



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-01587
)	
Applicant for Security Clearance)	

Appearances

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

02/21/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on January 29, 2017. On June 26, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and F. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on August 15, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on August 30, 2018. On August 31, 2018, a complete copy of the file of relevant

material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on September 7, 2018, and did not respond. The case was assigned to me on January 17, 2019.

The FORM included Items 5 and 6, summaries of personal subject interviews (PSI) conducted on October 6, 2014 and December 27, 2017. The PSI summaries were not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summaries; make any corrections, additions, deletions or updates; or object to consideration of the PSI summaries on the ground that they were not authenticated. I conclude that he waived any objections to the PSI summaries by failing to respond to the FORM. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). See ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018) (holding that it was reasonable for the administrative judge to conclude that any objection had been waived by an applicant's failure to object after being notified of the right to object).

Findings of Fact¹

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 47-year-old custodian employed by a community rehabilitation foundation. He has worked on a military installation since August 2016. He did not complete high school. He had kidney failure in June 2000, was hospitalized, underwent a kidney transplant and dialysis, and was supported by Social Security disability payments. He was incarcerated from November 2010 to July 2012 and unemployed after his release from prison until December 2012. He worked as a cook for a private-sector employer from December 2012 to February 2013. He worked as a custodian for his current employer from February 2013 to November 2014. He applied for a security clearance in December 2014, but it was denied. (Form Item 6 at 7.) He worked as a custodian in the private sector from November 2014 until he began his current employment.

Applicant married in August 2009 and separated in November 2010. He has no contact with his wife and does not know where she lives. He is still married because he cannot afford a divorce. (FORM Item 6 at 2.) He has four adult children from other previous relationships and a nine-year-old grandchild who lives with him. (FORM Item 4 at 24-26; FORM Item 6 at 2.)

¹ Applicant's personal information is extracted from his security clearance application (FORM Item 4) unless otherwise indicated by a parenthetical citation to the record.

Between 1992 and 1995, Applicant was arrested for numerous traffic offenses, including driving without a license, driving while under the influence, and leaving the scene of an accident. (FORM Item 7 at 1-2.) These offenses were not alleged in the SOR.

Applicant was arrested in April 2003 for three counts of negotiating worthless checks. He had an acquaintance who printed fake checks, using the names of businesses listed in the phone book. Applicant cashed the checks and gave his acquaintance a percentage of the proceeds. He was arrested after his third transaction with a fake check. He was convicted and sentenced to imprisonment for 20 days and a fine. He was placed on probation for two years and ordered to pay restitution. (FORM Item 8 at 4.) This offense is alleged in SOR ¶ 1.a.

Applicant was arrested in September 2006 for felony possession of a forged check for \$418. In the October 2014 PSI, he told an investigator that he received the check from a cousin and thought it was valid. (Form Item 5 at 4.) He was still on probation, which was revoked. He was convicted and sentenced to imprisonment for five years,² fined, and required to pay restitution. (FORM Item 8 at 4-5.) He was on probation from July 2007 to November 2010. (FORM Item 3 at 32.) This offense is alleged in SOR ¶ 1.b.

Applicant was charged with felony possession of a forged instrument in January 2010. He was convicted and sentenced to imprisonment for five years, fined, and required to pay restitution. He was incarcerated from November 2010 to July 2012. (FORM Item 3 at 31; FORM Item 7 at 4.) This offense is alleged in SOR ¶ 1.c.

During the October 2014 PSI, Applicant told an investigator that he committed the bad-check crimes because he was unemployed and needed money. He also told the investigator that being incarcerated gave him time to reflect on his life and led him to make better life choices. (FORM Item 6 at 4.)

Applicant's criminal record involving financial crimes is alleged in SOR ¶¶ 1.a-1.c under Guideline J and cross-alleged in SOR ¶ 2.a under Guideline F. In addition, SOR ¶¶ 2.b-2.e allege four delinquent debts reflected in Applicant's credit report from April 2018 (FORM Item 11.). The evidence concerning these debts is summarized below.

SOR ¶ 2.b: child-support arrearage of \$155,800. Applicant owes child support for three children. His credit reports reflect that in March 2015, his arrearage was \$14,065. (FORM Item 9 at 1.) In April 2017, it was \$150,597. (FORM Item 10 at 3.) In April 2018, it was \$155,800. (FORM Item 11 at 1.) Court records reflect as of June 25, 2018, he owed \$91,672 for Child #1; \$52,663 for Child #2; and \$12,813 for Child #3. (Attachments to Answer, pages 1-5.) During the December 2017 PSI, he told the investigator that he fell behind on child-support payments while he was hospitalized and unable to work. He told the investigator that he is paying a total of \$150 per month, which is automatically deducted from his pay. He is making no progress, because his credit reports reflect that

² The SOR alleges that he was sentenced to imprisonment for three years, suspended, and probation for three years.

the amount of arrearage is increasing. He told an investigator that he expects to be paying the arrearage for the rest of his life. (FORM Item 6 at 7.)

SOR ¶ 2.c: telecommunications bill placed for collection of \$431. During the December 2017 PSI, Applicant told an investigator that this debt was for unreturned equipment and that he had forgotten about it. In his answer to the SOR, he provided evidence of a payment agreement providing for monthly \$72 payments and evidence of payments for July through December 2018. (Answer to SOR at 6-7.) This debt is being resolved.

SOR ¶ 2.d: credit-card account past due for \$75, with a total balance of \$409. In his answer to the SOR, Applicant stated that he was making payments on this debt under a verbal agreement to pay \$50 per month. He submitted no documentation of an agreement or any payments.

SOR ¶ 2.e: credit-union charged off for \$250. During the December 2017 PSI, Applicant told the investigator that this debt was a “crunch loan” that he had forgotten about. (FORM Item 6 at 8.) In his answer to the SOR, he stated that he was making weekly payments of \$25. He submitted a receipt for one \$25 payment in July 2018, but no evidence of any further payments. (Answer to SOR at 8)

In the October 2014 PSI, Applicant told a security investigator that his financial situation was “not very good,” and he was barely able to pay his bills on time. (FORM Item 5 at 6.) In the December 2017 PSI, he told a security investigator that his overall financial situation is “good,” but he provided no specific information about his income and expenses. (FORM Item 6 at 9.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: “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.” Applicant’s criminal record establishes the following disqualifying conditions under this guideline:

AG ¶ 31(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; and

AG ¶ 31(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.

The following mitigating conditions are potentially relevant;

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; and

AG ¶ 32(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 ¶¶ 32(a) and 32(d) are established. Applicant's last criminal conduct was more than nine years ago. He has completed his prison sentences, has not engaged in any further criminal conduct, and has been employed continuously since he was released from prison in July 2012.

Guideline F, Financial Considerations

The security concern under this guideline 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the FORM establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

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

AG ¶ 19(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.

The following mitigating conditions are potentially applicable:

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

AG ¶ 20(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;

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

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making recurrence unlikely.

AG ¶¶ 20(b) and 20(d) are established for the child-support arrearage alleged in SOR ¶ 2.b and the telecommunications bill alleged in SOR ¶ 2.d. His child-support arrearage was caused in part by his unemployment due to a serious illness and a substantial recovery period. His unemployment during his incarceration was due to his criminal conduct and was not a condition largely beyond his control. He has acted

responsibly toward his child-support arrearage by making regular payments by automatic deduction. He is making regular payments on the telecommunications bill.

These two mitigating conditions are not established for the credit-card account alleged in SOR ¶ 2.d and the “crunch loan” alleged in SOR ¶ 2.e. He submitted no evidence of payments or a payment agreement for the credit-card account and no evidence of continuing payments on the debt to the credit union. However, the small amounts of these debts have minimal security significance.

AG ¶ 20(e) is not established. Applicant has not disputed any of the debts alleged in the SOR.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guidelines J and F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d).

I have incorporated my comments under Guidelines J and F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is a convicted two-time felon, but a security clearance adjudication is not a punishment tool for criminal conduct. He apparently learned his lesson in prison and has been a law-abiding citizen for nine years. His decision to voluntarily take custody of his nine-year-old grandson reflects his current sense of responsibility. His child-support arrearage is overwhelming, but he has been making regular payments while working at minimum-wage jobs.

A security clearance adjudication is an evaluation of an individual’s judgment, reliability, and trustworthiness. It is not a debt-collection procedure, nor is it intended to punish previous criminal behavior. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant has demonstrated that he has become a responsible, reliable, and trustworthy citizen.

³ The 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.

After weighing the disqualifying and mitigating conditions under Guidelines J and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his history of criminal conduct and his delinquent debts.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Paragraph 2, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 2.a-2.e: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge