



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



In the matter of:)
)
) ISCR Case No. 19-01112
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2021

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not establish that his past-due child support or other delinquent debts are being resolved. He did not mitigate his recent and lengthy history of criminal conduct and marijuana use. He did not mitigate the security concerns related to financial considerations, drug involvement, or criminal conduct. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 4, 2017. On April 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations), Guideline H (drug involvement), and Guideline J (criminal conduct). The DOD CAF took the action 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 Security

Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on May 13, 2019, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on December 12, 2019. On January 16, 2020, DOHA issued a notice scheduling the hearing for February 5, 2020.

Applicant's hearing convened as scheduled. Department Counsel offered Government's Exhibits (GE) 1 through 5, which I admitted without objection. Applicant testified, but offered no other evidence. I held the record open to provide him the opportunity to do so, but he did not provide any post-hearing submissions. The record closed on February 19, 2020. DOHA received the hearing transcript (Tr.) the same day.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.e, 2.a, 3.a, 3.b, and 3.d-3.g, although he said that SOR ¶¶ 3.e and 3.f were the same offense. He denied SOR ¶ 3.c. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 44-year-old employee of a defense contractor. He has never married. He has an adult son who lives in another state, an 18-year-old daughter, a 15-year-old daughter, and a 14-year-old daughter. His three daughters live with their mothers. Two of them live in other states. Applicant lives with his girlfriend and her 10-year-old son. (GE 1; Tr. 25) Applicant earned a certification in 1997, an associate's degree in 2012, and a bachelor's degree in 2015. (GE 1) He testified that he also has a master's degree. (Tr. 25, 58)

Applicant was employed by an electronics company from December 2005 to January 2008. He left the job to take a position in another state, but the job did not materialize. He was then unemployed for most of the next four and a half years. He spent much of this time improving his education. (GE 1; Tr. 67-69) He was employed at a computer company from May to September 2013, but was terminated after a confrontation with a coworker. (GE 1; Tr. 68-70) He was then unemployed again until May 2014, when he briefly took a job caring for seniors. He left the position because he did not believe the employer was following regulations appropriately. (GE 1; Tr. 71-72)

Since 2017, Applicant has worked in information technology for his current employer and clearance sponsor. (GE 1, Tr. 72-76) On occasion, he was unemployed between contracts. (GE 1; Tr. 61-65) He has never held a clearance. (Tr. 13) Applicant testified that in 2019, he earned between \$35,000 and \$40,000. He works full time. (Tr. 65-67, 90-93)

In April 1994, Applicant was arrested and charged with felony injury to a child. He was convicted and served five years in jail. (SOR ¶ 3.g)(GE 1 at 43-44) Applicant testified that the injuries to the child included bruises and a burn mark. (Tr. 34-35)

In September 2001, Applicant was arrested and charged with third-degree larceny. (SOR ¶ 3.f) He explained that he was arrested after he attempted to steal some items of clothing from a department store. He received a period of probation, but failed to pay the related fine. In March 2003, he was in an auto accident. In the aftermath, he gave a false name to the police. He was arrested for making a false report and for the larceny charge, due to the unpaid fine. He said that his probation was extended as a result. (GE 1 at 44-45; GE 5 at 11; Tr. 26-28, 35-37) (SOR ¶ 3.e)

In 2006, Applicant was arrested and charged with driving under the influence of alcohol (DUI) and driving with a suspended license. He was convicted and sentenced to one day in jail, 12 months of probation, fined, ordered to perform community service, and attend DUI education. (SOR ¶ 3.d) (GE 1 at 45-46; GE 5 at 8-9)

In January 2012, Applicant was arrested and charged with felony child abuse. (SOR ¶ 3.c) (GE 5 at 12; GE 1 at 38) He denied SOR ¶ 3.c. Applicant testified that the girlfriend of his daughter's maternal grandfather filed a child-abuse complaint against Applicant. The complainant, he asserted, was herself wanted for murder at the time. Applicant was arrested, as was his daughter's mother. Applicant denied that he committed the offense. (Tr. 28-31, 37) He participated in parenting classes. (Tr. 34, 81-83) He reported the arrest on his SCA and noted that the charge was dismissed in September 2014. (GE 1 at 38-39) The arrest is documented in Applicant's criminal record, but disposition of the charge is not. (GE 5)

In about June 2012, Applicant was arrested and charged with public intoxication and resisting arrest, and cited for speeding and improper lane usage. (SOR ¶ 3.b) In October 2013, he pleaded guilty to speeding and public intoxication and was fined. The resisting arrest charge and the citation for improper lane usage were dismissed. Applicant testified that he was on his way home and a police car going in the opposite direction turned and followed him. He pulled into his apartment complex. When the police asked him to exit the vehicle, he tripped over a curb and fell down because the parking lot was not well lit. (Tr. 37-38) (Answer to SOR; GE 1 at 39-40; Tr. 31-32) The charges are not detailed on the exhibit documenting Applicant's criminal record. (GE 5)

In December 2014, Applicant was charged with DUI and also cited for speeding and improper lane usage. (SOR ¶ 3.a) Applicant admitted the fact that he was charged but denied the conduct. He testified that he was pulled over because the police officer observed him swerving between the lanes and smelled liquor on him during the traffic stop. Applicant denied that he consumed alcohol that night. He said had just left the house, and was "sleepy" but not drunk. (Tr. 83-85) In October 2016, the DUI charge was nolle prossed after Applicant attended a nine-month DUI class through a diversion program. (GE 5 at 12; GE 1 at 41-42; Tr. 31-32, 39-40, 76-80, 94) He has not had any subsequent arrests. (Tr. 40)

Applicant reported on his SCA that he used marijuana weekly, at times daily, between May 2003 and July 2016. (SOR ¶ 2.a) His most recent use was after the sudden death of a close friend. He said this was shortly before he participated in the DUI diversion program. The timing of his last marijuana use is unclear. Applicant said he had not used marijuana since July 2016. (Tr. 43, 44) He later said this was some time in 2017. (Tr. 44, 46-47) He denied using marijuana after submitting his May 2017 SCA. (Tr. 46) He acknowledged knowing that marijuana use is against state and federal law. He has attended Narcotics Anonymous (NA) a few times in the last three years. (Tr. 40-47, 94-98)

Applicant's background investigation also included credit reports from July 2017, May 2018, and March 2019. Applicant had five delinquent accounts, the largest by far being SOR ¶ 1.a, concerning a \$121,692 child support arrearage. SOR ¶ 1.b is a charged-off student loan account for \$8,293. SOR ¶ 1.c is another charged-off account for \$1,755. SOR ¶¶ 1.d (\$250) and 1.e (\$76) are two past-due medical accounts. Applicant disclosed his debts on his SCA. (GE 1)

As to SOR ¶ 1.a, Applicant testified that he fell behind on his child-support payments during his periods of unemployment. This began with a layoff in 2009. He also acknowledged working odd jobs, but said that none of that income went to arrears or child support. (Tr. 85-90) Applicant testified that his child support went into arrears in about 2012. (Tr. 100)

Applicant testified that he is currently paying on his child support and has money taken out of his paycheck regularly. He said the arrearage amount was incurred during his various periods of unemployment. The child support concerns his two younger children, one of whom lives in his home state and one of whom is in another state. Applicant said he is paying between \$500 and \$600 in child support monthly for one child, and about \$425 for another child. Applicant does not believe that his monthly payments address the amount in arrears. Applicant did not provide documentation of the current status of his child-support payments. (Tr. 47-54, 99-104)

Applicant asserted that his student loan (SOR ¶ 1.b) is in deferment. He said he has other student loans, which are also deferred. (Tr. 54-55, 58-61) Applicant did not provide documentation of the current status of his past-due student loan. The past-due debt at SOR ¶ 1.c is also unresolved. (Tr. 105)

Applicant asserted that the two medical debts alleged (SOR ¶¶ 1.d and 1.e) are co-payments from medical procedures. He believes they should have been covered by insurance. (Tr. 55-56) They remain unresolved.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, "the clearly consistent standard indicates that security

determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (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 used 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 overarching 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 ¶ 2(b) 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement

AG ¶ 24 details the security concern for drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following is potentially applicable: "(a) any substance misuse (see above definition)." Applicant used marijuana on a weekly, at times daily, basis between May 2003 and at least July 2016, as alleged. AG ¶ 25(a) is satisfied.

The timing of Applicant's last use of marijuana is unclear. He testified that his last use occurred after the sudden death of a close friend. At times he testified that his last use was in 2016; at other times, he testified his last use was in 2017. Applicant reported on his SCA that he used marijuana as recently as July 2016 (as alleged). He testified that he did not use marijuana on probation. He testified that he last used marijuana shortly before entering the diversion program after his 2014 DUI. That charge was nolle prossed in October 2016, and he said the diversion program lasted about nine months. Even if Applicant did not use marijuana in 2017, his 2016 use was likely during the diversion program, or, at the least, while his DUI case was pending.

The following mitigating conditions under AG ¶ 26 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; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement is grounds for revocation of national security eligibility.

Applicant used marijuana on a weekly, even daily basis for about thirteen years, as recently as July 2016. He asserted that he did not use marijuana during his periods of probation. Even if this were established, his periods of probation served only as gaps between the times when he was using marijuana. Given the extent of his marijuana involvement, which encompasses many years and which ended only recently, Applicant did not establish a pattern of abstinence or a likelihood that his marijuana use will not recur. AG ¶¶ 26(a) and (b) do not apply.

Guideline J: Criminal Conduct

AG ¶ 30 details the security concern for criminal conduct:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(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.

Applicant was convicted on a felony child-abuse charge in 1994 and served five years in jail. He was arrested for larceny in 2001. He received probation but failed to pay the fine, so he was arrested again in 2003. At that time, he gave a false name to the police. Applicant was arrested for DUI in 2006. In 2012, he was arrested for public intoxication and resisting arrest. In 2014, he was arrested on another DUI charge. AG ¶¶ 31(a) and (b) apply to those offenses.

Applicant was also arrested in 2012 on a felony child-abuse charge. (SOR ¶ 3.c) He denied SOR ¶ 3.c but reported the arrest on his SCA. The arrest is also established by GE 5, his criminal record. The arrest is a matter of official record, which is sufficient to satisfy AG ¶ 31(b).

The citations for driving on a suspended license (2006), and for speeding and improper lane usage (2012 and 2014) are not established as criminal conduct. Rather, they are likely traffic infractions. Thus, no disqualifying conditions under Guideline J apply to them.

In answering SOR ¶¶ 3.e and 3.f, Applicant asserted that the two allegations were the same. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sept. 21, 2005). Applicant was arrested in 2001 for larceny (SOR ¶ 3.f). He failed to pay a related fine so he was arrested in 2003 on the same charge. (SOR ¶ 3.e) As to the larceny charge, they are duplicative, as the two allegations concern the same conduct. However, SOR ¶ 3.e also concerns an unrelated charge of making a false report to the police. Thus, SOR ¶ 3.e is not entirely duplicative of SOR ¶ 3.f, and cannot be found in Applicant's favor on that basis.

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(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;

(c) no reliable information that Applicant committed the offense; and

(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.

As to the 2012 felony child-abuse charge at SOR ¶ 3.c, Applicant does not dispute that he was arrested, but he denies the conduct. GE 5, Applicant's criminal record documents the arrest, but no disposition is noted. The police report is not in the record, so there is no record evidence of the underlying basis for the arrest. Applicant reported on his SCA that the charge was dismissed in 2014. His prior record includes a 1994 conviction for the same conduct, followed by a five-year jail term. Given that fact, the lack of a documented disposition of the 2012 charge suggests that it was not established. AG ¶ 32(c) applies to SOR ¶ 3.c.

Applicant's most serious offense, his 1994 arrest and subsequent conviction for felony child abuse, led to a five-year jail term. Since then, he has been arrested many times, from 2001 to as recently as 2014. He also illegally used marijuana for many years, including as recently as 2017. All of his marijuana use occurred after his felony prison term. While Applicant's marijuana use is not alleged as additional criminal conduct, it nonetheless serves to undercut a finding that Applicant is fully rehabilitated, or that he has established sufficient compliance with rules, regulations, and the law. Applicant's criminal record is simply too long, too serious, and too recent to warrant a finding that his criminal conduct is mitigated. AG ¶¶ 32(a) and (d) do not apply.

Guideline F: Financial Considerations

The security concern relating to the guideline for financial considerations 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual 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 guideline notes several conditions that could raise security concerns under AG § 19. The following are potentially applicable in this case:

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

Applicant has over \$120,000 in child-support arrears, and just over \$10,000 in other delinquencies. AG §§ 19(a) and (c) apply.

AG § 20 sets forth conditions that could mitigate security concerns arising from financial difficulties. The following are potentially applicable in this case:

- (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, or a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and

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

None of these mitigating conditions fully apply. Applicant's financial delinquencies are ongoing and unresolved. They may be attributable, in part, to his various periods of unemployment, but Applicant did not establish that his debts are largely due to that circumstance, or are largely due to other conditions beyond his control. Applicant indicated, but did not document, that he has been making payments on his child-support debts. He also did not establish that, even if his current child-support obligations are being addressed, that he is also addressing his extensive past-due child-support responsibilities alleged in the SOR. He did not establish that whatever conditions led to his financial problems are in the past and are unlikely to recur. He did not establish that he has made a good-faith effort to pay or resolve his debts. AG ¶¶ 20(a), 20 (b), and 20(d) do not apply.

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):

(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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F, H, and J in my whole-person analysis. Applicant is credited with improving his education and with trying to make a better life for himself after serving several years in jail. However, his debts are too great, his criminal record is too extensive, and his marijuana use is too long-term and too recent for him to establish sufficient evidence that he warrants eligibility for access to classified information. Overall, the record

evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2: Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant
Subparagraph 3.c:	For Applicant
Subparagraphs 3.d-3.g:	Against Applicant

Conclusion

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

Braden M. Murphy
Administrative Judge