



Applicant for Security Clearance

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: Sean M. Bigley, Esq.

February 16, 2018

Decision

MOGUL, Martin H., Administrative Judge:

Statement of the Case

On November 22, 2016, in accordance with Department of Defense (DoD) Directive 5220.6, as amended (Directive), the DoD issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines F and E.¹ The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant replied to the SOR on December 23, 2016, and requested a hearing before an administrative judge. (RSOR.) The case was assigned to me on February 15 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines, effective September 1, 2006.

on February 27, 2017, setting the hearing for April 4, 2017. The hearing was convened as scheduled.

At the hearing, the Government offered Exhibits 1 through 8, which were admitted without objection. Applicant testified on his own behalf and presented documents, which were identified and entered into evidence without objection as Exhibits A through F. The record was left open until April 21, 2017, for receipt of additional documentation. No additional documents were received. DOHA received the transcript of the hearing (TR) on April 12, 2017. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a thorough and careful review of the pleadings, and exhibits, I make the following findings of fact:

Applicant is 36 years old. He is unmarried and has three children. He completed some college courses. Applicant served in the United States Army from 1999 to 2006, and he received an Honorable Discharge. He is currently employed by the United States Post Office, and a defense contractor has applied for a security clearance on his behalf. Applicant seeks a DoD security clearance in connection with his potential employment in the defense sector. (Tr at 20-23.)

Guideline F, Financial Considerations

The SOR lists four allegations (1.a. through 1.d.) regarding financial difficulties, under Adjudicative Guideline F. All of the allegations will be discussed below in the order they were listed on the SOR:

1.a. The SOR alleges that Applicant failed to file his Federal Income Tax returns for tax years 2009, 2010, and 2011 in a timely manner, and he did not file those returns until 2012. Applicant denied this allegation in his RSOR.

At the hearing, Applicant testified that during the tax years in question, he was working in Iraq for a Government contractor, and he believed that he did not have to file his Federal income tax returns until he returned to the United States. He explained that he learned that individuals who are serving in a combat zone, either as uniformed personnel or contract employees who support the military, have an extension of 180 days after they return to the United States to file their income tax returns for the tax years that they were deployed. Exhibit C, "The Armed Forces' Tax Guide" confirms that Applicant's assertion is correct. Applicant contended that he filed an email to the IRS telling them that he would file his tax returns when he returned to the United States, and he received an email back from the IRS that confirmed that this was the correct course of action for him to take. Applicant testified, and Exhibit D confirmed, that Applicant was deployed from January 2009 to sometime in December 2011. When he returned to the

United States in 2012, he filed his tax returns for the tax years that he had been deployed. (Tr at 24-27.)

1.b. The SOR alleges that Applicant failed to file his State A Income Tax returns for tax years 2009, 2010, and 2011 in a timely manner, and he did not file those returns until 2012. Applicant denied this allegation in his RSOR. At the hearing, Applicant testified that during tax years 2009 through 2011, he received no income from State A. He stated that his accountant, who prepared his taxes, also told him that he did not have to file State A tax returns since he had not earned any income from State A for those tax years. Applicant testified that when he was deployed, he had no home address in the United States, so he used his sister's address in State A as an emergency contact, if something had to be sent to him in the U.S, but it was not where he lived during those years. (Tr at 28-31.)

Applicant further stated that he has been disputing with State A for several years that he should not have had to file tax returns for State A or owe any taxes to State A. State A asked him to produce utility bills showing that he was out of the country during those years, but he contended that the bills were paid by the military, and he did not have any individual bills for that period. He testified that when he was unable to produce utility bills, State A simply placed a lien on his bank account and withdrew the money that State A claimed he owed them. (Tr at 31-33.) Exhibit B establishes that State A has released the lien on Applicant's property.

Applicant also testified that he was informed that State A was going to refund his money, but he has more recently learned that they were not going to offer him a refund. So he is still disputing this action from State A, since he believed that he had no connection with State A, for which he should owe any taxes, and plans to hire a tax attorney to help him get his refund. (Tr at 76-78.) Applicant further averred that but for the years reviewed above, he has always filed all of his tax returns and paid his taxes in a timely manner. (Tr at 35.)

1.c. The SOR alleges that Applicant is indebted to State A for a tax lien entered against him in January 2014 in the approximate amount of \$27,347. Applicant denied this debt in his RSOR. As has been reviewed in 1.b., above, Applicant's testimony and Exhibit B establish that the lien has been released and this debt has been satisfied.

1.d. This overdue debt is cited in the SOR for a delinquent account in the amount of \$296. Applicant denied this allegation in his RSOR. Applicant testified that this debt for cable television and internet was for a service, which his sister had cancelled when he was deployed. He strongly averred that he did not owe this debt, and he had not even been aware of it until the security clearance background check was conducted. He further testified that when he learned of the debt, he phoned the creditor and was informed that the debt was closed. (Tr at 35-36.) Exhibit D establishes that this debt has been paid in full.

Guideline E, Personal Conduct

The SOR lists two allegations (2.a. and 2.b.) regarding Personal Conduct, under Adjudicative Guideline E.

2.a. The SOR alleges that Applicant deliberately falsified material facts on an Electronic Questionnaires for Investigations Processing (e-QIP) that he executed on September 9, 2015. He was asked whether he had ever been charged with any felony offenses, including any under the Uniform Code of Military Justice (UCMJ) and non-military/civilian felony offenses. Applicant did not disclose that he had been charged in 2004 with a violation of Article 120 of the UCMJ, the offense of Carnal Knowledge. Applicant denied this allegation in his RSOR.

2.b. The SOR alleges that Applicant deliberately falsified material facts on an e-QIP that he executed on May 6, 2010. Applicant also did not disclose on this e-QIP that he had been charged in 2004 with a violation Article 120 of the UCMJ, the offense of Carnal Knowledge. Applicant denied this allegation in his RSOR.

At the hearing, Applicant explained that this event occurred at a bar outside the United States, where the minimum age required to enter was 18 years of age. He met a female at this bar, and he stated that this woman showed him her identification, which confirmed that she was 18 years of age. Later, after he returned to his base, he was informed that he was being accused of Carnal Knowledge, which is comparable to statutory rape. Applicant stated that when he was interviewed, he explained that the woman had shown him an identification establishing that she was 18 years of age. He also testified that this woman was pregnant, and she accused Applicant of being the father. After a paternity test was conducted, it was determined that he was not the father of this woman's baby. It was also found during the investigation that this woman did have fraudulent documents that listed her age as 18. He averred that after an investigation the case was dismissed, and no further action was taken. (Tr at 38-39.)

Applicant testified that because he never appeared before a judge and jury and because the case was dismissed after the investigation, he had not believed he should have had to answer affirmatively to the question on either e-QIP. Also his attorney, an Army captain, had told him that in the future it would not be required for him to disclose the information about the allegation, since the case was dismissed before it ever went to trial; it was like it never happened. He has continued to have this belief since his meeting with the attorney. (Tr at 40-42.)

The evidence also establishes that a charge sheet was issued for this incident, but Applicant credibly testified that he did not know if he received the charge sheet. He also did not believe that he was ever charged with a felony, and he stopped reading before he got to the section that discussed a charge of violation of the UCMJ, for which he should have answered affirmatively on the e-QIP. (Tr at 50-60, Exhibit 7.)

Applicant testified that he never met with a Government investigator after he completed his e-QIP in 2010, but when he was confronted by an investigator after he

completed his e-QIP in 2016, he was shocked to be asked about the 2004 allegation of Carnal Knowledge. He believed that it was something that was not listed anywhere, since he thought it was like it never happened. Finally, he testified that he would not have omitted this from either of his e-QIPs if he knew it should have been included, since the information showed that he was never found guilty of anything. (Tr at 42-44.)

Mitigation

Applicant offered into evidence four very laudatory letters of recommendation. (Exhibit A.) He was described by a lieutenant colonel of the United States Air Force, as “a pillar of honesty, integrity, and dedication among our contract support.”

Policies

When evaluating an applicant’s suitability for a security clearance, the 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, 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or

safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (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 relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Applicant was alleged to have not filed his state and Federal tax returns in a timely fashion. He was also alleged to have a substantial state tax lien. The evidence is sufficient to raise disqualifying conditions (a), (c), and (f) as potentially applicable in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust;

(e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;

(g) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that are inconsistent with known legal sources of income;

(h) borrowing money or engaging in significant financial transactions to fund gambling or pay gambling debts; and

(i) concealing gambling losses, family conflict, or other problems caused by gambling.

AG ¶ 20 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

As reviewed above, evidence was introduced to establish that Applicant had a good-faith belief that for the three years he was in a combat area and he was supporting the United States troops, he could defer filing his Federal taxes. While a question was raised as to whether his employment position came within this deferment, I find it reasonable for him to have believed that it did. Regarding the state taxes, I find the evidence presented sufficient to conclude that there was no connection of any kind with State A while Applicant was deployed in the combat area, so he reasonably had a belief that he did not have to file taxes for State A during 2009 through 2011. The evidence further establishes that no Federal or state taxes are still owed, and the additional SOR debt has been satisfied. Therefore, I find that mitigating factors AG ¶ 20 (a), (d), (e), and (g) are applicable in this case, and I find for Applicant under Guideline F.

Guideline E, Personal Conduct

The security concern relating to the guideline 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Because Applicant failed to include the information about the incident that resulted in his being charged with Carnal Knowledge on his two e-QIPs, I find that the evidence is sufficient to raise disqualifying condition (a) in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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 individual may not properly safeguard classified or sensitive 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;

- (3) a pattern of dishonesty or rule violations; and

- (4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

- (2) while in another country, engaging in any activity that is illegal in that country;

- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 listed below:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Because of the advice that Applicant received from his military attorney regarding this incident, and because the case was dismissed without requiring him to appear in court, I find that Applicant had a reasonable, good-faith, although incorrect, belief that he did not have to include this information on his e-QIPs, and he was not trying to mislead the government when he answered as he did. I therefore, find that mitigating factors AG ¶ 17(b) and (c) are applicable in this case, and I find for Applicant under Guideline E.

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(d):

(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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and E in my whole-person analysis.

Overall, the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Financial Considerations and Personal Conduct security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 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 eligibility for a national security eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge