



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 20-02101
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Jerald Washington, Esq.

01/28/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations), H (Drug Involvement and Substance Misuse), and E (Personal Conduct). The security concerns under Guidelines H and E are mitigated. The security concerns under Guideline F are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on December 12, 2019. On November 2, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F, H, and E. The 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on November 18, 2020, and requested a hearing before an administrative judge. He attached Applicant's Exhibits (AX) A through F to his answer. Department Counsel was ready to proceed on February 17, 2021. Scheduling of the hearing was delayed by health precautions imposed in response to the COVID-19 pandemic. The case was assigned to me on September 24, 2021. On November 5, 2021, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on November 18, 2021. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) G through N. AX A through F, previously submitted, and G through N were admitted without objection. DOHA received the transcript (Tr.) on December 1, 2021.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.h, 2.a, and 3.a, with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old engineering technician employed by a defense contractor since November 2018. He served on active duty in the U.S. Navy from February 2012 to October 2017. He received a security clearance in December 2011, in preparation for entrance into the Navy nuclear propulsion program. He married on September 2016 and has a two-year-old son and an eight-year-old stepson.

Applicant completed his first enlistment in the Navy without incident, received an honorable discharge, and immediately reenlisted. He received nonjudicial punishment in February 2013 for smoking an electronic cigarette in the engine room, which was a restricted area. He was reduced one pay grade (suspended), and restricted to the ship for 30 days. At the time, he was responsible for supervising up to seven junior technicians. (AX J; Tr. 37.) After receiving nonjudicial punishment, he was removed from his supervisory position.

Smoking in the engine room was a common practice. Applicant admitted that he should have enforced the rule against smoking in the area. Instead, he joined the smokers in the practice. He believes that an incoming new chain of command punished him to set the example and make it clear that violation of the no-smoking rule would not be tolerated any longer. (Tr. 15.)

Applicant attended a party with a group of friends in August 2017 and joined them in smoking marijuana that was being passed around. He tested positive in a random urinalysis, and he received nonjudicial punishment for drug use. He attributed his use of marijuana to being depressed after being removed from a supervisory position. (GX 3 at 5.) Based on the two incidents resulting in nonjudicial punishment, he was discharged from the Navy with an other than honorable discharge, and he did not complete his term of enlistment, for which he had received a substantial reenlistment bonus. There is no

evidence that he was diagnosed with a drug-use disorder or that he received any counseling or treatment for his marijuana use.

After Applicant was discharged from the Navy, he was unemployed for about a month. When he found a job with a car dealership, he earned about \$2,000 per month, as compared to his Navy pay, which was more than \$5,000 per month. (GX 1 at 16-18; Tr. 19.) His wife had a difficult pregnancy and was unable to continue working outside the home. (AX L; Tr. 20-21.)

The SOR alleges a debt to the U.S. Government placed for collection (SOR ¶ 1.b) and seven consumer debts totaling \$18,895 that are past due or referred for collection (SOR ¶¶ 1.a and 1.c-1.h). The debts are reflected in credit reports from February 2021 and January 2020. (GX 4 and 5.) The evidence pertaining to the debts alleged in the SOR is summarized below.

SOR ¶ 1.a, credit union debt, past due for \$573, outstanding balance of \$14,857. In an enhanced subject interview (ESI) in January 2020, Applicant told an investigator that this debt was a line of credit that he used to cover multiple debts after he was discharged from the Navy. (GX 3 at 11.) In his answer to the SOR, he stated that it was a joint credit-card account that he opened to enable his wife to establish credit. At the hearing, he testified that it was a credit-card debt incurred to buy furniture, repair cars, and “different things.” (Tr. 24.)

SOR ¶ 1.b, indebtedness to the United States, placed for collection of \$35,559. This debt is a recoupment of Applicant’s reenlistment bonus as a result of his premature discharge for misconduct. He had a payment plan providing for monthly \$50 payments for one year, but after the one-year plan expired, the monthly payments increased to about \$1,000 per month. Starting in February 2019, his pay was garnished for \$250 twice a month to repay the debt. (GX 3 at 13.) He requested a new payment plan, but had not received a response as of the time the record closed. In November 2019, Applicant requested the garnishment be terminated because of financial hardship. (AX G.) At the time of the hearing, collection of the debt was being deferred because of the COVID-19 pandemic. (Tr. 23, 28.) Applicant’s most recent federal tax refund of about \$7,000 was diverted to pay this debt. (Tr. 27.)

SOR ¶ 1.c, credit card account placed for collection of \$2,948. In the ESI, Applicant told the investigator that he incurred this debt at an electronics store to buy a laptop and other items. (GX 3 at 10.) At the hearing, he testified that this debt was incurred to buy his wife’s engagement ring. (Tr. 29.)

SOR ¶ 1.d, credit-card account charged off for \$6,423. Applicant testified that he opened this account jointly with his wife so that she could build her credit. (Tr. 25.)

SOR ¶ 1.e, credit-card account placed for collection of \$3,947. Applicant testified that this account also was used to purchase his wife’s engagement ring, her wedding ring, and his wedding ring. Two accounts were used to make these purchases

because his credit limit prevented him from charging all the purchases on the same account. The total cost of an engagement ring and two wedding rings was around \$5,000. (Tr. 30.)

SOR ¶ 1.f, finance company account charged off for \$1,456. This debt was incurred to buy an expensive vacuum cleaner from a door-to-door salesman. (Tr. 31.)

SOR ¶¶ 1.g and 1.h, credit-card accounts charged off for \$1,837 and \$2,284. Applicant used these accounts to pay for expensive repairs on an older sports car. (Tr. 31-32.)

None of the debts alleged in the SOR are resolved. Except for the recoupment of the reenlistment bonus, Applicant presented no evidence that he attempted to contact his creditors, made any payments, or attempted to establish payment plans before resorting to Chapter 7 bankruptcy. He has not disputed any of the debts.

In August 2020, Applicant hired a lawyer to file a Chapter 7 bankruptcy petition. He paid the lawyer \$400 and agreed to pay an additional \$1,070 before the petition is filed. (AX D.) He completed the credit counseling required by the bankruptcy court in February 2021. (AX I.) He testified that he found the credit counseling helpful, because it taught him how to create a budget and how to plan for the future. (Tr. 22.) At the time of the hearing, he had not yet filed his bankruptcy petition because he could not afford the attorney's fee and filing fees. (Tr. 34.)

Applicant's wife worked part time at a grocery store until her complications with pregnancy. For the past year, she delivered pizzas until the end of October 2021. She has enlisted in the Navy, and at the time of the hearing she was scheduled to report to boot camp on November 30, 2021. Applicant will be a sole parent until April 2022, and he expects to incur child-care expenses of about \$300 per week, which he believes will be affordable with their increase in joint income. (Tr. 47-49.) As of November 2020, Applicant and his wife had monthly income of \$3,540; expenses of \$2,855; and debt payments (for two cars) of \$307 and \$298, leaving a net monthly remainder of \$80. (AX E.)

When Applicant responded to the SOR in November 2020, he submitted a statement of intent to refrain from illegal drug involvement and acknowledged that any future involvement or misuse would be grounds for revocation of his security clearance. (AX H.) He testified that he does not associate with the persons with whom he used marijuana or any of his former coworkers. He found a church community and new friends who share his values. He has stopped using alcohol and tobacco products. (Tr. 44-45.) His pastor submitted a letter attesting to his good character, candor, honesty, and credibility. (AX M at 1.)

Applicant's instructor at a technical school has known him for about two years and believes that he has demonstrated the high character and integrity required to work as a test engineer. (AX M at 2.) Applicant's project manager describes him as "a shining example of integrity, duty, and patriotism." (AX M at 3.)

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. . . . 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 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 relevant:

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 debts are numerous, recent, and, except for the reenlistment bonus that is being recouped, were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is not established. All of Applicant's delinquent debts were triggered by his premature discharge from the Navy for misconduct. Although the discharge was a condition beyond his control, it was caused by his intentional misconduct, which was within his control.

AG ¶ 20(c) is not established. Applicant has completed the financial counseling required by the bankruptcy court, but he has not resolved any of his delinquent debts, and he has not filed his bankruptcy petition.

AG ¶ 20(d) is not established. Except for the repayment plan for his reenlistment bonus, Applicant has not initiated any payment arrangements and has not yet filed his bankruptcy petition. The repayment of the reenlistment bonus was being collected by involuntary garnishment until collection was deferred because of COVID-19. Payment by involuntary garnishment is not a "good-faith" means of paying a debt. ISCR Case No. 09-05700 (App. Bd. Feb. 24, 2011)

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline 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.

Applicant's admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position

The following mitigating conditions are relevant:

AG ¶ 26(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;

AG ¶ 26(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 or misuse is grounds for revocation of national security eligibility.

Both mitigating conditions are established. Applicant's marijuana use was a one-time incident that occurred more than three years ago. He lives in a different environment and no longer associates with his former shipmates or the persons with whom he smoked marijuana. He provided a signed statement of intent to abstain from drug involvement and acknowledged that any future drug involvement would be grounds to revoke his security clearance.

Guideline E, Personal Conduct

The allegation in SOR ¶ 2.a that Applicant used marijuana while granted access to classified information is cross-alleged under this guideline. 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. . . .” Applicant’s admissions and the evidence submitted at the hearing establishes the following disqualifying condition:

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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

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(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

All three mitigating conditions are established for the reasons set out above in the discussion of AG ¶¶ 26(a) and 26(b).

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, H, 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, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement and personal conduct, but he has not mitigated the security concerns raised by his delinquent debts.

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.h: Against Applicant

Paragraph 2, Guideline H (Drugs): FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 3.a: 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