



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 19-01726
)
 Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

01/24/2020

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Applicant has refuted the allegation that he falsified his security clearance application (SCA). He has mitigated the security concern raised by his arrest and charge of assault and battery on a family member, but he has not mitigated the security concern raised by his financial problems. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his SCA on April 30, 2018. On July 12, 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 August 8, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 28, 2019, and the case was assigned to me on the same day. On October 29, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 13, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses and did not submit any documentary evidence. I kept the record open until December 2, 2019, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on November 26, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. However, with respect to SOR ¶ 2.a, alleging falsification of his SCA, he admitted that his answer to a question was incorrect but denied deliberate falsification. I have treated his response to SOR ¶ 2.a as a denial. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 35-year-old electrical engineer employed by a defense contractor since October 2014. He has been employed by defense contractors since September 2007. He has held security clearance since 2005. (Tr. 42.)

Applicant married in August 2005, separated in June 2016, reconciled in February or March 2017, and separated again in January 2018. He has three children, ages 13, 11, and 7, and a stepchild, age 19. He received an associate's degree in May 2006 and a bachelor's degree in May 2012.

In June 2017, Applicant and his wife filed a joint Chapter 7 bankruptcy petition. Applicant testified he and his wife decided to file a bankruptcy petition to allow them to start with a "clean slate" and remove the burden of indebtedness on their effort to restart their marriage. (Tr. 21- 22.)

The bankruptcy petition listed assets of \$295,708 and liabilities of \$422,090. The debts listed in the petition included two student loans incurred by Applicant in 2002 for \$37,000 and \$48,000; the mortgage loan on the marital home for \$241,000, legal fees of \$9,000 incurred by Applicant; legal fees of \$14,600 incurred by Applicant's wife; medical bills totaling \$12,290, mostly incurred by Applicant's wife; and credit-card debts totaling \$24,650 incurred in Applicant's name only, but which he attributed to his wife's spending habits. It is not clear from the record whether the two student loans included in the bankruptcy petition were duplicates. They retained one car and the marital home. Applicant's wife was not employed outside the home when they filed their bankruptcy petition. The bankruptcy petition listed net monthly income of \$6,842 and expenses of \$6,796. Both debtors received a discharge in October 2017. (GX 6.)

When Applicant was first hired by his current employer, his annual salary was about \$65,000. He has since been promoted several times and his annual salary has increased to about \$110,000 (Tr. 39.)

In January 2018, Applicant saw his stepdaughter looking through mail that had been delivered to their home. He attempted to take the mail from her, and she accused him of grabbing her arm, spinning her around, and shoving her into the kitchen stove. The sheriff's deputy who came to the home and investigated the incident determined that there was insufficient evidence to file charges. Applicant's wife filed a petition for an emergency protective order, and the magistrate found the stepdaughter's testimony credible and issued the protective order. Applicant's wife then filed charges of assault and battery on a family member, and Applicant was convicted. He appealed. In accordance with local law, the case was tried *de novo* on appeal. He was offered a plea agreement, which he declined. The case went to trial in August 2018 and was continued for six months, with the stipulation that the charges would be dismissed if there were no further incidents. The charges were dismissed in March 2019. (SOR Answer, Enclosures 1 and 2; GX 2 at 2; GX 3.) Applicant moved out of the house after the January incident. He and his wife have lived apart since that incident, but they are not divorced.

Applicant testified that the January 2018 incident was the second time his wife had filed false charges against him. According to Applicant, she had filed a petition for a protective order about a year earlier, alleging that he had assaulted her. Her petition was dismissed because Applicant had a tape recorder in his pocket during the argument during which she alleged he assaulted her. The recording reflected that Applicant's wife was the aggressive party. Applicant presented no documentary evidence supporting his testimony about this earlier incident.

In April 2018, Applicant and his wife joined in a *Pendente Lite* order providing for joint custody of their three children, visitation rights, and allocation of marital debts. Applicant agreed to pay his wife \$3,311 per month, allocated as follows: \$821 in spousal support; \$1,565 in child support; and \$926 in family-debt adjustment. (AX A.) In July 2019, they executed a consent order on child custody and visitation, superseding the *Pendente Lite* order and amplifying the conditions for custody and visitation. (AX B.)

When Applicant submitted his SCA in April 2018, he did not disclose student loans totaling about \$38,811 that were reflected as 180 days past due in the credit report from June 2018. (GX 5.) Applicant testified that he understood when they started the bankruptcy process that the student loans would not be discharged. However, he remembered that the student loans were included among the debts listed in the bankruptcy petition, and he testified that he vaguely remembered seeing a document that led him to believe that the student loans might be included in the debts that were discharged. (Tr. 48-49.) After he was interviewed by a security investigator in November 2018, he knew that his student loans had not been discharged. (Tr. 55.)

Applicant testified that he was making automatic monthly payments on his student loans for about three years after he received his bachelor's degree. (Tr. 51.) He stopped making payments around May 2015 because he could not afford them, and he had not resumed payments when he filed his bankruptcy petition in June 2017. (Tr. 55.) He put the student loans on the "back burner" until he received the SOR. He then contacted the loan servicer about an income-based repayment plan. He had not received a response from the loan servicer by the time the record closed. (Tr. 56-57.)

Although Applicant did not disclose the delinquent student loans in his SCA, he disclosed other derogatory information, including the Chapter 7 bankruptcy and arrest for assault and battery in January 2018. (GX 1 at 37-38, 42-43.) He denied deliberately falsifying or omitting information. He admitted at the hearing that he should have disclosed the delinquent student loans. (Tr. 59.)

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 SOR alleges that Applicant filed a Chapter 7 bankruptcy petition in June 2017 and received a discharge in October 2017 (SOR ¶ 1.a), and that he has past-due student loans totaling \$37,100 (SOR ¶ 1.b). The security concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

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

Applicant's admissions and the documentary evidence in the record establish 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"); 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; 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 delinquent student loans are recent and were not incurred under circumstances making them unlikely to recur. His bankruptcy discharge was more than two years ago, but his current financial situation precludes a finding that his financial delinquencies are unlikely to recur.

AG ¶ 20(b) is not established. Applicant's marital breakup and the legal expenses related to it were conditions beyond his control. He provided no evidence explaining the large credit-card debt included in the bankruptcy, except a general reference to his wife's spending habits. Almost all the medical debts were incurred by his wife and may have been due to conditions beyond his control, but he provided no evidence regarding the circumstances in which they were incurred. He submitted no evidence of efforts to resolve his delinquent debts before resorting to bankruptcy. He has not acted responsibly regarding the delinquent student loans, taking no action to resolve them until he realized that they were an impediment to retaining his security clearance.

AG ¶ 20(c) is partially established. Applicant received financial counseling in connection with his bankruptcy, and the debts, except for the student loans, have been resolved by the bankruptcy discharge.

AG ¶ 20(d) is not established. While a Chapter 7 bankruptcy is a legal and sometimes prudent remedy for financial problems, it does not constitute a “good-faith effort” to resolve the debts. See ISCR Case No. 11-08274 (App. Bd. May 2, 2013). Applicant has made no payments on the student loan since his bankruptcy petition, and he did not contact the creditor about resuming payments until he realized that his security clearance was in jeopardy. Applicants who wait until their clearance is in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by deliberately failing to disclose the delinquent student loans alleged in SOR ¶ 1.b (SOR ¶ 2.a). It also alleges that he was arrested in January 2018 and charged with assault and battery on a family member (SOR ¶ 2.b). The security 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 condition for the conduct alleged in SOR ¶ 2.a is AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to . . . determine national security eligibility or trustworthiness” 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 credibly testified that his student loans were included in the bankruptcy petition, making him unsure whether they were discharged. He disclosed other derogatory information in his SCA, including the Chapter 7 bankruptcy and his arrest for assault and battery in January 2018, indicating his effort to be candid. I conclude that he did not intentionally falsify his SCA by failing to disclose the delinquent student loan alleged in SOR ¶ 1.b. AG ¶ 16 (a) is not established.

The following disqualifying conditions are relevant for the conduct alleged in SOR ¶ 2.b:

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 . . . (2) any disruptive, violent, or other inappropriate behavior . . . ; 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. . . .

None of these disqualifying conditions are established. Although the evidence establishes that Applicant was arrested and charged, it also shows that he was falsely accused and that the charges were dismissed. Thus, the evidence as a whole does not establish personal conduct sufficient to raise a security concern. I note that if the conduct had been alleged as criminal conduct under Guideline J, it would be mitigated under AG ¶ 32(c) ("no reliable evidence to support that the individual committed the offense").

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 Guidelines 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 refuted the allegation that he falsified his SCA, and he has mitigated the security concern raised by his arrest for assault and battery on a family member, but he has not mitigated the security concerns raised by his Chapter 7 bankruptcy and delinquent student loans.

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 and 1.b: **Against Applicant**

Paragraph 2, Guideline E (Personal Conduct): **FOR APPLICANT**

Subparagraphs 2.a and 2.b: **For Applicant**

Conclusion

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

LeRoy F. Foreman
Administrative Judge