



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



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| In the matter of: |) | |
| |) | |
| XXXXXXXXXX, XXXXX |) | ISCR Case No. 11-11242 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

11/29/2013

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated Guideline F (financial considerations) security concerns, but failed to mitigate Guideline E (personal conduct) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 18, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 16, 2012, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. 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 for SORs after September 1, 2006.

Applicant answered the SOR on December 3, 2012, which was received by the Defense Office of Hearings and Appeals (DOHA) on December 14, 2012. Department Counsel was prepared to proceed on June 5, 2013. The case was assigned to me on

June 11, 2013. DOHA issued a notice of hearing on June 11, 2013, scheduling the hearing for August 2, 2013. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 11, which were received without objection. The Applicant offered Applicant Exhibits (AE) 1 through 44, which were received without objection. He called his wife as a witness, and testified on his own behalf. I held the record open until August 8, 2013, to afford the Applicant the opportunity to submit additional evidence. Applicant timely submitted AE 45 through 55, which were received without objection. DOHA received the hearing transcript (Tr.) on August 13, 2013.

Findings of Fact

Applicant denied all of the SOR allegations. After a thorough review of the evidence, I make the following findings of fact.

Background Information

Applicant is a 60-year-old investigator, who seeks a security clearance as a condition of securing future employment. He claims to have successfully held a top secret security clearance from 2004 to 2011 when he was working as an investigator doing background investigations for a defense contractor. (Tr. 17-20, GE 1, GE 3.)

Applicant graduated from high school in June 1971. He attended community college from September 1971 to June 1972 and estimates that he has earned “around 35” college credits. Applicant married in October 1974 and has three adult daughters. At the time of Applicant’s hearing, he was not employed and was receiving a police department retirement pension following 26 years of service. He did not serve in the armed forces. (Tr. 20-26, GE 1.)

Financial Considerations

Applicant’s SOR identified five separate debts totaling approximately \$136,828. Applicant encountered financial difficulties in approximately 2011 and retained a bankruptcy attorney in February 2012. His bankruptcy attorney filed a chapter 7 bankruptcy petition in October 2012 and he was awarded a discharge in January 2013. The debts in SOR ¶¶ 1.a – 1.d were included on Applicant’s Schedule F and were discharged. The debt in SOR ¶ 1.e was a delinquent \$27,375 second mortgage; however, that account was paid in full and satisfied in October 2012. (Tr. 27-38, 43-45, AE 1 – AE 3, AE 47 – AE 50, AE 54 – AE 55.) **ALL OF THE SOR DEBTS HAVE BEEN ADDRESSED AND/OR HAVE BEEN RESOLVED.**

Applicant attributes his financial problems to being “abruptly released” from his employment as a contract background investigator in January 2011. As a contractor, he was ineligible to receive unemployment compensation. Applicant was unable to shore up a \$60,000 loss of annual income and remain current on his debts. (Tr. 78, GE 3 (I-16).) Applicant and his wife completed the mandatory financial counseling required to

file bankruptcy in September 2012. (AE 52, AE 53.) Their monthly budget reflects that Applicant and his wife are living within their means, with a net monthly remainder of \$1,562. (Tr. 78, AE 46.)

Personal Conduct

The SOR identified two separate falsification allegations stemming from Applicant's April 2011 e-QIP. On section 13C, regarding his past employment, Applicant failed to disclose that he was terminated in 2011 as a contract background investigator due to chronic timeliness with work assignments. (SOR ¶ 2.a.) On section 26, regarding his financial record, Applicant failed to disclose a \$72,818 charged-off delinquent student loan. (SOR ¶ 2.b.)

Regarding Applicant's 2011 termination, he testified company management informed him that his services were no longer needed as an investigator in January 2011. Applicant sought clarification whether he was being fired. He reportedly was told that he was a contract employee and the company was not required to give him a reason for being terminated. During questioning from Department Counsel, Applicant revealed that he was suspended for two months in 2008 over an integrity issue. When confronted by an Office of Personnel Management (OPM) investigator in June 2011, Applicant stated that he wished to amend his e-QIP answer to "yes" adding that this incident may be considered a suspension. During his testimony, Applicant stated that he was not inclined to characterize his termination as negative if his employer was not willing to characterize it as such. In an April 2011 statement, Applicant referred to a further problem management brought to his attention regarding his purportedly recruiting investigators away from the company. He summarized his treatment from the company as overall unfair. (Tr. 47-56, GE 3 (I-12), AE 5.)

Regarding the charged-off student loan, Applicant testified that a certain degree of confusion existed regarding who actually held the loan because the original lender had sold the loan to another bank without notifying him. A review of the evidence indicates that this loan became past-due in 2007. Applicant claims that he had received collection calls from the new lender and was later advised by his attorney not to pay the loan until he was able to determine who "actually owned the loan." He also claims that an attorney acting on behalf of the new lender contacted him in 2007 offering to settle the debt for \$30,000, which he refused. Applicant discussed purported attempts he made to contact the original and subsequent lender, which did not result in any resolution. When confronted by an Office of Personnel Management (OPM) investigator in June 2011 as to why he failed to list this debt as delinquent, Applicant informed the investigator that he wished to amend his answer.

During cross-examination, Applicant when asked how he would answer the question regarding his financial record said, "It's hard to answer, it's a 50/50. You know, you're seeking guidance from counsel, you know, and he's telling you, it's no longer yours, we've got to find out who owns it. Don't pay it anymore. But on the other hand--" Applicant acknowledged that he borrowed the money from the original lender as a parent-student loan and stopped making payments when he became confused

regarding the purported validity of the new lender. He also acknowledged the original lender stopped sending him monthly statements around the time the new lender surfaced. He added that he answered the e-QIP financial record question as he did because he “would still have a right to be able to explain myself.” (Tr. 31-43, 45-46, GE 3 (I-12-13).)

I carefully listened to Applicant’s hearing testimony and reviewed the record evidence regarding falsification concerns. Having done so, I do not find his explanations plausible or credible. Applicant has attempted to use purported confusion regarding his 2011 termination and the validity of his \$72,818 student loan debt. It is clear that Applicant knew that he was having problems with his employer even before he was terminated and when he was informed that he was terminated he sought clarification whether he was being fired. It is also clear that Applicant knew he owed \$72,818 to a lender, whether it was the original lender or the subsequent lender. Applicant is suggesting that he was kept “in the dark” by his lender who he owed \$72,818 to the point he did not know who to pay. I further note that his financial situation had significantly deteriorated at the time he filled out his April 2011 e-QIP, and ten months later he retained counsel to file bankruptcy.

As someone who made his living conducting background investigations, Applicant was well versed and experienced in completing security clearance applications. He was familiar with the forms and the process. The language of the questions is straightforward. Based on the foregoing, I find against Applicant on personal conduct security concerns.

Character Evidence

Applicant submitted a variety of favorable information to include letters and newspaper articles that addressed positive events that occurred during his career with the police department. (AE 9 – AE 43.) Applicant’s wife provided good character testimony on behalf of her husband. (Tr. 76-78.)

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 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, 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.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining 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 protect 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 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

AG ¶ 18 articulates the security concern pertaining to financial considerations:

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

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and a “(c) a history of not meeting financial obligations.”

Applicant's history of delinquent debt is established by his admissions and the evidence presented. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20(a) through (e) 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.

Applicant's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debts are a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Applicant receives full credit under AG ¶ 20(b) following the loss of his job in 2011. Full credit is warranted under AG ¶ 20(c) for the mandatory financial counseling Applicant completed in conjunction his bankruptcy filing. Since his bankruptcy discharge in January 2013, he has established a viable budget and lives within his means. Applicant also receives full credit under AG ¶ 20(d) because four of the five debts were discharged through bankruptcy and the fifth debt was paid in full. AG ¶ 20(e) is not applicable.

Personal Conduct

AG ¶ 15 articulates the security concern pertaining 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.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(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 failed to disclose that he was terminated under unfavorable circumstances from his job as a contract background investigator in 2011 as well as failing to disclose his charged-off \$72,818 student loan as a bad debt when he completed his April 2011 e-QIP. The Government established through the evidence presented the disqualifying condition in AG ¶ 16(a).

AG ¶ 17 provides seven conditions that could potentially mitigate security concerns about his personal conduct:

(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;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Applicant does receive some credit for later acknowledging that he should have answered his e-QIP questions affirmatively during his OPM interview. However, this fact and his rather qualified response is not enough to overcome his willful misrepresentation of his past employment history or true financial situation.¹ Applicant was no neophyte to the security clearance process – he was an experienced background investigator and previously held a clearance in that capacity. He knowingly and deliberately chose not to disclose complete and accurate information regarding his unfavorable employment and financial history.

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 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.

¹The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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 comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant has recovered from the financial setback he incurred following the loss of his job in 2011. However, his deliberate falsifications, if relied upon, could have adversely affected or influenced the security clearance adjudication process to the detriment of the Government.

Applicant receives credit for seven years of service as a background investigator. Before doing background investigations, he worked in law enforcement until he retired. His overall record of good employment weighs in his favor.

However, Applicant's deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. Particularly aggravating is the fact that Applicant knew the importance of providing truthful and accurate answers on his e-QIP. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated security concerns pertaining to financial considerations, but not mitigated security concerns pertaining to personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the Government's case.

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:

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| Paragraph 1, Guideline F: Subparagraphs 1.a – 1.e: | FOR APPLICANT For Applicant |
| Paragraph 2, Guideline E: Subparagraphs 2.a - 2.b: | AGAINST APPLICANT Against Applicant |

Conclusion

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

ROBERT J. TUIDER
Administrative Judge