



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



In the matter of:)	
)	
)	ISCR Case No. 11-11287
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq. Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/10/2013

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by his criminal conduct, his delinquent debt, and the falsification of relevant information from his 2010 security clearance application.

Statement of the Case

On August 14, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, criminal conduct; F, financial considerations; and E, personal conduct. 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) implemented by the DOD on September 1, 2006.

On October 2, 2012, Applicant answered the SOR, denying all of the allegations. The case was assigned to me on January 4, 2013. A notice of hearing was issued on

January 11, 2013, scheduling the case for February 1, 2013. I held the hearing as scheduled and received 12 Government exhibits (GE 1-12) and 13 Applicant exhibits. (AE A - K) Also, I considered Applicant's testimony and a pre-hearing memorandum prepared by Department Counsel. (Hearing Exhibit (HE) I). DOHA received the transcript (Tr.) on February 21, 2013.

Findings of Fact

Applicant is a 50-year-old man with one child, age 20. He was married in 1993 and divorced in 2007 after a lengthy separation. (GE 1 at 20) Applicant served in the U.S. Army from 1983 to 2000. He was discharged honorably. (Tr. 38) He earned a bachelor's degree in 1987, and a master's degree in environmental sciences in 2008. (GE 2 at 8; AE L)

In 2010, Applicant began working for a contractor as an intelligence analyst. Working in a combat zone, Applicant provided network analysis and counter-insurgency training. (AE K at 2) He was highly respected on the job. According to a colleague, Applicant "is a man of outstanding honor and integrity, as well as ability and capability." (AE F) According to another colleague, Applicant "has a wealth of experience in weapons and special operations." (AE I) Applicant's position is currently on hold pending the resolution of his security clearance application.

Applicant has a lengthy history of criminal activity and personal misconduct. In 1987, he was charged with alcohol intoxication. (GE 6) After pleading guilty, he was fined \$25.00. (GE 6)

In September 1992, a police officer stopped Applicant and administered him a breathalyzer test after observing him driving his car and "weaving from lane to lane." (GE 7 at 13) After Applicant failed the test, the police officer arrested Applicant, searched him, and discovered a handgun concealed in Applicant's waistband. Subsequently, Applicant was charged with felony criminal possession of a weapon in the third degree and operating a motor vehicle under the influence of alcohol. (GE 7 at 7) The court reduced the first charge from a felony to a misdemeanor and convicted Applicant of both charges. His driver's license was revoked for 90 days, he was fined, and he was placed on probation for three years. (GE 7 at 34)

In December 1992, Applicant was charged with interstate firearms dealing. In January 1995, he was sentenced to 12 months and one day in prison and five years of probation. He was released in December 1995, approximately one month early. (Tr. 22)

In May 1998, Applicant was charged with first degree aggravated unlicensed operator motor vehicle, a felony, and operating a motor vehicle under the influence of alcohol. The first charge was reduced to a misdemeanor and Applicant pleaded guilty to both charges. (GE 8 at 1) Consequently, the court fined him, revoked his driver's license, and placed him on probation for three years. (Tr. 22-23)

In February 2005, Applicant was charged with the following:

- 1) aggravated unlicensed operator motor vehicle;
- 2) operating a motor vehicle with suspended registration;
- 3) operating a motor vehicle without insurance;
- 4) vehicle registration violation;
- 5) operating a motor vehicle without an inspection certificate; and
- 6) equipment violation. (GE 9)

In July 2007, the state merged Charges 2, 4, 5, and 6 into Charge 1. Applicant then pleaded guilty to Charge 1 and Charge 3. (Tr. 22-23)

In April 2005, Applicant was charged with third degree grand larceny (a felony), two misdemeanor counts of criminal possession of a forged instrument in the second degree, and petit larceny, after depositing two counterfeit checks, totaling approximately \$10,000, in his bank account.(GE 10 at 56; Tr. 23) Subsequently, Applicant pleaded guilty to the petit larceny charge and the other charges were dismissed¹. (GE 10 at 40) The court sentenced him to three years probation.

One evening in August 2006, a woman at a train depot got onto a train and noticed that her wallet was missing from her handbag. She suspected that a man who had been sitting next to her while she was waiting for the train stole the wallet. Later that evening, the woman's boyfriend saw a man, who matched the description of the man that the woman alleged stole her wallet, at a gas station near the train station. He called the police. When the police arrived, they searched the suspect, identified him as the Applicant and discovered a \$100 gift card in his possession that matched the registration number of a gift card that the woman had reported missing along with her wallet. (GE 11 at 4) Applicant was arrested and charged with criminal possession of stolen property. The following month, he pleaded guilty and was sentenced to 45 days imprisonment. (GE 11 at 1) When asked to discuss the details of this offense at the hearing, Applicant testified that he was arrested after he "tried to use a Metrocard that [he] found at the train station." (Tr. 59)

In December 2007, Applicant was arrested and charged with obstructing governmental administration, resisting arrest, and disorderly conduct. In March 2009, he pleaded guilty to all three charges, was fined approximately \$160, and placed on probation for one year.

The SOR alleges 31 delinquent debts totaling approximately \$74,000. The alleged delinquencies include 26 debts in collection or charge-off status (subparagraphs 2.a-2.s; 2.u-2.v), six federal and state tax liens (2.y-2.cc; 2.e), one judgment for \$34,364 (2.dd), and a child support delinquency (subparagraph 1.t). Department Counsel

¹The petit larceny charge stemmed from the money that Applicant withdrew from his account, totaling \$467, after he deposited the counterfeit checks. (GE 10 at 40)

presented documentation supporting each of the Guideline F allegations.² (HE I) Applicant contested all of them.

The debts alleged in subparagraphs 2.a through 2.s were all held by the same collection agent. Applicant contacted a credit reporting agency and requested an investigation. (Tr. 27) Subsequently, the credit reporting agency deleted the debts from Applicant's credit report. (AE A) Applicant provided no evidence supporting his denial of the remaining SOR delinquencies.

Applicant completed a security clearance application on August 10, 2010. On Section 22, Applicant was required to answer whether he had been arrested within the past seven years, any if he had ever been charged with a felony, firearm, or alcohol-related offense. (GE 1 at 31-32) Section 26 required Applicant to answer whether he ever had any delinquent tax liens, child support payments, or judgments. (GE 1 at 36-37) Applicant answered "no" to each of the questions within these sections of the security clearance application.

Applicant testified that he did not list this information because the medication that he has been taking to alleviate the symptoms from two strokes he suffered 12 years ago impairs his memory. (Tr. 24-25) As part of the security clearance application process, Applicant was interviewed by an investigative agent two weeks after completing the security clearance application. (GE 2 at 7) When asked why he omitted the criminal charges, Applicant said that he thought he did not have to list the September 1992 and the May 1998 offenses because they had been dismissed. (GE 2 at 10-11) He told the agent that he did not list the April 2005 offense because he thought it was the same as the August 2006 offense, and he did not disclose the December 1992 arrest because it was a confidential United States government-ordered arrest. (GE 2 at 10-11). He testified that he did not list the tax liens or the child support delinquency because he was unaware of them when he completed the application. (GE 2 at 11) He did not mention anything about an impaired memory.

Policies

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.

² HE I is a chart annotating each SOR allegation to the corresponding Government exhibit.

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 applicant or proven by department counsel” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness.” Moreover, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant’s history of criminal activity triggers the application of AG ¶ 31(a), “a single serious crime, or multiple lesser offenses.”

Applicant engaged in criminal conduct over a long period of time, and some of his criminal offenses were serious. Also, he did not testify credibly about either his criminal conduct or his omissions from the security clearance application.³ Under these circumstances, neither AG ¶ 32(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,” nor AG ¶ 32(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,” apply.

Guideline F, Financial Considerations

Under this guideline, “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” (AG ¶ 18). Applicant’s multiple delinquencies trigger the application of AG ¶ 19(a), “inability or unwillingness to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations.” Although multiple tax liens have been entered against Applicant’s property over the years, it is unclear from the record whether he actually failed to file any income tax returns. AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns, as required or the fraudulent filing of same,” does not apply.

³See Personal Conduct section of the Decision, *infra*.

Because Applicant denied all of the delinquencies, the only potentially applicable mitigating condition is AG ¶ 20(d), “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 submitted evidence that he disputed the debts listed in subparagraphs 2.a. through 2.s, and that a credit reporting agency considered his dispute, concluded that he was not responsible for these debts, and deleted them from his credit report. AG ¶ 20(e) applies to these debts, and I resolve them in his favor.

Applicant provided no documented proof supporting his denial of the other SOR delinquencies. Neither AG ¶ 20(e) nor any of the other mitigating conditions apply to these remaining delinquencies.

Guideline E, Personal Conduct

Under this guideline, “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.” Moreover, “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 ¶ 15) Applicant’s omission of relevant information about his criminal offenses and his finances raises the issue of whether AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .,” applies.

Applicant’s testimony for omitting his criminal offenses from his security clearance application contradicted what he told the security clearance investigator during an interview in 2010. Moreover, Applicant did not testify truthfully about his August 2006 charge. Under these circumstances, I conclude that Applicant falsified his security clearance application, as alleged in the SOR, and that AG ¶ 16(a) applies without mitigation.

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. 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.

I considered the whole-person concept in my analysis of the mitigating conditions and it does not warrant a favorable conclusion. Applicant has failed to mitigate the 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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2.s:	For Applicant
Subparagraphs 2.t-2.ee:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.h:	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.

MARC E. CURRY
Administrative Judge