



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-07023

Appearances

For Government: Meg Foreman, Esquire

For Applicant: Martin P. Hogan, Esquire

06/02/2016

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On August 17, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). 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 DOD on September 1, 2006.

In an undated response, Applicant admitted one allegation and denied one allegation raised under Guideline F. He also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 16, 2015, the SOR was amended to add security concerns under Guideline E (Personal Conduct). To that end, two additional allegations were noted, which Applicant denied in an answer dated December 2, 2015. I was assigned the case on April 12, 2016. The matter was scheduled on April 29, 2016, for a May 18, 2016, hearing. The hearing was convened as scheduled.

The Government offered six documents, which were accepted without objection as exhibits (Exs.) 1-6. Applicant offered testimony, introduced one witness, and offered 25 exhibits, which were accepted into the record as Exs. A-Y without objection. The record was held open through June 15, 2016, in the event the parties wished to submit additional material. The transcript (Tr.) was received on June 1, 2016, and the record was closed on June 15, 2016. After review of the record as a whole, I find that Applicant mitigated personal conduct and financial considerations security concerns.

Findings of Fact

Applicant is a 50-year-old deputy program manager with a defense contractor, for which he has worked since 2013. There, he has earned superior ratings as an employee. Applicant served in the United States military for four years of enlisted duty and 20 years as an officer, retiring with an honorable discharge in July 2010 at the rank of major. (Tr. 43-45) His performance evaluations over his last decade of military service generally reflect outstanding levels of service. (Tr. 45-47; Ex. B; Amended SOR Response) He earned a bachelor's degree in 1989 and later attended coursework in government acquisitions. He is separated and the father of two adult children.

On April 26, 2004, Applicant, while on active duty in the military, was issued a general officer memorandum of reprimand for misconduct arising from his performance of duties. That misconduct was cited to include improperly pressuring a contractor to modify a job offering to a potential employee for the purpose of increasing the individual's pay rate; improperly assuring employees of an incumbent contractor that he would look out for their interests during competition for a new contract; and exercising poor judgment by consuming alcoholic beverages while driving a rental vehicle carrying contractor employees while on temporary duty abroad. The memorandum was placed in his official military personnel file in May 2004. Applicant continues to dispute the accuracy of the allegation, as well as the underlying facts. (Amended SOR Response)

From about July 2007 to January 2010, while on active duty in the military, Applicant was investigated by military criminal investigators for fraud against the United States Government, during which time he was titled with the offenses of wire fraud, conduct unbecoming an officer, and falsification of contract documents. Applicant vigorously denied the matter.¹ The investigation was concluded with no action taken and no charges raised. (Tr. 146) Applicant does not recall being interviewed about the issues. (Tr. 137-138)

Ultimately, his commander only determined that he may have improperly signed letters of authorization for contractors and forged the signature of another service member. In the end, Applicant completed his active duty military service in the military at the rank of major with an honorable discharge in July 2010, receiving a Bronze Star Medal in addition to numerous previously bestowed decorations, medals, and ribbons.

¹ The Government noted that the military term "titled" used "doesn't mean guilty of." (Tr. 145, 147) It noted that as an administrative matter, however, a record of the issue is maintained. (Tr. 147)

In the interim, in late 2007, Applicant purchased a townhouse subject to a mortgage. Shortly thereafter, he was transferred to another state. Starting in December 2007, Applicant initiated mortgage payments through automatic deductions from his bank, a practice he would continue until about June or July of 2013. As part of his association fees, Applicant relied on his homeowners association to handle "the overall insurance on the homes as agreed by the bank in the condominium rider." (see, e.g., Tr. 130, 153; Ex. K at 2) In October 2009, his lender sent him a letter requesting proof of insurance on the property. Specifically, the letter noted that failure to provide proof of hazard insurance would lead to the lender acquiring coverage on his behalf. When no response was received, a second letter to that effect was mailed in November 2009.²

With no proof of insurance received, the lender acquired insurance on the property in November 2009. It paid \$2,691 for the policy, which for the period of April 2009 through April 2010. Ultimately, in March 2010, it received proof of insurance regarding Applicant's property, reflecting he had, in fact, maintained coverage from June 2009 through June 2010. The lender refunded \$2,212 into Applicant's escrow account in March 2010. However, it maintained the expenditure of \$479 for the remaining gap in insurance, from April 2009 to June 2009.

In June 2011, Applicant's lender again requested proof of insurance on the property. When no proof was received by August 2011, the lender paid \$1,329 for a policy on the property, effective June 2011 through June 2012. Toward the end of 2011, the lender received Applicant's proof of insurance, and the imposed policy was cancelled in December 2011. A refund was placed into Applicant's escrow account later that month for \$1,329.

In July 2012, the lender requested proof of insurance coverage from Applicant concerning the same property. With no response, a lender-placed policy was acquired in August 2012. In September 2012, it paid \$2,583 for a policy effective, July 2012 through July 2013. That amount was refunded in full when the lender received the requested proof of insurance in April 2013.

Around this same time period, between around October 2012 and December 2012, Applicant was deemed to be \$33,329 delinquent on his \$268,143 mortgage balance. (Ex. 3 at 1; Ex. 4 at 6; see *also* Ex. 2 at 1) Applicant inquired about his having been noted as delinquent in or around February 2013, believing that through

² Although Applicant provided no evidence reflecting the methods of transmission for any responses to the lender regarding insurance coverage, he noted he was only to correspond with the lender by mail or facsimile transmission (FAX). He testified that "[e]very time that we would send documents [by FAX], [the lender] would say that they didn't receive anything." (Tr. 129) He testified that "the only time I could get [the lender] to finally agree that they had the documents is I would call the insurance company, and then I would call [the lender] and put them in a three-way call until [the lender] mentioned that they received the fax while we were all on the phone." (Tr. 129) No reason was given for not using mail as an alternative to FAX if FAX was problematic on multiple occasions.

misapplication of his payments, the lender had found him delinquent on the mortgage.³ Applicant retained an attorney in the matter, who believed the issue was related to the lender's practices and could be settled with favorable terms. (Ex. 2 at 1-2) On the advice of counsel, Applicant ceased making payments on the mortgage.

In an August 2013, letter, the lender notified Applicant that it had stopped payment on five checks it had sent to him, dated March 2013 through June 2013, that appeared to have been unreceived. The checks issued to Applicant were for the same sums he had paid to the lender. In sum, it returned approximately \$34,628, an amount roughly equal to the \$33,329 cited as past due in SOR allegation 1.a.⁴ (Tr. 14; Ex. J; Ex. 3 at 1; Ex. 4 at 6) The only relevant notation on the checks was the entry "for misapplication reversal." (Tr. 80; Ex. J) No explanation was offered as to what this phrase signified. Those sums were returned to Applicant because they were deemed insufficient to reinstate his loan. (see, e.g., Tr. 157; Ex. J)

As this was going on, Applicant pursued a home loan with a different lender. His application was denied. A November 2013 letter from a home loan officer with this lending entity noted that the recent home loan request denial was based, in part, on issues with Applicant's current mortgagor, the lender at issue. In her letter, she noted that Applicant's credit history revealed he had been "marked 180 days late twice in a row then 30 days late and then foreclosure status." (Ex. Q) It further noted that this foreclosure status on a government-backed loan would make him ineligible for a home loan until he could show a clean credit report.

Alleging fraud, Applicant pursued action against the lender, stressing that the lender "refused to accept his payments because they wrongly forced placed [sic] insurance on the property and received remuneration from the insurer. When challenged, [the lender] subsequently returned all [Applicant's] payments in large sums."⁵ (SOR Response, law office letter of September 2, 2015) Based on this assertion, it was noted Applicant contended he owes nothing to the lender. Evidence was shown Applicant retained counsel to pursue this matter. Through this action, he hoped to renegotiate his mortgage with better terms.⁶ (Ex. 2)

³ Applicant provided no documentary evidence showing that the delinquent sum cited in his credit reports is inaccurate or has been disputed. Rather, he maintains that the sum is "not legitimate" for "many reasons," including the fact payments were made. (Tr. 13)

⁴ A \$10,359 check was also returned to Applicant in July 2013, as was a letter with a revised statement of sums due.

⁵ Applicant argued that he is a victim in what is described as a nation-wide fraud scheme perpetrated by the lender. (Tr. 15)

⁶ Notes from an investigative interview with Applicant conducted on April 22, 2014, include:

Subject advised that his lawyer have [sic] put together a Class Action lawsuit case against [the lender], but have yet to file it in the court system as subject's attorney's [sic] believe [the lender] will settle this matter out of court. Subject will pursue this lawsuit in the court system if [the lender] does not settle out of court . . . [I]n the lawsuit, subject is

Meanwhile, an adverse judgment for \$2,995 against Applicant was entered in August 2014 after suit by Applicant's homeowners association against him. It initially began years earlier with a \$10 increase in the monthly premium Applicant owed to the homeowners association. The information about this increase was "probably" sent to the property, not to Applicant at his home or office. (Tr. 133) A tenant living in the property was not required or requested to forward correspondence to Applicant. Applicant did not check on the status of mail sent to the rental address. Applicant had stopped "putting in a forwarding address [postal request] and it just didn't - - didn't cross [his] mind because [he] had [his] townhome payments going out automatically the same time every month through the bank."⁷ (Tr. 134)

When Applicant eventually learned of the association fee increase, he was in arrears for about \$80. He then notified the homeowners association about his preferred address for contact. It was noted. However, although the association agreed to waive late fees, the amount had ballooned to about \$3,000 due to attorney's fees. (Tr. 69) Applicant paid that amount by check in December 2014. (Tr. 71-72; Ex. F)

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.

suing for not being able to refinance at a lower interest rate due to the bank error and to have his credit report cleared of the mis-payments [sic] and foreclosure. (Ex. at 2)

⁷ It is unknown when or if Applicant initially requested a forwarding of his mail after he left the property at the end of 2007. However, notice is taken that upon notice of a new address, the United States Postal Service generally forwards First-Class, Priority, and Express Mail for 12 months at no charge, except those marked "Do Not Forward."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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. 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).

Analysis

Guideline F, Financial Considerations

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that 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 engaging in illegal acts to generate funds.

Here, the Government introduced credible evidence indicating that Applicant was past due on a mortgage account in the approximate amount of \$33,329 on a total loan balance of \$268,143, and indebted on an adverse judgment in the approximate amount of \$2,995. Such facts are sufficient to invoke financial considerations disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts, and

AG ¶ 19(c): a history of not meeting financial obligations.

Five conditions could mitigate these finance-related security concerns:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

The debts at issue are recent, with only one being satisfied to date. Both delinquencies were the result, at least in part, of poor communication or oversight. Therefore, they cannot be said to have been created by situations beyond his control, or the types of situations that will not recur. Neither AG ¶ 20(a) nor AG ¶ 20(b) apply.

To his credit, Applicant has satisfied the \$2,995 debt to his homeowners association. Moreover, it is clear through the documentary evidence submitted that Applicant made payments on his mortgage in good faith for a period of time, and that those payments, while initially accepted, were returned by the lender on its own initiative. He is still trying to work out an arrangement with the lender to settle the matter, including potential resort to litigation over the way it handled the matter. In light of the facts, this factor raises AG ¶ 20(d) in full, and, for having resolved one of the two delinquent debts at issue, AG ¶ 20(c).

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct or concealment of information about one's conduct that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The Government provided credible evidence showing that Applicant was issued a general officer memorandum of reprimand for misconduct arising from his performance of duties while on active in the US. Army in 2004, and that it was placed in his official military personnel file that same year. In addition, it provided evidence that certain actions attributed to Applicant led to his being titled with various offenses that were investigated by the U.S. Army between July 2007 and January 2010. His commander subsequently determined that Applicant may have improperly signed letters of authorization for contractors and forged a signature. Such evidence is sufficient to raise personal conduct disqualifying conditions AG ¶ 16(c), (d), and (e).

There are six personal conduct mitigation conditions under AG ¶ 17. Here, four of them are potentially applicable:

AG ¶ 17(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;

AG ¶ 17(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;

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(f) the information was unsubstantiated or from a source of questionable reliability.

To this day, Applicant denies the accusations raised in these matters. Indeed, it is noted that the latter incident leading to the commencement of an investigation resulted in no charges and the investigation closed, the record being maintained to date for administrative purposes.

What is noted is that Applicant continued in service well after the cited incidents and activities, receiving an honorable discharge and being awarded a Bronze Star Medal in addition to numerous previously bestowed decorations, medals, and ribbons. The cited information does not appear to have hampered Applicant's career. Indeed, throughout this time, the majority of his evaluations were superb. Regardless, now retired from the military, it is unlikely this type of questioned professional conduct will be repeated. The incidents at issue occurred over a decade ago and there is no evidence of subsequent activity of this type. Consequently, I find that AG ¶ 17(c) applies.

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). 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 incorporated my comments under the two guidelines at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 50-year-old deputy program manager who has earned superior ratings as an employee. He served in the United States military for four years of enlisted duty and 20 years as an officer, retiring with an honorable discharge in July 2010 at the rank of major. While in service, his appraisals reflected excellent service. He earned a bachelor's degree in 1989 and later attended coursework in government acquisitions. Separated, he is the father of two adult children.

A 2004 military general officer memorandum of reprimand for misconduct may provide insight into the judgment or trustworthiness of an applicant, but it is also clearly dated. The only other potentially adverse incident during Applicant's military service was his having been titled for offense that were not otherwise pursued after a protracted investigation ended in 2010. These incidents appear to be isolated incidents from the rather remote past. They do not reflect poorly on the individual of today. Therefore, personal conduct security concerns are mitigated.

Applicant could have been more attentive to assuring lines of communication were clearly established, maintained, and monitored between himself and both his lender and homeowners association. While he could have been more attentive to his financial arrangements, he ultimately proved to be reliable in performing his obligations appropriately. Here, he satisfied the adverse judgment regarding the homeowners association and he showed that he tried repeatedly to make payments on his home loan, but that those payments were returned and his efforts rebuffed.

Today, Applicant is pursuing action against his lender for what he genuinely believes was a fraudulent practice. He is firm in his commitment to having the matter favorably resolved and his credit report corrected. Although a less fluid conclusion would be more desirable, Applicant can demonstrate little more in terms of efforts exerted to address the debts at issue. The fact that he is continuing with his efforts with the lender aided by legal counsel reflects his earnest desire to conclude the matter. Under these circumstances, I find that Applicant mitigated financial considerations 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:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-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 a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge