that he had received a court-martial while in the Marine Corps. His reasoning for not listing his citation for DUI, while wrong, is not outside the conduct of a reasonable, non-legally trained, person.

After listening to Applicant testify and observing his demeanor, I find that his explanations for failing to disclose the DUI as alleged in SOR ¶ 2.b are adequate and credible. SOR ¶ 2.b is found in his favor. As a consequence, a discussion of the applicability of mitigating conditions is not warranted. As stated earlier, SOR ¶2.a is found for Applicant because his answer was true. Paragraph 2 is found for Applicant.

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 the relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guidelines F and E, above, applies here as well. Applicant has had financial problems for several years, which are now being resolved. He currently shows good judgment with regards to his debt. In my opinion, he will continue to exercise such judgment in the future. In addition, he did not intentionally falsify his Government questionnaires, as alleged.

I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is little to no likelihood of continuation or recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his financial

situation, and alleged personal conduct. Accordingly, the evidence supports granting his request for a security clearance.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.s:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a. and 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge