



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



In the matter of:)
)
 REDACTED) ISCR Case No. 14-06406
)
 Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: REDACTED, Personal Representative

09/15/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the security concerns arising from his finances and falsification of his security clearance application. He was discharged from the military for defrauding the U.S. Government of approximately \$8,500. He falsified his recent security clearance application by deliberately failing to disclose the true reason for his discharge. Applicant’s past criminal conduct and recent falsification of his security clearance application were, in part, motivated by financial stress. He has a long history of financial problems that continue to the present day. Applicant’s finances and conduct raise concerns about his judgment, reliability, and trustworthiness. Clearance is denied.

History of the Case

On February 3, 2015, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his conduct and circumstances raised security concerns under the financial considerations and personal conduct guidelines.¹ Applicant timely answered the SOR (Answer), and initially requested a decision on the

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

written record. Subsequently, he requested a hearing. Pursuant to Applicant's request for an expedited hearing, his hearing was scheduled for July 30, 2015. Applicant waived the procedural right to at least 15-days advance notice of the hearing, and the hearing was held as scheduled.²

At hearing, Department Counsel offered Government Exhibits (Gx.) 1 – 8. Applicant and his spouse testified. He offered Applicant's Exhibits (Ax.) A – P. All exhibits were admitted into evidence without objection.³ The hearing transcript (Tr.) was received on August 7, 2015.

Findings of Fact

Applicant is a federal government contractor. He has been working for his current employer for about 18 months. He is married with two children.

Applicant served in the U.S. military from 1982 to 1992. His service included an overseas deployment in support of the first Gulf War. He was charged by the military in about 1992 with committing fraud because he applied for and received allowances that he was not entitled to receive. Specifically, Applicant applied for and received allowances for military members with a dependant(s). Although he was married to his first wife, they had been separated for years and he was not providing her financial support. Long after Applicant and his first wife permanently separated, he submitted at least two forms to the military claiming that he and his former wife were living together in order to receive the higher-rate allowances. (Gx. 4 at ¶¶ 3-9, 3-12)⁴

At the time Applicant submitted the fraudulent forms, he was also having an affair with his now wife, who was then married to a fellow service member from his unit. His wife's former spouse became aware of the affair and alerted military authorities, who eventually uncovered Applicant's multi-year fraud. When interviewed by military investigators, Applicant was specifically advised that he was suspected of committing fraud against the U.S. Government, in violation of Article 132, Uniform Code of Military Justice (UCMJ). (Gx. 5 at 1) After waiving his rights to counsel and to remain silent, Applicant told military investigators that he was unable to afford to get a divorce from his former wife because of financial problems. He went on to state: "Unfortunately I did not realize until now the seriousness of my actions, therefore I am willing to take full responsibility for my actions." (Gx. 5 at 3).

² See Hearing Exhibit (Hx.) I (prehearing correspondence); Tr. at 9.

³ I afforded Applicant the opportunity to keep the record open to submit additional evidence, but he declined the offer. (Tr. at 99)

⁴ In a signed, sworn statement that Applicant provided military investigators, he admitted that he and his former wife separated in late 1985. At the time of their separation, Applicant's former wife told him that "she wasn't coming back." (Gx. 5 at 2) Applicant testified that he and his former spouse never lived together again after she left in 1985. (Tr. at 80) However, in his notarized Answer, Applicant states that it only became "evident" to him six years later, in April 1991, that he and his former wife "would no longer be together" – coinciding with the time he started "seeing" his current wife. (Answer at 3; Tr. at 31)

Applicant was charged with committing fraud against the U.S. Government. He went to a preliminary hearing (or investigation), where he was represented by a military defense counsel and evidence was presented by the prosecution. Subsequently, he submitted a request for a discharge in lieu of trial by court-martial. His request was granted and he received an under other than honorable conditions (UOTHC) discharge. His federal income tax returns were intercepted to recoup the \$8,500 in allowances he illegally received. (Gx. 4; Gx. 6; Tr. at 32-34, 48-52, 59, 69-80, 85-91, 95-99)

Applicant submitted a security clearance application (SCA) in May 2014. He listed, under section 15 regarding military history, that he received a UOTHC discharge for “dating my present wife while she was still married to her first husband and charges were brought against me by her former husband.” (Gx. 1 at 22) Applicant was subsequently interviewed by a security clearance background investigator. Applicant told the background investigator that he was investigated and discharged by the military for adultery. (Gx. 7 at 2; Tr. at 76). At hearing, he admitted that he was investigated and discharged by the military for committing fraud, not for adultery. (Tr. at 72-73) He also testified that the reason he listed adultery as the reason for his discharge on his SCA was because he did not remember the correct information. (Tr. at 74-78) He subsequently stated he “didn’t know the specific wording for which to put in there [the SCA],” and that, in his mind, the real reason he was discharged from the military was the adultery and the vindictiveness of his wife’s former husband. (Tr. at 92-93)

In his notarized Answer, Applicant stated that he “was led to believe” the military preliminary hearing was regarding the potential imposition of non-judicial punishment under Article 15, UCMJ. (Answer at 3) At his DOHA hearing, Applicant testified that at the time of the military preliminary hearing he was a Sergeant with nearly 10 years of active duty service and understood that he was not facing potential administrative action under Article 15. Instead, the preliminary hearing was to determine whether he would face a trial by court-martial (as required under Article 32, UCMJ, before a matter can be referred to trial by general court-martial⁵). (Tr. at 85-91)

After the preliminary hearing and on the advice of counsel, Applicant submitted a request to be discharged in lieu of trial by court-martial. In return for the military accepting his request, Applicant agreed to accept an unfavorable administrative discharge. His request was approved, avoiding the potential of a criminal conviction and confinement; but resulting in a UOTHC discharge. (Tr. at 85-91; Gx. 6)

Applicant’s current financial problems date back to 2002. He purchased furniture on credit and was not required to pay for it for the initial 18 months. After the 18-month grace period ended, he did not make any of the required payments. In 2008, the creditor secured a judgment against him in the amount of approximately \$7,500. He purportedly entered into a repayment plan with the creditor, but stopped paying after about six months. He did not submit evidence of the repayment agreement or having made any payments towards satisfaction of the debt. The creditor secured a garnishment, but it was dismissed by a court because the garnishment imposed a financial hardship on Applicant. Applicant has not contacted the creditor to resolve the debt. The judgment is

⁵ See generally, 10 USC § 832.

listed in SOR 1.a, and remains unresolved. The remaining three SOR debts, totaling approximately \$1,000, do not raise a security concern because they are either paid or are medically related. (Tr. at 35-44, 81; Gx. 2; Gx. 3 at 4; Gx. 7 at 5; Ax. P)

Applicant states that his financial problems are a result of layoffs, unsteady employment, and underemployment. He did not submit evidence of having received financial or debt counseling. Although he did not submit a written budget, Applicant purportedly has about \$200 a month in disposable income to resolve non-recurring debts and unexpected expenses. (Tr. at 48, 63-65, 81; Gx. 1; Gx. 7)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.⁶

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions

⁶ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is explained at 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 \$7,500 judgment listed at SOR 1.a is for a debt that Applicant incurred in 2002 and did not pay. The record evidence raises the financial considerations security concern, and establishes the disqualifying conditions at AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.”

The guideline also lists a number of conditions that could mitigate the concern. The following mitigating conditions are potentially relevant:

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 and provides documented proof to substantiate the basis of the dispute.

Applicant did not incur the SOR debt at issue under unusual circumstances. Furthermore, although periods of unemployment and underemployment may have impacted Applicant's ability to repay the debt, it has been outstanding for over a decade with no documented record evidence of voluntary payments to resolve the debt. Applicant's unwillingness or inability to resolve the debt continued long after a judgment was issued. Additionally, notwithstanding full-time employment for the past 18 months and purportedly having the financial means to negotiate a monthly payment plan, Applicant has yet to contact the creditor to resolve the debt.⁷

In reviewing all the evidence presented, the SOR debt at issue is not an isolated incident. Instead, the debt is symptomatic of a long standing history of financial problems dating back to the mid-1980s. Applicant has yet to take any discernible action, to include financial counseling, to change the trajectory of his financial situation. Accordingly, it appears likely that his poor financial situation, as well as the attendant security concerns, will continue into the foreseeable future.

Individuals seeking a security clearance are not required to be debt free, nor are they required to resolve all past-due debts simultaneously or even resolve the delinquent debts listed in the SOR first. However, they are expected to present documentation to refute, explain, or mitigate security concerns raised by their circumstances, to include the accumulation of delinquent debt. Moreover, they bear the burden of establishing that they manage their finances in a manner expected of those granted access to this nation's secrets.⁸ Applicant failed to meet his burden of persuasion and, thus, security concerns regarding his finances remain.

Guideline E, Personal Conduct

The personal conduct concern is set forth at 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.

⁷ ISCR Case No. 14-03991 at 2 (App. Bd. Jul. 17, 2015) ("A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Accordingly, . . . the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.")

⁸ ISCR Case 07-10310 at 2 (App. Bd. Jul. 30, 2008).

The personal conduct guideline notes several disqualifying conditions. The one condition that warrants discussion is set forth at AG ¶ 16(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.”

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA and continues throughout the security clearance process. An applicant is required to disclose adverse information during the course of the security clearance investigation in order for the Government to adequately adjudicate their security eligibility. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified their SCA or provided misleading information during the investigation. An omission is not deliberate if the person genuinely forgot the information requested, inadvertently overlooked or misunderstood the question, or sincerely thought the information did not need to be reported. An administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant’s true intent.⁹

After a complete and thorough review of the evidence, and having a full opportunity to observe Applicant’s demeanor, I find that he intentionally falsified his SCA when he failed to disclose the true reason for his UOTHC discharge from the military. In reaching this conclusion I considered the length of time that has passed since the discharge and that Applicant is neither a lawyer, nor an expert in military justice. However, Applicant admitted that: (1) he knew he was never charged with adultery, (2) he was pending trial by court-martial for fraud; and (3) following a preliminary hearing regarding the fraud charge, he submitted a request to be discharged in lieu of court-martial. Under such circumstances, Applicant’s explanation for not listing fraud on his SCA as the reason for his UOTHC discharge is implausible and not credible.

Moreover, Applicant’s attempt to mislead the Government regarding the basis for this UOTHC discharge did not end with the submission of his SCA. Instead, he repeated the lie that he was discharged for adultery to the background investigator. His attempt to mislead the Government in an attempt to obtain a security clearance continued in his notarized Answer, where he claimed that he was under the impression that the Article 32 (investigation) preliminary hearing was an administrative proceeding.

Additionally, I have considered that Applicant’s past criminal conduct was motivated, in part, by financial stress. Applicant’s recent submission of a false SCA was also motivated by financial pressures.

The personal conduct guideline sets forth a number of mitigating conditions. I have considered all the mitigating conditions and none apply. Applicant’s falsification of his SCA is recent and was part of an ever escalating plan to mislead the Government regarding his past, namely, that he defrauded the U.S. Government.

⁹ See generally ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁰ I hereby incorporate my comments under Guidelines F and E. I have considered all the favorable and extenuation factors in this case, to include Applicant's combat service. In addition, Applicant's past criminal conduct would normally be mitigated by the passage of time. However, in falsifying his SCA, Applicant has again exhibited the same poor judgment and untrustworthiness that led to his adverse discharge from the military. His recent actions were again due, in part, to his poor finances that have persisted for years. Overall, the record evidence leaves me with doubts regarding Applicant's eligibility for access to classified information.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-d:	For Applicant
Subparagraph 1.e:	Withdrawn
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant ¹¹
Subparagraph 2.b:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹⁰ The non-exhaustive list of adjudicative factors are: (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.

¹¹ Although factual allegations can raise security concerns under more than one guideline and Applicant's poor finances were a clear motivation in his decision to falsify his SCA, the security concern arising from his poor financial situation was adequately dealt with under Guideline F.