



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



In the matter of:)
)
) ISCR Case No. 18-00982
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

June 5, 2019

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines J (criminal conduct), F (financial considerations), and E (personal conduct). Clearance is denied.

Statement of the Case

On January 29, 2016, Applicant submitted a Questionnaire for National Security Positions (SF-86). On April 24, 2018, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, F, and E. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On May 5, 2018, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated September 19, 2018, was provided to him by letter that same day. Applicant received the FORM on October 19, 2018. He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not

submit any information within the 30-day period. On January 30, 2019, the case was assigned to me.

Findings of Fact

Background Information¹

Applicant is a 57-year-old welder, who was unemployed at the time he completed his SF-86. He seeks a security clearance to secure employment with a Government contractor.

Applicant was awarded an associate's degree in 1991, and has earned various welding and construction-related certifications. Applicant married in 1991 and separated in 1999. The FORM does not provide any further information regarding the status of his marriage. Applicant has four adult children.

Criminal Conduct

Applicant's SOR lists 18 separate allegations under this concern. He admitted to all but two of the allegations.

Summarized, those allegations are: (1) in 1986, arrested and charged with possession of narcotics; (2) in July 1993, arrested and charged with carrying a firearm without a license; (3) in February 1994, arrested and charged with carrying a firearm without a license; (4) in June 1994, arrested and charged with felony robbery, felony burglary, theft by unlawful taking, unlawful restraint, robbery, recklessly endangering, felony criminal conspiracy, and possessing an instrument of a crime (claimed these charges were dismissed); (5) in November 1994, arrested and charged with two felony counts of violating the state's Controlled Substance, Drug, Device, and Cosmetic Act;

(6) In May 1995, arrested and charged with two counts of possession of cocaine, four counts of felony possession with intent to manufacture or distribute, and felony criminal conspiracy; (7) in September 1996, arrested and charged with cruelty to a child and under the influence of a controlled substance; (8) In January 1997, arrested and charged with two counts of felony criminal mischief and two counts of felony criminal trespass; (9) in March 2001, arrested and charged with three felony counts of violating the state's Controlled Substance, Drug, Device, and Cosmetic Act; (10) in April 2003, arrested and charged with two counts of manufacture or distribute possession with intent to manufacture or distribute, and possession of a controlled substance;

(11) in May 2003, arrested and charged with two felony counts of violating the state's Controlled Substance, Drug, Device, and Cosmetic Act; (12) in September 2003, arrested and charged with three felony counts of violating the state's Controlled

¹ The limited background information regarding Applicant was derived from the FORM and was the most current information available.

Substance, Drug, Device, and Cosmetic Act, resisting arrest, and disorderly conduct; (13) in July 2004, arrested and charged with three counts of robbery (he denied this allegation); (14) in February 2011, arrested and charged with carrying a firearm without a license, receiving stolen property, disorderly and hazardous conduct, and carrying a loaded weapon; (15) in February 2012, arrested and charged with two felony counts of violating the state's Controlled Substance, Drug, Device, and Cosmetic Act, disorderly conduct, scattering rubbish, carrying a firearm without a license, receiving stolen property, disorderly and hazardous conduct, and carrying a loaded weapon;

(16) in January 2013, arrested and charged with carrying a firearm without a license, possess-use-transfer of a firearm, resisting arrest, escape, possessing prohibited and offensive weapons, and carrying a loaded weapon; (17) in April 2014, arrested and charged with tampering or fabricating evidence, violating the state's Controlled Substance, Drug, Device, and Cosmetic Act, and driving under the influence of alcohol or a controlled substance; and (18) currently on probation until September 2021.

These allegations are established through Applicant's admissions and evidence submitted by the Government. (SOR ¶¶ 1.a – 1.r; Items 2 - 5)

Applicant submitted no mitigating evidence in his SOR answer to suggest that he had overcome his 30-year history of criminal behavior from 1986 to 2014, other than a statement in his SOR answer, "I no longer live that destructive lifestyle." (Item 2)

Financial Considerations

Applicant's SOR lists five separate allegations under this concern. He admitted all of the allegations.

Summarized, those allegations are: (1) owes the Federal Government approximately \$23,000 for delinquent taxes for tax years 2011, 2012, and 2014; (2) has an unpaid \$3,434 hospital medical collection account; (3) has an unpaid \$555 medical collection account; (4) has an unpaid \$542 medical collection account; and (5) has an unpaid \$535 medical collection account.

These debts are established by Applicant's admissions and evidence submitted by the Government. (SOR ¶¶ 2.a – 2.e; Items 2 - 4, 6, 7)

When queried about nonpayment of taxes during his Office of Personnel Management Personal Subject Interview, Applicant explained he was going from job to job as a contract employee and lost his tax paperwork, and then forgot about filing his taxes. Applicant claimed that he contacted the IRS and started the process to file and pay his back taxes. The investigator discussed other accounts alleged during those interviews. (Item 4) Applicant submitted no mitigating evidence that addressed any of the allegations raised under this guideline.

Personal Conduct

Applicant's SOR lists seven separate allegations under this concern. He admitted all of the allegations.

Summarized those allegations are: (1) the information alleged under criminal and personal conduct was cross-alleged under this concern; (2) used illegal drugs with varying frequency between 1988 until at least July 2015; (3) consumed alcohol at times to the point of intoxication with varying frequency from 1991 until at least April 2014; (4) more than one of the arrests alleged under criminal conduct involved excessive consumption of alcohol and/or use of illegal drugs; (5) fired in June 2011 for failure to follow safety rules; (6) fired in April 2014 for abusing sick leave for which some of the abuse was related to excessive drinking; and (7) fired or quit in lieu of being fired in July 2015 for testing positive on a drug test.

These allegations are established through Applicant's admissions and evidence submitted by the Government. (SOR ¶¶ 3.a – 3.g; Items 2 - 5) Applicant submitted no mitigating evidence that addressed any of the allegations raised under this guideline.

Department Counsel's FORM discussed specific shortcomings of Applicant's answer. He further emphasized long-standing DOHA case law that it is necessary for applicants to provide mitigating documentation. As noted, Applicant did not submit any additional information within the 30-day period following his receipt of the FORM.

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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 national security eligibility will be resolved in favor of the national security.”

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Criminal Conduct/Financial Considerations/Personal Conduct

AG ¶ 30 articulates the security concern for criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of

whether the individual was formally charged, prosecuted, or convicted;
and

(c) individual is currently on parole or probation.

Based on the evidence contained in the record under criminal conduct, AG ¶¶ 31(a), 31(b), and 31(c) are applicable. Further review is necessary.

Four potential criminal conduct mitigating conditions are listed under AG ¶ 32:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 18 articulates the security concern for financial problems:

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.

AG ¶ 19 describes three conditions that could raise a security concern and may be disqualifying 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; and

(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.

Based on the evidence contained in the record under financial considerations, AG ¶¶ 19(a), 19(b), 19(c), and 19(f) are applicable. Further review is necessary.

AG ¶ 20 lists seven potential mitigating conditions:

(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.

AG ¶ 15 articulates the security concern for 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. 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 three conditions that could raise a security concern and may be disqualifying in this case:

(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 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.

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

Based on the evidence contained in the record under personal conduct, AG ¶¶ (c), (d) (1)-(4), and (f) are applicable. Further review is necessary.

Seven potential personal conduct mitigating conditions are listed under AG ¶ 17:

(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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 caused 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 activity 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.

Inasmuch as Applicant submitted no mitigating evidence in response to the SOR or the FORM, none of the potential mitigating conditions were established under criminal conduct, financial considerations, or personal conduct.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for

access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 5 (App. Bd. Sept. 24, 2013).

In summary, no mitigating conditions fully apply. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guidelines J, F, and E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Without other information suggesting his long-standing problems are being addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against Applicant.

Applicant has a criminal history spanning over thirty years for which he currently remains on probation. This history includes multiple arrests for drug-related offenses, multiple arrests for alcohol-related offenses and multiple arrests for illegal possession of a firearm as a convicted felon. Applicant’s history of convictions and his pattern of behavior continue to call into question his ability and willingness to comply with laws, rules, and regulations. Although Applicant now claims that he has moved beyond the events from his past, the passage of time is insufficient to mitigate his extensive criminal history. Additionally, Applicant remains on probation, which reflects his state’s ongoing concern regarding his behavior and makes his recent good behavior less probative of rehabilitation.

In addition to Applicant’s extensive criminal history, he has unresolved debts, most notably an estimated \$23,000 he owes in back taxes for multiple tax years. He claimed that he filed his returns, but provided no information regarding when the filings occurred or the amount currently owed; nor did he provide any information regarding his non-tax debts. The Appeal Board has consistently held that a person who is unwilling to fulfill his tax obligations “does not demonstrate the high degree of good judgment and reliability required of persons granted to classified information.” (ISCR Case No. 12-09545 at 3 (App. Bd. Dec. 21, 2015); ISCR Case No. 14-02694 at 4 (Dec. 9, 2015); ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015); ISCR Case No. 14-03358 at 3 (App. Bd. Oct 9, 2015); ISCR Case No. 98-0810 at 4 (App. Bd. June. 8, 2000).

Applicant has exhibited a long history of alcohol and drug abuse. His criminal past and substance abuse problems led to his terminations from various employers. Again, enough time has not elapsed and further evidence is required to demonstrate sobriety and responsible conduct.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, or mitigate the security concerns identified. By failing to provide such information, and in relying on a limited explanation lacking sufficient detail to fully establish mitigation, criminal conduct, financial considerations, and personal conduct security concerns remain.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.r:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a – 2.e:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a - 3.g:	Against Applicant

Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant national security eligibility. Clearance is denied.

ROBERT TUIDER
Administrative Judge