



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



In the matter of:)
)
) ISCR Case No. 15-07343
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq.
For Applicant: *Pro se*

06/07/2017

Decision

LYNCH, Noreen A., Administrative Judge:

On April 18, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 19, 2016. A notice of hearing was issued on March 21, 2017, scheduling the hearing for April 28, 2017. Government Exhibits (GX) 1-7 were admitted into evidence without objection. Applicant testified but did not submit any exhibits. I kept the record open for Applicant to submit additional information. He timely submitted three documents, which were marked as Applicant's Exhibits (AX) A-C, and admitted into the record without objection. The transcript was received on May 5, 2017. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In his answer to the SOR, Applicant denied the SOR allegations, with explanations.

The SOR alleges Applicant filed a Chapter 7 bankruptcy in June 2015, which was discharged in September 2015 (SOR 2.a) and a Chapter 13 bankruptcy filing in October 2015, in which a Chapter 13 trustee filed a Motion to Dismiss in March 2016 due to unlisted creditors, which made the performance plan impossible. (SOR 2.b). The SOR also alleges that in June 2007 Applicant was terminated due to a security infraction relating to US embassy photographs that were on his personal computer and an external hard drive. (SOR 1.a); and that he provided misleading information on his 2010 and 2012 security clearance application and during a subsequent clearance interview in 2014 regarding the reason he was terminated by his employer in 2007. (SOR 1.b-1.d)

Applicant is a 47-year-old program manager. He served in the military from 1992 until 1996. He obtained his undergraduate degree in 1986 and his master's degree in 2003. He is also a software engineer who has been with his current employer for about three years. Applicant completed his latest security clearance application in 2012 and has been employed as a federal contractor for many years. (GX 1) He held a security clearance in 1996 while in the military. He held a top secret clearance in 2004. He divorced in 2008 and is remarried with three children. Applicant has been working for a defense contractor overseas for about three years. (Tr. 11; 65)

Financial

Applicant cited his financial difficulties to a difficult 2007 separation and 2008 divorce.¹ He separated from his ex-wife and incurred both mortgage loans on their home and all associated costs. He paid the mortgage despite being unemployed in July 2007 until March 2008. Applicant cashed in more than \$20,000 from his 401(k) and used several credit cards to pay bills, which created debt. (Answer to SOR) In September 2007, his adjustable rate mortgage (ARM) ended and his mortgage loan payments increased by about \$700. He could not obtain a hardship loan modification because he had not missed any payments. He was advised to skip payments and then perhaps he might qualify for a loan modification. His credit suffered and many credit cards were cancelled. Applicant was then told that he made too much money to apply for a modification. He put his home up for sale in 2013, when he again became unemployed for almost a year. (Tr. 59) He worked with several debt collectors and made arrangement for payment plans. (GX 3) After all the good-faith efforts, Applicant's short sale is still pending. The processing of the paperwork was mishandled. Several times Applicant was asked to provide the same information. While he was working abroad, his current wife would send requested documents to no avail to the mortgage lender. In 2015, a new appraisal for the home was required. Applicant had the appraisal

¹Applicant disclosed the information on the SF-86 concerning the financial issues.

done and told the processors that he would be overseas working. (Tr. 31) Applicant contacted them from his work abroad and was told the application was now too old, and the house would go to auction. (Tr. 32) He was advised that the only way to prevent a foreclosure on the house was to file Chapter 7 bankruptcy, which he did in 2015 and his nonpriority, unsecured debts were discharged in 2015. (GX 5) Creditors could not contact Applicant directly but had to go through his bankruptcy attorney. Thus, to add more confusion to this case, Applicant's car which was not included in the Chapter 7 because payments were current, was repossessed. The reason given for the repossession was that a letter of "reaffirmation" was sent to Applicant's lawyer but it was never received. The lawyer stated that he did not believe that it had to be sent and he had never done so in his 25 years of practice. (Tr. 33) In order for Applicant to get his car returned, he was advised to file a Chapter 13 bankruptcy. (Tr. 62) Applicant continued to make payments on his car and the car was returned. Since that was the only item in the Chapter 13 bankruptcy, Applicant's attorney advised that the Chapter 13 should be dismissed. (Tr. 53) Applicant relied on the advice that was given to him on both occasions concerning the filing of bankruptcy.

Applicant's current annual salary is about \$108,000. His wife earns about \$13,000 a year. He receives a quarterly bonus, which can amount to \$15,000. (Tr. 56) Applicant has a budget. He received financial counseling when he filed for bankruptcy. (GX 5) He has a monthly net remainder. He is current on his bills. He volunteered that he has a payment plan with the IRS, which is current. Applicant pays \$110 to both Federal and state tax authorities. He believes he owes about \$1,000 to each. (Tr. 52) This happened in 2012 when he received an IRS Form 1099, and he underpaid his taxes that year. He is current with his student loan. (Tr. 57)

Applicant noted that the former home is still up for a short sale, but he now rents another home for his family. (Tr. 57) He has rented since 2016. He has no delinquent debts. His 2016 credit report reflects his assertion about not having delinquent debts. (GX 7)

Personal Conduct

Applicant credibly testified that his security clearance issue has been ongoing for years. The personal conduct issues stem from a 2007 alleged security violation concerning sensitive information relating to US embassies on Applicant's personal computer and an external hard drive. At that time, he served as a project manager for the company and there were no sensitive or classified blueprints. (Tr. 37) The falsification issues that follow concern Applicant's responses to a 2010 and a 2012 security clearance application and a 2014 investigative interview.

Applicant denied each of the four allegations concerning falsifications concerning a security violation and the reason for the end of his employment in 2007. He denied he deliberately falsified his 2010 or 2012 security clearance applications by stating that he filed for unemployment with the State of Virginia and the employer at the hearing refused to answer why Applicant was terminated. When pressed to answer the question by the Commissioner, the employer stated that there was a security infraction.

However, the infraction cited was that Applicant did not report that he was separated from his wife. He had been separated for about three weeks. Thus, on the 2010 security application form Applicant noted that he was fired due to the security violation for not reporting a change in marital status. He emphasized that the official reason for termination on the unemployment was failure to report change of marital status. (AX B, Tr. 25) He received unemployment benefits. Since Applicant had received the email from the branch chief that the hard drive or computer did not have classified information, thus he believes there was no security violation as alleged in SOR 1.a. (Tr. 27)

As to SOR allegation 1.a, Applicant took pictures of the exterior of buildings as required by his job (an overseas survey). The pictures were general conduit routing and interior of buildings. He used a personal digital camera to take pictures, which were then transferred to a hard drive. He maintained that there was nothing classified. In fact, he stated that if one would "google" a US embassy in a certain place, you would find the identical pictures. His ex-wife sent the hard drive to his FSO. Applicant submitted an email dated 2008 from his branch chief that confirmed that there was nothing concerning security on the hard drive computer. (AX A; Tr. 21) However, by that time, Applicant was terminated from the job. Applicant stated that when he was put on administrative leave in 2007, he was not given the reason for the security violation. Applicant noted that he had sent the email in with his original material years ago. (Tr. 20) Applicant emphasized that it was a standard practice when they did surveys. They were not inside classified areas. In fact, diplomatic security did not find any classified or sensitive information on Applicant's hard drive. (GX 4) In the 2014 interview report, the reason for firing Applicant was listed as not changing his marital status.

As to SOR allegation 1.b, Applicant responded "yes" to the question had anything happened regarding employment in the past seven years (Section 13C) on his 2010 security clearance application. He explained that the reason he was "fired or laid off" was not reporting change in marital status. (GX 2) He had only been separated a few weeks. Moreover, since the employer at an unemployment hearing gave that reason for his termination, he specified in the response to Section 13C, that was the official reason on file with the state unemployment commission. (GX 2)

As to SOR allegation 1.c, Applicant responded in his 2012 security clearance application that he left his employer due to a reduction in force. (GX 1) Applicant's conversation with his former supervisor between submitting his 2010 and 2012 application led him to believe that was the real reason for the termination. Applicant was credible when he explained that he had been told by his supervisor that the real reason he was terminated was Applicant was making too much money. He also agreed with Applicant that he did not know there was a policy about reporting a change in marital status. (GX 3) Applicant explained that it was probably not the correct answer, but he had filled out so many forms he listed that reason. He had no intent to deceive the Government as they knew he was terminated due to a security violation on several occasions.

As to SOR allegation 1.d, Applicant spoke to the interviewer in 2014. (GX 4) In that interview he gave the official reason that he was fired for failure to report a change in marital status. He did not fail to disclose the alleged security violation about his hard drive because it was found that there was no sensitive or classified information on his computer or hard drive. Thus, there was no security violation as alleged in SOR 1.a.

Applicant was credible when he explained the long, convoluted information that related to the 2007 incident. In the 2014 investigative interview, Applicant explained the sequence of events following his administrative leave and the fact that he was not told what the security violation was until the unemployment hearing. At the unemployment hearing, the employer did not want to give a reason, but finally stated that it was for non-disclosure of marital status.

Applicant has answered questions concerning the 2007 termination many times over the years. He stated that he has been interviewed time and again about the 2007 incident. He also testified about a work-place disagreement with management preceding the termination in 2007. Applicant relayed that he believed that because he had sent an email complaining about a dress code (requirement of ties) that management became upset and did give him a warning letter. (Tr. 23) When he was put on administrative leave, he was not given a reason. As noted above, at the unemployment hearing, the employer stalled but then answered that the security violation was non-disclosure of a marital change. (Tr. 24) As to the reduction in force answer, Applicant by 2012 believed in his opinion that was the real reason for the firing or termination. (Tr. 25) He acknowledge that it was probably a mistake to answer that on the security application, however, the termination for a security violation had been given many times.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .”² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses 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.

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following conditions are relevant here.

(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; and

(B) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official,

In this case AG ¶ 16(a) and 16 (b) are not established. Applicant consistently denied that he falsified either his 2010 or 2012 security clearance application or falsified material facts to an interviewer in 2014. Applicant did not have sensitive information on his computer or hard drive in 2007. He provided documentation supporting his assertion. The other falsifications stem from that allegation. As to the answer Applicant provided in his 2010 security clearance application, he stated that he was told he was terminated due to a security violation - but not the specifics. When he had a hearing for unemployment benefits, his employer refused to provide the reason for Applicant's termination, but eventually stated to the Commissioner that it was due to a failure to report a change in marital status. He and his wife had been separated for about three weeks. Nevertheless, that was the official reason given for the unemployment report and is on file with the state unemployment commission. He explained that he was "laid off or fired". He denied the falsification and was candid in his answers at the hearing about his reasoning. He listed information concerning the firing or termination several times. He denied that he falsified his 2012 application. He had put the government on notice about termination for a security violation and he did acknowledge that he probably made a mistake by putting "laid off", although that was his opinion. He acknowledged that was a mistake. He had no intention to mislead the Government. I find Applicant has refuted the allegations of falsification and I find for him under the guideline for personal conduct.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds."

The government introduced credible evidence that Applicant filed for bankruptcy on two occasions. The credit report confirms the filings. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Applicant's 2015 Chapter 7 bankruptcy was discharged in 2015. The bankruptcy was the result of his marital separation, divorce and unemployment. He paid his bills and mortgage and used savings until he had no more options. The 2016 Chapter 13 bankruptcy was the result of confusion concerning the repossession of his car which was repossessed the day after his Chapter 7 bankruptcy was discharged. This occurred despite the fact that he was current on his payments. The reason given was that the company did not receive an "affirmation letter" from his bankruptcy attorney. His bankruptcy attorney could not open the chapter 7 case for omission of the letter. He advised Applicant to file for a Chapter 13 bankruptcy, so that he could get his car. Applicant received the car and after discussions with his attorney, the Chapter 13 was dismissed. This was an unusual set of events that occurred and Applicant has no new debts. Consequently, Financial Considerations Mitigating Condition (FC MC) 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) applies.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) applies. Applicant paid his mortgages and other bills after his wife left. He paid even when he was unemployed and took money from savings. The divorce and unemployment were the cause of the financial problems and he eventually had to file for bankruptcy, which is a legitimate means of resolving debt.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has application. FC MC 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) applies. Applicant received counseling through the bankruptcy process. He is gainfully employed and has a good salary. He is paying his bills.

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 an 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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 47 years old. He served in the military and was honorably discharged. He held a clearance in the military and also when he served as a contractor in 2004. He has worked in the field for many years. He has worked abroad for the United States in many places. As a result of a separation, divorce, and unemployment, he experienced financial problems. He made good-faith efforts to pay his bills, even when he was unemployed. He used his savings to pay mortgages. He was advised to file bankruptcy, which is a legitimate means to resolve debts. He did so in 2015. There was some confusion concerning his car, which was repossessed after the discharge, and he was advised by a bankruptcy attorney to file a Chapter 13 to recover his vehicle. This was a unique set of circumstances. He has resolved the delinquent debt. He is current with a tax payment plan and his student loans. He has a good job and his current wife also works. His 2016 credit report reflects that the majority of accounts are current.

I found him candid and sincere in his testimony concerning the answers on his 2010 and 2012 security clearance application. Applicant provided information that confirmed that there was no security violation as alleged in SOR 1.a. Given the facts in this case and his responses to the 2010 and 2012 security clearance applications and report to the investigator in 2014. I do not find that he deliberately falsified material information or misled the Government. He has mitigated the personal conduct concerns in this case, as well as the financial considerations security concerns.

Applicant provided sufficient information to establish mitigation under the financial considerations guideline. Disqualifying conduct under the personal conduct guideline was not established.

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 E:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Paragraph 2, Guideline F:	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. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge