



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



In the matter of:)
)
) ISCR Case No. 19-00338
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: *Pro se*

04/03/2020

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by his use of marijuana, his falsifications regarding marijuana use on multiple investigative processing applications, and his outstanding tax debt. Clearance is denied.

Statement of the Case

On March 13, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines H, drug involvement, E, personal conduct, and F, financial considerations, explaining why it was unable to find it clearly consistent with the national security to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On August 1, 2019, Applicant answered the SOR, admitting the allegations set forth in Paragraph 1 and denying the remaining allegations. He initially requested a decision based on the record, then requested a hearing. The case was assigned to me on August

2, 2019. After granting two motions for continuance requested by Applicant, I scheduled the hearing for January 27, 2020. The Defense Office of Hearings and Appeals issued a notice of hearing, as requested, and it was held as scheduled. I received nine Government exhibits (GE 1 – GE 9) and ten Applicant’s exhibits (AE A - AE J), together with the testimony of Applicant. Also, I incorporated into the record a copy of Department Counsel’s discovery letter to Applicant (Hearing Exhibit I). The transcript (Tr.) was received on March 12, 2020.

Findings of Fact

Applicant is a 54-year-old single man. He is a veteran of the U.S. Army, serving on active duty from 1987 to 1990, and in the National Guard from 1990 to 1995. (GE 9; AE I) While on active duty, he earned an associate’s degree. (Tr. 54) After leaving active duty, having been discharged honorably, Applicant enrolled in college, completing a bachelor’s degree in 1996 and a master’s degree in computer science in 1999. He is a software developer who has been subcontracting with various federal government contractors since 1996. (Tr. 55; GE 1 at 11) Throughout his career, Applicant has been in positions that have required either a security clearance or public trust eligibility. (Tr. 61)

Applicant is highly respected among his professional peers. According to his current project supervisor, he has a stellar work ethic, logging long hours to get the job done under highly stressful situations. (AE H) A project manager for another contractor with whom he works, characterizes him as an outstanding software developer who “continues to impress the customer with the quality of his work, his integrity, and his can-do attitude.” (AE H at 3)

Applicant has been using marijuana intermittently since 1982. Although the majority of his use occurred before 1997, some of his marijuana use since then occurred while he possessed a security clearance. (Tr. 58) According to Applicant, he has only used marijuana twice since 2014. (Tr. 57)

Since 1996, Applicant has completed three security clearance applications and one application for public trust eligibility. Each application contained a question concerning illegal drug use within the seven years preceding the completion of the respective application. Applicant answered “no” on each application. (GE 1 – 3; GE 5) After completing the 1996 security clearance application, Applicant disclosed his omission to an agent before being confronted, explaining that he overlooked the section of the security clearance application that required the application to be answered with complete honesty. (GE 9 at 5) Specifically, he told the agent that when he completed an application for acceptance into the Army in the late 80s, the recruiter told him not to admit past drug use because it could have a detrimental effect on his career. (GE 9 at 5) He followed this advice when he completed the 1996 clearance application.

Between 2007 and 2014, Applicant submitted two security clearance applications and an application for a position of trust. He omitted the marijuana use from each application, explaining that the legality of marijuana in several states since the completion of the 1996 security clearance application rendered the question of “illegal” use of

marijuana ambiguous. (GE 8 at 2) Marijuana was not legal, nor has it ever been legal in the state where Applicant used it. (Tr. 59-60)

Applicant continued to use marijuana over the years despite promising during the course of each previous investigation that he would quit. (Tr. 61-62) In January 2020, Applicant executed an affidavit swearing to abstain from all drug involvement in the future. (AE J)

As of July 2017, Applicant owed approximately \$38,000 in unpaid federal income taxes. (AE D) Applicant attributes his tax debt to financial problems that began in 2006, when he overextended himself financially by purchasing a home using a non-traditional mortgage loan product that he could not afford. (Tr. 15) The house was underwater for all 11 years that he owned it. (Answer at 6) Furthermore, Applicant testified that his financial problems stemming from the home were exacerbated in 2008 when the market crashed, additionally decreasing the home's value. (Tr. 15)

In 2013, Applicant experienced a brief period of unemployment, which coincided with the acceleration of the mortgage payments. (GE 6 at 7) Consequently, by the end of April 2013 Applicant had exhausted his savings, and he was unable to pay his federal income taxes for 2012. (Tr. 16, 68) By November 2013, the tax year 2012 income tax debt had grown to \$18,875. (GE B) That month, Applicant began making \$5,000 monthly payments through an installment agreement that he negotiated with the IRS. (AE B) By November 2014, he had satisfied the income tax debt for tax year 2012. (Tr. 70; AE C at 13) Although he had satisfied the 2012 tax delinquency, he had incurred a tax debt for tax year 2013, which totaled \$10,570. (AE C at 14) Per the installment agreement, Applicant's 2013 income tax debt rolled over automatically to tax year 2014, and has continued to roll over to successive years after each preceding year's tax debt is satisfied. (AE C at 14)

Applicant continues to make payments on his income tax debt through his installment agreement. Once he satisfies the tax debt for one year, the IRS then applies the payments to the successive tax year. (Tr. 71) Applicant's tax debt spiked in 2017, the year he short sold his home. (AE C at 14) Since then, he has been paying \$1,000 monthly. Currently, the balance of his tax debt is approximately \$16,000. (Tr. 17)

Applicant earns \$111,000 annually. (Tr. 73) He anticipates receiving a raise. He will apply the additional funds to the tax debt.

Applicant is a successful gambler. (Tr. 76) He has mastered the laws of probability governing table games, minimizing the "house advantage." (Tr. 76) In 2008, Applicant won \$100,000 through casino gambling. (Tr. 75) In 2012, he won \$15,000. (Tr. 76) When asked on cross-examination about additional gambling winnings, Applicant acknowledged more winnings, but could not specifically recall the corresponding years, explaining that at "times [he] win[s] \$10,000, there's times [he] win[s] \$20,000, [and] there's times [he] win[s] \$100,000." (Tr. 76)

SOR subparagraph 2.e alleges that Applicant falsified his response to Section 26 of the June 2014 security clearance application when he failed to disclose the outstanding tax debt from tax years 2012 and 2013. Applicant did not file his 2012 tax return on time. However, he applied for an extension, negotiated a payment plan, and had begun executing it in November 2013, six months before he completed the security clearance application. (AE B)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 1(d) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Analysis

Guideline H: Drug Involvement

The security concerns about drug involvement are set forth in AG ¶ 24, as follows:

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.

Applicant's history of marijuana use, some of which occurred while he possessed a security clearance, triggers the application of AG ¶ 25(a), "any substance misuse," and AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

Applicant has only used marijuana twice since 2014. However, in light of the multiple broken promises to quit smoking marijuana, the infrequency of use has limited probative value. Similarly, Applicant's history of broken promises to quit smoking marijuana minimizes the probative value of his 2020 affidavit expressing an intention to quit smoking marijuana. I conclude that none of the mitigating conditions apply, and that Applicant has failed to mitigate the drug involvement security concerns.

Personal Conduct

Under this guideline, "[c]onduct 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." (AG ¶ 15) Moreover, "of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes." (*Id.*)

Applicant's omission of information from four investigative processing applications warrants the application of 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 is an educated and highly successful man. Under these

circumstances, neither his explanation for omitting the drug use from his 1996 security clearance application, nor his explanation for withholding this information from successive applications is credible. AG ¶ 16(a) applies without mitigation.

Although Applicant did not file his 2012 federal income tax return on time, he timely applied for an extension, negotiated an installment payment agreement, and had begun making payments consistent with the plan before the completion of the security clearance application. Under these circumstances, his income tax payments were never in delinquent status. I conclude Applicant's negative response to Section 26 of his 2014 security clearance application was not a falsification, rendering AG ¶ 16(a) inapplicable. I resolve SOR subparagraph 2.e in Applicant's favor.

Guideline F, Financial Considerations

Under this guideline, "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." (AG ¶ 18) Applicant's outstanding income tax debt triggers the application of AG ¶ 19(a), "inability to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(f), "failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required."

Applicant contends that he initially fell behind on his income tax payments when the housing market crashed in 2008, shortly after he had overextended himself on the purchase of a home. However, between 2008 and 2012, the first year Applicant did not pay his federal income taxes on time, he won more than \$100,000 through casino gambling – money which could have been spent on keeping his finances stable. AG ¶ 20(b), "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances," does not apply.

Applicant "has made arrangements with the appropriate tax authority to . . . pay the amount owed and is in compliance with those arrangements." (AG ¶20(g)) He has sold his home, the source of his financial struggles.

At the end of the day, I cannot reconcile Applicant's characterization of himself as a gambling *savant* who can win large sums of money at will, with his characterization of himself as a man who was so in over his head financially that he was unable to pay his income taxes when due over the course of several years. Consequently, I conclude that Applicant has failed to mitigate the financial considerations security concern.

Whole-Person Concept

Applicant is an outstanding software developer who is highly respected by colleagues within the information technology community. This positive attribute is insufficient to overcome the negative security inferences posed by his marijuana use, his

repeated broken promises to stop using marijuana, his failure to disclose his marijuana use, as required, on his investigations processing applications, and his outstanding income tax debt. Under these circumstances, I conclude Applicant has failed to mitigate the security concerns.

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
Subparagraph 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a – 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge