



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



In the matter of:)	
)	
)	ISCR Case No. 19-00330
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

11/25/2019

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse), and Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 7, 2017. On February 19, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H 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) effective on June 8, 2017.

Applicant responded to the SOR on March 18, 2019, and requested a hearing before an administrative judge. Department Counsel amended the SOR on April 11, 2019, adding under Guideline H, an allegation of a positive drug test. Applicant answered the

amended SOR on May 14, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 18, 2019, and the hearing was convened on August 5, 2019. Government Exhibits (GE) 1 through 4 with an exhibit list were admitted into evidence without objection. A Department Counsel discovery letter was marked as Hearing Exhibit (HE) 1, and appended to the record. Applicant testified at the hearing, and submitted Applicant's Exhibits (AE) A through C, which were admitted without objection. The record was held open for Applicant to submit any documentary evidence in mitigation. He submitted several documents marked as AE D, and admitted into evidence without objection. DOHA received the hearing transcript on August 15, 2019.

Findings of Fact

Applicant is a 32-year-old aircraft electronics maintenance technician, employed by a government contractor since April 2019. He graduated from high school in 2005, and completed some college credits. He is unmarried, and has two children (ages three and seven years old), one of whom lives with him. Applicant stated he has held a security clearance since 2007 while employed by other government contractors.

The SOR alleges under Guideline H that in October 2016, Applicant used and tested positive for methamphetamine while cleared for access to classified information. Under Guideline F, the SOR alleges a mortgage foreclosure in 2016; a state child support arrearage of \$14,651; and four other collection accounts totaling over \$4,000. Applicant admitted the SOR allegations.

In October 2016, Applicant resigned from a position as a government contractor, stating in his SCA that "it got real political" and "I was unhappy, was time to find something new." (GE 1) In his personal subject interview, Applicant claimed he left the position because the "contract changed three times in the six years he was there," and he denied that drug use while possessing a security clearance was the cause. (GE 2) However, in testimony, Applicant admitted that he was going to be fired from his employment for failure to take a random urinalysis test. He claimed that he could not provide a sufficient amount of urine for the test, and it would be considered a failure to comply. He decided to resign to avoid a "false positive" test and resulting termination. (Tr. 38-40) He claimed it would be a "false positive," because his inability to provide a sample would be considered the same as a positive test. He remained unemployed from October 2016 to December 2016, and lived using money withdrawn from a 401(k) retirement plan and help from his parents. (GE 2)

Applicant claims that after he resigned from his job, he and his live-in girlfriend, the mother of his second child, attended a party where he smoked crystal methamphetamine with her. He stated in his personal subject interview (PSI) that he used the illegal drug because he was "leaving" his job, was behind on his mortgage and threatened with foreclosure, and was paying child support arranges. He rationalized his surrender to peer pressure by declaring "why not, what else do I have to lose." (GE 2) The following day, Applicant argued with his girlfriend over finances. She reported his drug use the previous evening to her ex-husband, who in turn reported it to the state Child Protective Services

(CPS). CPS investigators removed his child from the home, and requested Applicant and his girlfriend submit to a drug test. Applicant refused, but his girlfriend tested positive for methamphetamine. The following day, Applicant submitted a sample, which also tested positive for methamphetamine. Of note, in response to the Government's amended SOR allegation adding Applicant's October 2016 positive drug test, Applicant admitted the allegation but inexplicably claimed in his Answer that there is "no evidence or proof of this," despite admitting to a positive drug test in his SCA. (Amended SOR Answer and GE 1) Applicant admitted that he never weighed the risks of his one-time drug use, and that it resulted in unexpected and disastrous consequences. He vowed to refrain from further illegal drug use.

Applicant appeared in court for a custody hearing, and was ordered to attend counseling and submit to weekly drug tests for one year. (GE 1) Applicant continued to cohabit with his girlfriend until at least May 2017 when he completed his SCA. (GE 1) He completed a year of negative drug tests and family counseling, and was able to recover custody of his child. He claimed that some of the counseling included drug abuse issues.

In October 2016, Applicant was cited by state police for misdemeanor failure to register a vehicle. He was required to appear in court, but he claimed that because he received notice of his child-support arrearage, lost his job, his child, and was about to lose his home, he forgot about the citation. A warrant was issued for his arrest. A similar incident occurred in December 2016, and a second warrant was issued. Applicant finally registered his vehicle in February 2017, and in September 2017, borrowed money from his parents to pay a \$1,200 fine for the citations. These events were not alleged in the SOR. (GE 2)

Applicant claimed that his mortgage became delinquent after he left his employment in October 2016, however he testified that the mortgage account was current to November 2016. Of note, his credit report shows the last activity on the account was in June 2016. (GE3) He noted in his PSI that he was too embarrassed to contact the creditor and did not have the funds to pay the mortgage and his child-support obligations, so he allowed the mortgage to go into foreclosure. In testimony, he claimed that he tried to file a Chapter 13 bankruptcy, but he did not have the requisite income. He also claimed that he tried to refinance the mortgage, but he did not qualify. There is no evidence of a deficiency balance owed.

Applicant testified that his child-support obligation began with a judgment in June 2015, and continued unpaid until September 2016 when his pay was garnished and his tax refunds were seized. Applicant has been making regular monthly payments since September 2016. As of August 2019, he was in arrears for child support totaling \$11,804, and owed a total of \$13,213.

Applicant owes a debt to a phone company that has been placed in collection for \$1,412. (SOR ¶ 2.c) He testified that he disagreed with the amount of the debt and was told by the company that it would be adjusted, but it was not. He eventually agreed with the collection agent to pay, but he has not done so. The debt remains unpaid. Applicant

owes medical debts listed in SOR ¶¶ 2.d and 2.e. He testified that he has not investigated the debts nor has he resolved them. Finally, Applicant owes a bank for overdraft charges and penalties incurred in early 2017. The debt has been placed in collection, and Applicant had not resolved it. He also testified that he is currently behind on his internet service account, and has about \$200 to \$300 in available cash. In 2016, he withdrew about \$14,000 to \$15,000 from his 401(k) retirement plan. He has not had credit counseling.

Applicant provided several character letters from his case worker, coworkers and friends. They generally attest to his work ethic, honesty and trustworthiness. His case worker noted Applicant's behavioral changes after participating in services and completing a parenting course.

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.

National security eligibility 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g., 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; see, AG ¶ 1(d).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and

(c) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted to using methamphetamine in October 2016 while being granted security eligibility, and testing positive for the drug. Disqualifying conditions AG ¶ 25 (a), (b), and (c) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's use of an illegal drug, purportedly after he was unable to give a complete urine sample for an employer-mandated test, and testing positive after first refusing a state-sponsored test, cast doubt on his current reliability, trustworthiness, and good judgment. Applicant admitted to the SOR allegations, including use of an illegal substance while holding a security clearance. Although he claims this was a one-time incident, his explanation of the timing of his drug use and employer testing is not convincing, and he continued to live with the person with whom he used the drug for a lengthy period of time.

Although Applicant has had family counseling that included some substance abuse issues, and he states that he has learned from his error in judgment, I am not convinced that drug involvement is completely behind him. He has completed a year of drug testing with negative results, however these tests were under the order and supervision of the court with the custody of his child at stake. He has not signed a statement of intent to

abstain from future illegal drug use per AG ¶ 26(b)(3). He has not shown evidence of completion of a drug evaluation or treatment program with a favorable prognosis, rather he asks the Government to accept his word. Although Applicant claims that his use of methamphetamine was a one-time incident, it would not have likely been discovered but for his girlfriend's complaint. In addition, his explanation of the timing of his incomplete urine sample at work and claimed subsequent drug use with his girlfriend rings hollow. I continue to doubt Applicant's truthfulness, judgment, and willingness to comply with rules and regulations. Applicant is entitled to credit for a year of negative drug tests, no longer living with his girlfriend, and some counseling, but full mitigation credit does not apply in any particular area.

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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions AG ¶¶ 19 (a) and (c).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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; and

(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.

Applicant's finances may have suffered after leaving his employment and losing custody of his child, but his employment was purportedly within his control, and his loss of custody resulted from his use of an illegal drug. Neither of these incidents are sufficient to warrant application of AG ¶ 20(b). His financial delinquencies are a current and continuing matter.

Applicant has not submitted sufficient evidence to mitigate the SOR debts or to show that his financial problems are under control and will not recur. Applicant's behavior casts doubt on his current reliability, trustworthiness, and good judgment. Although he is making payments on his child-support obligation, these payments were forced through a judgment and garnishment of his wages, and he remains significantly in arrears. The timing of his first delinquent mortgage payment is questionable. Evidence exists to show that it may have begun prior to his resignation, drug use, and loss of custody. His failure to address or resolve his mortgage and other delinquent debts is evidence of his lack of financial responsibility.

Overall, Applicant's financial status raises significant doubts about his financial management decisions and personal financial responsibility. I am not convinced he can meet his current financial needs, and he has not shown a willingness or ability to resolve the SOR debts. No mitigation fully applies.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines H and F, in my whole-person analysis. I also considered Applicant's struggles to regain custody of his child, ongoing support obligations, negative drug tests, and the support from his coworkers, friends, and case worker. However, I remain unconvinced of his financial responsibility, ability and willingness to meet his financial obligations, and willingness to follow rules prohibiting use of illegal drugs.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a through 2.f:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant or continue Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge