



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 18-02399
)
 Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

03/07/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 10, 2016. On October 19, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, F, and E. 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), 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 November 8, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's

written case on November 30, 2018. On December 7, 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 December 17, 2018, and did not respond. The case was assigned to me on February 12, 2019.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.c and 2.a-2.o. He denied the allegations in SOR ¶¶ 1.a, 1.b, and 3.b. He did not specifically admit or deny the allegation in SOR ¶ 3.a, which cross-alleges SOR ¶¶ 1.a, 1.b, 1.c, and 2.b. His admissions are incorporated in my findings of fact.

Applicant is a 39-year-old sheet metal worker employed by a defense contractor since November 2016. He served in the U.S. Navy from March 2003 to September 2016. While on active duty, he received nonjudicial punishment for misuse of a government credit card by buying dinner for family members. (FORM Item 2 at 46.) He was reduced from petty officer first class (E-6) to petty officer second class (E-5) and restricted to the barracks for 21 days. (FORM Item 3, Personal Subject Interview in February 2018 (PSI) at 6.)

On April 30, 2013, Applicant's wife sought treatment at a military medical facility for neck pain. She told a member of the medical staff that Applicant had choked her during an argument. She declined to make a written statement. Applicant was interviewed and admitted grabbing her by the neck on several occasions during arguments in March and April 2013. He was required to obtain counseling and attend an anger management course. No disciplinary or criminal action was taken.

In June 2016, Applicant was arrested for felony embezzlement. He was working part time at a department store and he bought multiple items, including a television set and cellphone, on layaway. He entered false information into the store's data system reflecting that he was making payments on the items. He also took cash totaling about \$800 from a cash register. When he was interviewed by store investigators in June 2016, he attributed his criminal conduct to financial problems caused by his reduced income after he was demoted for misconduct. (FORM Item 5.)

In April 2017, Applicant was convicted of felony embezzlement from the department store. He was sentenced to 121 days in jail and placed on probation for three years, until April 2020. He was ordered to pay restitution of \$4,860. He was fired from his part-time job and prohibited from entering the store's premises. (FORM Item 6 at 3; FORM Item 7.) In the PSI and Applicant's answer to the SOR, he stated that the offense was reduced from a felony to a misdemeanor after he made restitution. There are no court documents in the record reflecting a reduction of the offense to a

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

misdeemeanor. In September 2016, he was discharged from the Navy with an “other than honorable” discharge. He was unemployed after his discharge until he was hired for his current job. He has never held a security clearance.

Applicant has taken college courses since October 2016 but has not received a degree. He married in December 2004, divorced in April 2007, and married his current spouse in December 2011. He has a seven-year-old son and three stepchildren, ages 21, 17, and 11.

The SOR ¶¶ 1.c-1.o alleges 13 delinquent debts totaling about \$33,000, which are reflected in credit reports from March 2017 (FORM Item 9) and November 2018 (FORM Item 10). The evidence concerning these debts is summarized below.

SOR ¶¶ 1.c and 1.k: two unsecured loans from the same creditor charged off for \$9,454 and \$3,051. The November 2018 credit report reflects that both accounts are current. (FORM Item 10 at 4.)

SOR ¶ 1.f: account past due for \$3,418. In Applicant’s answer to the SOR, he claimed that this debt was paid, but he submitted no documentation to support his claim.

SOR ¶ 1.g: credit-card account placed for collection of \$452. In Applicant’s answer to the SOR, he submitted documentary evidence showing that he was making payments on this debt.

Applicant submitted no evidence of payments, payment agreements, or other resolution of the delinquent debts alleged in SOR ¶ 1.d (unsecured loan placed for collection of \$6,372); ¶ 1.e (unsecured loan past due for \$3,556); ¶ 1.h (medical bill placed for collection of \$264); ¶ 1.i (credit-card account charged off for \$423); ¶ 1.j (dental bill placed for collection of \$235); ¶ 1.l (unsecured loan charged off for \$4,464); ¶ 1.m (unsecured loan placed for collection of \$1,257); ¶ 1.n (credit-card account placed for collection of \$468), and ¶ 1.o (credit-card account placed for collection of \$479).

When Applicant submitted his SCA in November 2016, he did not disclose any of the debts alleged in the SOR. He disclosed his misuse of the government credit card and an unalleged delinquent car loan for \$10,000 that was resolved by repossession. He answered “no” to all the questions in Section 26, which included questions asking if, in the past seven years, he had defaulted on any type of loan; had bills or debts turned over to a collection agency; had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; or had been over 120 days delinquent on any debt not previously entered. (FORM Item 2 at 47-49.) In the PSI, he did not disclose the delinquent debts alleged in SOR ¶¶ 1.c-1.o until the investigator confronted him with the evidence. (PSI at 11.) In his answer to the SOR, he denied intentionally falsifying his SCA, claiming that he was confused by the questions.

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 SOR alleges that Applicant was arrested in May 2013 and charged with domestic assault (SOR ¶ 1.a); arrested in September 2013 and charged with domestic battery (SOR ¶ 1.b); and was arrested in June 2016, charged with felony burglary, convicted of embezzlement, and sentenced to 121 days in jail and probation for three years, until April 2020 (SOR ¶ 1.c).

SOR ¶ 1.a is partially established by Applicant’s admission that he choked his spouse during arguments on several occasions during March and April 2013, but there is no evidence that he was arrested or formally charged. There is no evidence in the record supporting SOR ¶ 1.b. SOR ¶ 1.c is established by Applicant’s admissions and the documentary evidence in the record.

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.”

The evidence 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;

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;

AG ¶ 31(c): individual is currently on parole or probation; and

AG ¶ 31(e) discharge or dismissal from the Armed Forces for reasons less than “Honorable.”

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.

The above mitigating conditions are not established. Applicant's criminal conduct was recent and did not occur under unusual circumstances. Disposition of the criminal charges was pending when he submitted his SCA, and he is still on probation until April 2020. He presented no evidence of his duty performance in his current job or evidence of community involvement.

Guideline F, Financial Considerations

The SOR cross-alleges Applicant's conviction and sentencing for embezzlement (SOR ¶ 2.a) and his nonjudicial punishment for misusing a government credit card (SOR ¶ 2.b). It also alleges 13 delinquent debts (SOR ¶¶ 2.c-2.o).

The evidence establishes that the delinquent accounts alleged in SOR ¶¶ 2.c and 2.k are current, and that Applicant is making payments on the delinquent debt alleged in SOR ¶ 2.g. He presented no evidence of payments, payment agreements, or other resolution of the debts alleged in SOR ¶¶ 2.d-2.f, 2.h-2.j, or 2.l-2.o.

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).

The evidence establishes the following disqualifying conditions under this guideline:

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

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

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; and

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

AG ¶ 20(a) is not established. Applicant's misuse of a government credit card, embezzlement from an employer, and delinquent consumer debts are recent, numerous, and did not occur under circumstances making recurrence unlikely.

AG ¶ 20(b) is not established. Applicant's income reduction while on active duty and his loss of a second job were due to his own misconduct. He submitted no evidence of any conditions that were largely beyond his control.

AG ¶ 20(c) is not established. Applicant submitted no evidence of financial counseling, and his financial problems are not yet under control.

AG ¶ 20(d) is established for the delinquent debts alleged in SOR ¶¶ 1.c, 1.g, and 1.k. It is not established for the other delinquent debts alleged in the SOR. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, pay the debts alleged in the SOR first, or establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has made some progress in resolving his delinquent debts, but he has not yet established a track record of responsible financial conduct.

Guideline E, Personal Conduct

SOR ¶ 3.a cross-alleges SOR ¶¶ 1.a, 1.b, 1.c, and 2.b. SOR ¶ 3.b alleges that Applicant falsified his SCA by not disclosing the debts alleged in SOR ¶¶ 2.d-2.o. The concern under this guideline 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. . . .

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's explanation for not disclosing his delinquent debts in his SCA is implausible and unconvincing. The only delinquent debt he disclosed in his SCA was a car repossession that had been resolved. He knew that he was in financial distress. During his part-time employer's investigation of his embezzlement in June 2016, five months before he submitted his SCA, he attributed his criminal conduct to his financial problems after his demotion for misconduct. His intentional failure to disclose his delinquent debts in his SCA establishes the disqualifying condition in 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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant's domestic assault in May 2013, misuse of a government credit card in June 2015, and embezzlement in 2016 establish the following disqualifying conditions:

AG ¶ 16(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;

AG ¶ 16(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; . . . (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources; and

AG ¶ 16(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

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant did not provide any information about the delinquent debts until he was confronted with the evidence during the PSI.

AG ¶ 17(b) is not established. Applicant's falsification was arguably infrequent, but it was recent and did not happen under unique circumstances. Falsification of an SCA is not minor, because it "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

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).²

I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

After weighing the disqualifying and mitigating conditions under Guidelines J, F, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct, delinquent debts, and falsification of his SCA.

Formal Findings

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

| | |
|--|-------------------|
| Paragraph 1, Guideline J (Criminal Conduct): | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | Against Applicant |

² 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.

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

Subparagraphs 2.a and 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraphs 2.d-2.f: Against Applicant

Subparagraph 2.g: For Applicant

Subparagraphs 2.h-2.j: Against Applicant

Subparagraph 2.k: For Applicant

Subparagraphs 2.l-2.o: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 3.a and 3.b: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge