



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



In the matter of:)
)
) ISCR Case No. 12-02078
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2014

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 September 11, 2013, the Department of Defense (DOD) 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; DOD 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.

Applicant answered the SOR on October 29, 2013, and requested a hearing before an administrative judge. The case was assigned to me on February 10, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 12, 2014, scheduling the hearing for March 12, 2014. The hearing was

convened as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection. DOHA received the hearing transcript (Tr.) on March 20, 2014.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor. He has worked for his current employer since January 2013. He seeks to retain a security clearance. He has a master's degree, and he is a law school graduate. He is divorced for the third time. He has five children. Four of the children are adults. He has custody of his minor child.¹

Applicant served as an enlisted member and officer in the National Guard and military reserves from 1986 through 2011. By 2010, he had reached the rank of O-4 and was serving on active duty with about 19 years of active duty toward his retirement.²

Applicant was tried by a general court-martial in September 2010. He pleaded not guilty to all charges and specifications. After a trial by military judge alone, he was found guilty of one specification of a violation of Article 107 of the Uniform Code of Military Justice (UCMJ), false official statement; and four specifications of violating Article 133 of the UCMJ, conduct unbecoming an officer and a gentleman. Applicant was sentenced to receive a letter of reprimand.³

The court found that Applicant committed the 107 violation by intentionally making a false statement to an officer from another service. The 133 offenses consisted of Applicant receiving services that he was not authorized; providing copies of official documents that another officer used under false pretenses to procure a financial advantage; signing a letter containing false information on official letterhead; and providing a false letter purporting to be from a senior officer without the permission or authorization of the senior officer. The conduct all took place in 2008.⁴

After the court-martial, Applicant was sent to a board of inquiry (BOI) to determine whether he should be released from active duty. He was released from active duty in 2011, less than two weeks before he would have had 20 years of active duty. He retired from the reserves at the rank of O-3 with an honorable discharge, but he does not currently receive the retirement pay, medical care, and other benefits that he would have received had he been permitted to remain on active duty another two weeks.⁵

¹ Tr. at 18-20, 25, 35, 68-70, 77; GE 1, 2.

² Tr. at 29-30; GE 1.

³ Tr. at 78-80; Applicant's response to SOR; GE 1-4.

⁴ GE 2, 3.

⁵ Tr. at 28-30, 64, 79; GE 2.

Applicant admits that he was convicted at a court-martial and that he was wrong, but he denies that he committed the exact criminal acts that resulted in his conviction. The specifications are all related to Applicant's interaction with another military officer. Applicant states that he was duped by the officer, who is now deceased.⁶

The SOR alleges 16 delinquent accounts, including a \$1,198 unpaid judgment for a medical debt (SOR ¶ 1.a); four delinquent medical debts totaling \$3,414 (SOR ¶¶ 1.b-1.e); a mortgage loan that is \$16,965 past due (SOR ¶ 1.f); and past-due student loans totaling \$9,731 (SOR ¶¶ 1.h-1.p). Applicant admitted responsibility for the debts, and all of the debts appear on at least one credit report.⁷

Applicant's financial problems started after he was discharged from the military. He was unemployed for about a year. He had an accident in his home, and he was severely injured, requiring hospitalization for about a week. He did not have medical insurance. Some of the medical bills were paid, but he was unable to pay all the debts.⁸

Applicant moved out of his house and rented it. His renter became unemployed and did not pay the rent for an extended period. Applicant was unable to pay the first and second mortgage loans on his house, and it was recently lost to foreclosure. A January 2014 credit report lists that Applicant was \$31,537 past due on the first mortgage loan, with a balance of \$341,000 (SOR ¶ 1.f). It listed that his second mortgage loan was charged off, with a balance of \$11,107. Applicant's first mortgage loan was guaranteed by the Department of Veterans Affairs (VA).⁹

Applicant has about \$250,000 in student loans for graduate school and law school. All of the loans are currently in forbearance, including the past-due loans alleged in the SOR. Applicant stated that he will start income-based payments on some of the loans in December 2014 and the rest in 2015. His projected monthly payments will be about \$143.¹⁰

In October 2013, Applicant contracted with a debt resolution company. He enrolled four debts, totaling \$16,197, in the company's debt resolution program. The enrolled debts included the medical judgment and an accumulation of the other medical debts alleged in the SOR. The two remaining enrolled debts, totaling \$6,130, were not alleged in the SOR. The company agreed to negotiate settlements with his creditors, and the settlements would be paid out of the accumulated funds in the dedicated

⁶ Tr. at 79-82, 90-91; Applicant's response to SOR; GE 1, 2.

⁷ Tr. at; Applicant's response to SOR; GE 2, 5-7.

⁸ Tr. at 26-33; GE 2.

⁹ Tr. at 20-24, 46-49; Applicant's response to SOR; GE 2, 5-7. Applicant's second mortgage loan was not alleged in the SOR. Any financial issues that were not alleged in the SOR will not be used for disqualification purposes. They may be considered in assessing Applicant's overall financial situation, in the application of mitigating conditions, and in analyzing the "whole person."

¹⁰ Tr. at 49-62, 72; Applicant's response to SOR; GE 2, 5-7.

account. Applicant has made his monthly deposits of \$283, and the company has negotiated a settlement for one of the non-SOR debts. The company does not permit secured loans to be enrolled in the debt resolution program, which precluded the enrollment of the second mortgage loan. Because of the foreclosure, the second mortgage loan is no longer secured. Applicant stated he will add the second mortgage loan to the debt resolution program.¹¹

Applicant has not received formal financial counseling. His income from his contractor job is barely enough to pay his expenses and debts. He works a second job for additional income. He took the bar examination twice, but he did not pass it either time. He will have to explain his court-martial conviction before he is admitted to the practice of law. He hopes to use the additional income he earns as a lawyer to help pay his debts and student loans.¹²

Applicant served in Iraq, Afghanistan, and the Horn of Africa while he was on active duty. He submitted several letters praising his work performance, trustworthiness, dedication, honor, responsibility, professionalism, and ethics. One author wrote that he was “aware that [Applicant] had a little trouble while [in the military] (though I don’t know the details – only that he was reprimanded and that he is too ashamed to talk about it with anyone).”¹³

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.”

¹¹ Tr. at 21-24, 31, 38-46, 71; Applicant’s response to SOR; AE A, D.

¹² Tr. at 25-26, 53-55, 62-77, 82-85; Applicant’s response to SOR; GE 2.

¹³ Tr. at 37-38; GE 1, 2; AE B, C.

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).

Analysis

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. 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's financial problems began after he was released from military active duty. He was unemployed for about a year, and he was hospitalized for about a week after an accident in his home. He did not have medical insurance. His renter lost his job and stopped paying rent. The accident and the loss of rent were beyond his control, but his release from active duty without medical benefits was because of his criminal misconduct. To be fully applicable, AG ¶ 20(b) requires that the individual act responsibly under the circumstances.

Applicant has been working with a debt resolution company since October 2013. His house was lost to foreclosure. The first mortgage loan was guaranteed by the VA. He indicated that he would add the second mortgage loan to his debt resolution program. His \$250,000 in student loans are currently in forbearance, but he will have to start paying them in December 2014. Applicant is barely making ends meet. His finances are precarious. I have no confidence that he will attain financial stability.

There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or that he made a good-faith effort to pay his debts. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a), 20(c), and 20(d) are not applicable. AG ¶ 20(b) is partially applicable.

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; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was convicted at a general court-martial of five violations of the UCMJ. Both of the above disqualifying conditions are applicable.

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; 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.

Applicant's crimes involved moral turpitude. He admits that he was wrong, but he denies that he committed the exact criminal acts that resulted in his conviction. Applicant states that he was duped by the now-deceased officer involved in the crimes.

Despite the length of time since the criminal conduct, without remorse and acceptance of fault, I cannot find rehabilitation. I am unable to find that criminal conduct is unlikely to recur. It continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are applicable.

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:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; 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.

SOR ¶ 3.a cross-alleges Applicant's criminal conduct. That conduct showed poor judgment and an unwillingness to comply with rules and regulations. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

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

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The author of one of the character letters submitted by Applicant noted that the author did not know the details of the court-martial because Applicant was "too ashamed to talk about it." There are no applicable mitigating conditions under the same rationale discussed above for Guideline J.

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.

I considered Applicant's favorable character evidence, and his honorable military service, particularly his service in Iraq, Afghanistan, and the Horn of Africa. However, his military service was marred by his criminal acts and his finances are in disarray, with no sign of improvement in the foreseeable future.

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 the 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 F:	Against Applicant
Subparagraphs 1.a-1.p:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant

Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge