



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 19-00192
)
 Applicant for Security Clearance)

Appearances

For Government: Dan O'Reilly, Esq., Department Counsel
For Applicant: *Pro se*

10/07/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines 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 April 15, 2016. On April 30, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines 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), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on May 25, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 28, 2019, and

the case was assigned to me on July 23, 2019. On August 7, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for August 28, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or any documentary evidence. I kept the record open until September 13, 2019, to enable him to present documentary evidence. He timely submitted Applicant's Exhibits A through D, which were admitted without objection. DOHA received the transcript (Tr.) on September 9, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.b, 1.c, 1.e-1.h, and 2.c. He denied the allegations in SOR ¶¶ 1.a, 1.d, 1.i-1.l, 2.a, 2.b, and 2.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 43-year-old senior systems administrator employed by a defense contractor since March 2017. He has held a security clearance since September 1996.

Applicant married in May 2004 and separated in 2017. (Tr. 19.) He and his wife have two children, ages 13 and 19, who live with Applicant. (Tr. 56.)

Applicant served on active duty in the U.S. Air Force from February 1996 to December 1999. In December 1997, he received nonjudicial punishment for unauthorized absence and making a false official statement. He received a suspended reduction in rank, forfeiture of \$50 pay, and 15 days of extra duty. (GX 12 at 7.) In late 1998, he was convicted by a general court-martial of wrongful use of cocaine. He was reduced to the lowest enlisted rank, restricted to the limits of his duty station, and ordered to perform hard labor without confinement for 45 days. (GX 12 at 4.) In June 1999, he was administratively discharged for misconduct and received a general discharge under honorable conditions. (GX 12 at 2.)

The record does not reflect Applicant's employment history from June 1999 to July 2007. He worked for non-government employers from August 2007 to September 2013. He worked for another defense contractor from September 2013 to March 2016, and was terminated for chronic tardiness. In his SCA, he stated that he left this employer because his contract ended. At the hearing, he admitted that he knew he had been fired, and he admitted that he falsified his SCA when he stated that he left this job because his contract ended. (Tr. 35.)

Applicant worked for another defense contractor from April to November 2016, and he was fired for submitting a fraudulent information technology (IT) certification. (GX 2; GX 11) He denied that he submitted a fraudulent certificate, and explained that he simply submitted his previous expired certification. (Tr. 21-23.) He was unemployed from November 2016 until he was hired for his current job. (GX 1 at 10.)

Applicant testified that he had three surgeries for herniated disks in his back between 2003 and 2012, and he was prescribed opiate medications following his surgery. He believed that he became addicted to opiates, but he was unable to obtain professional help in overcoming his addiction, because he was using the opiates in accordance with his prescriptions. He stopped taking the medications in 2017, because they adversely affected his work, his financial situation, and his marriage. (Tr. 23-31.) He provided no documentation to support his testimony.

The SOR alleges 12 delinquent debts reflected in credit reports from June 2019, January 2019, November 2017, and June 2016 (GX 3-6), and various court records (GX 7-10). The evidence concerning these debts is summarized below.

SOR ¶ 1.a: judgment for \$1,805, filed in 2014. Applicant testified that he was unaware of this judgment when he submitted his SCA, and he had not made any recent efforts to identify it. (Tr. 35-36; GX 7.) It is not resolved.

SOR ¶ 1.b: judgment for \$1,884, filed in 2015. Applicant testified that he believes this judgment is for the debt alleged in SOR ¶ 1.f and that the original creditor was a dentist. (Tr. 37; GX 8.)

SOR ¶ 1.c: judgment for \$961, filed in 2017 and satisfied by garnishment. This debt was for homeowners' association dues, and it was satisfied by garnishment of Applicant's bank account in June 2018. (GX 9.) It was incurred because Applicant and his wife each thought that the other was paying it. (Tr. 39.)

SOR ¶ 1.d: home-mortgage loan past due for \$3,030, with a balance of \$223,668. Applicant testified that this loan became delinquent because he and his wife were separated, and each believed that the other was making the payments. (Tr. 14) He fell behind in April 2016. He contacted the lender and applied for hardship assistance, which was granted, and his monthly payments were reduced. (GX 13 at 5.) He testified that he has been making regular payments and the account is current. (Tr. 42.) The June 2019 credit report reflects that the payments were current when the debt was transferred to another lender in April 2019. (GX 3 at 3.)

SOR ¶ 1.e: medical debt placed for collection of \$2,223. This debt was placed for collection in July 2017. (GX 4 at 2.) The creditor obtained a judgment against Applicant for this debt in March 2019. (GX 10.) Applicant paid it in full on August 29, 2019. (AX A.)

SOR ¶ 1.f: charge account placed for collection of \$2,298. On September 14, 2018, Applicant made a payment agreement providing for monthly \$50 payments. As of September 3, 2019, his balance due on this debt was \$1,698. Although Applicant testified that he thought this debt might be a dental bill, his documentation reflects that the original creditor is a discount department store. (GX 3 at 1; AX C.)

SOR ¶ 1.g: medical debt placed for collection of \$543. Applicant paid this debt in full on August 30, 2019. (AX B.)

SOR ¶¶ 1.h and 1.i: medical debts placed for collection of \$190 and \$166. Applicant paid these debts in full on September 13, 2019. (AX D.)

SOR ¶ 1.j: credit-card account charged off for \$3,859 in July 2013. This debt is not being resolved. Applicant testified that he was making monthly \$50 payments on this debt, but his documentation of the monthly payments reflects that the payments were for the debt alleged in SOR ¶ 1.f. (Tr. 47.)

SOR ¶¶ 1.k and 1.l: collection accounts for \$638 and \$489. Applicant testified that both collection accounts were for medical bills and that they have been paid in full. (Tr. 48.) He did not provide any documentation supporting his testimony.

When Applicant submitted his SCA in April 2017, he answered “No” to a question, “Have you EVER been charged with an offense involving alcohol or drugs?” (Capital letters were used for emphasis in the SCA.) He did not disclose that he was charged with wrongful use of cocaine and convicted by a court-martial in 1998. (GX 1 at 26.) When he was interviewed by a security investigator in August 2017, he voluntarily disclosed his nonjudicial punishment, but he did not disclose his court-martial conviction until he was confronted with the evidence. He told the investigator that he did not disclose the conviction in his SCA because it was embarrassing. (GX 13 at 8.) At the hearing, he testified that he did not disclose the conviction because he did not understand the question in the SCA. (Tr. 15.)

Applicant also answered “No” to the question in the SCA asking if he had any judgments entered against him in the last seven years. (GX 1 at 30.) He testified that he was unaware of the judgments alleged in the SOR when he submitted his SCA. (Tr. 33.) He became aware of the judgment for homeowners’ association dues when his bank account was garnished in June 2018 to satisfy the judgment. (Tr. 39-40.)

Applicant also answered “No” to the questions in the SCA about delinquencies involving routine accounts during the last seven years. (GX 1 at 30.) When asked why he did not disclose any of his delinquent debts, he responded, “I don’t really have an answer for that.” (Tr. 34.) His answer to this question in the SCA is not alleged in the SOR.

Applicant currently earns \$102,000 per year. (Tr. 20.) He has about \$8,000 in a savings account and about \$28,000 in retirement accounts. (Tr. 53-54.) He hired a law firm to dispute some of his debts, but he has never sought or obtained financial counseling. (Tr. 51.)

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 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. 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. . . .

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).

At the hearing, Applicant testified that he believed the judgment alleged in SOR ¶ 1.b duplicated the dental bill alleged in SOR ¶ 1.f. He submitted no documentation to support his belief. The court records reflect that the creditor who obtained the judgment is a bank, likely the issuer for a credit-card account. Applicant's documentation in AX C reflects that the original creditor for the debt alleged in SOR ¶ 1.f is a discount department store. The judgment in SOR ¶ 1.b was filed in April 2015, and the debt alleged in SOR ¶ 1.f was referred for collection in July 2017. (GX 3 at 1; GX 8.) Applicant has not established that the debts alleged in SOR ¶¶ 1.b and 1.f are duplicates.

Applicant's admissions and the documentary evidence submitted at the hearing establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). 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 them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's marital breakup in 2017 was a condition largely beyond his control, and it apparently contributed to the past-due home-mortgage payments and delinquent homeowners' association dues. He acted responsibly regarding the past-due mortgage payments, but not the delinquent association dues, which were collected by garnishment. His involuntary discharge from the Air Force, termination of employment for tardiness, and termination for submitting a false IT certification were not conditions largely beyond his control, but rather the consequences of his derelictions and misconduct. Opiate addiction would qualify as a condition largely beyond his control, but he has not provided corroborating evidence to support his claim of opiate addiction.

AG ¶ 20(c) is not established. Applicant has not sought or received financial counseling.

AG ¶ 20(d) is established for the debts alleged in SOR ¶¶ 1.c and 1.f. Applicant was current on his mortgage payments when the mortgage was sold to another lender in April 2019. He began making regular monthly payments on the debt alleged in SOR ¶ 1.f in September 2018, well before the SOR was issued.

AG ¶ 20(d) is not established for the judgment alleged in SOR ¶ 1.d, because it was resolved by involuntary garnishment. Payment by involuntary garnishment, "is not the same as, or similar to, a good-faith initiation of repayment by the debtor." ISCR Case No. 09-05700 (App. Bd. Feb. 24, 2011).

AG ¶ 20(d) is not established for the debts alleged in SOR ¶¶ 1.g, 1.h, and 1.i. Although they have been paid in full, they were not paid until August and September 2019, after the hearing. Evidence of past irresponsibility is not mitigated by payment of

debts only under pressure of qualifying for a security clearance. Applicants who begin to address their security-significant conduct only when their personal interests are at stake may be lacking in judgment and reliability. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

AG ¶ 20(e) is not established. Applicant admitted all the debts in his response to the SOR. The credit report from January 2019 reflects that Applicant disputed this debt, but the record does not reflect the basis for the dispute, and the debt has been resolved. Applicant could not identify some of the debts at the hearing, but he has not disputed them.

Guideline E, Personal Conduct

The SOR alleges that Applicant deliberately falsified his SCA by failing to disclose that he was charged with and convicted of wrongful use of cocaine while on active duty in the Air Force (SOR ¶ 2.a); by failing to disclose the judgments entered against him (SOR ¶ 2.b); and by failing to disclose that he had been fired from a job in March 2016 (SOR ¶ 2.c). It also alleges that he falsified material facts during an interview with a security investigator in August 2017 by failing to disclose that he had been fired from a job in November 2016 (SOR ¶ 2.d).

Applicant could not explain why he answered “No” to the question in his SCA asking if he had any delinquencies other than the judgments. Although his negative answer was false, it is not alleged in the SOR. Conduct not alleged in the SOR may not be used as an independent basis for denying or revoking a security clearance, but it may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant’s answer to this question in the SCA for these limited purposes.

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. . . .

The relevant disqualifying conditions are:

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; and

AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

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).

I found Applicant's explanation for not disclosing the judgments against him plausible and convincing. He demonstrated repeatedly during the hearing that he did not have a good grasp of his financial situation. His marital break-up contributed to his confusion about joint obligations. However, he has not given plausible and convincing explanations for not disclosing that he was charged with and convicted of a drug offense and not disclosing that he was fired in November 2016. He admitted that he falsified his SCA by not disclosing that he was fired in March 2016. I conclude that SOR ¶ 2.b is not established, but SOR ¶¶ 2.a, 2.c, and 2.d are established and are sufficient to raise the disqualifying conditions in AG ¶¶ 16(a) and 16(b).

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. When Applicant was interviewed by a security investigator in August 2017, he disclosed his nonjudicial punishment, but denied that he had any further criminal conduct while in the Air Force. He did not disclose his conviction for wrongful use of cocaine until he was confronted with the evidence. (GX 13 at 7.) He also denied that he was involuntarily terminated in March 2016. (GX 13 at 6.) He was interviewed again in November 2018 regarding his employment record, and he denied being fired for submitting a forged IT certification. Instead, he told the investigator that he was terminated because he lacked the required certification. (GX 13 at 12.)

AG ¶ 17(b) is not established. Applicant's falsifications in his SCA were not minor. Falsification of an SCA "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) His falsifications were recent because they pertained to his current application for a security clearance. They did not occur under unique circumstances making them unlikely to recur.

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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline F and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines 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 delinquent debts and lack of candor during the security-clearance process.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.c, 1.e, and 1.g-1.i: **Against Applicant**

Subparagraphs 1.d and 1.f: **For Applicant**

Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a, 2.c, and 2.d:	Against Applicant
Subparagraph 2.b:	For 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