



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 21-01235 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
 For Applicant: *Pro se*
 03/17/2022

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the personal conduct or financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 28, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct and Guideline F, financial considerations. Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on December 1, 2021. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 7, 2021. As of January 25, 2022, he had not responded. The case was assigned to me on February 28, 2022. The Government exhibits included in the FORM and the documents Applicant attached to his SOR are admitted into evidence without objection.

Findings of Fact

Applicant is 55 years old. He has been married since 1990 and has three adult children. He served on active duty in the U.S. military for about fifteen years, earning an

honorable discharge. He earned a bachelor's degree in 2008. Applicant applied for and successfully obtained security clearances during his time in the military. (Item 3)

Applicant is an employee of defense contractor X for whom he has worked since March 2017. Applicant worked for defense contractor Y from January 2010 until November 2016. From January 2016 until March 2017, Applicant owned and operated a restaurant. His ownership and work at his restaurant overlapped with his work at defense contractor Y from January 2016 until November 2016. In February 2016, defense contractor Y issued a written reprimand to Applicant for violating its timekeeping policy by failing to report for work as required from January 5, 2016 until February 2, 2016. In March 2016, as Applicant continued to violate its timekeeping policy, defense contractor Y issued a final written reprimand to Applicant. (Items 3, 6-9)

In October 2016, defense contractor Y undertook an investigation into Applicant's timekeeping. After comparing Applicant's badge readings with his timecards, it found that Applicant had overcharged 500.5 hours, costing it \$88,673. Applicant admitted to overcharging his time. He stated that he had "lost focus" on his work with defense contractor Y because of an outside business activity. On at least one occasion, Applicant's manager at defense contractor Y found Applicant at his restaurant when he was supposed to be working for defense contractor Y. As a result of these findings, defense contractor Y terminated Applicant's employment. (Items 3, 6-9)

The SOR alleges this termination and Applicant's overcharging of his hours worked. In his response to the SOR, Applicant admitted that he was terminated from his employment, but denied that he had overcharged his time. Despite admitting to his employer that he overcharged it, he averred in his response to the SOR that it was "his understanding" that he complied with all of his employer's timekeeping requirements because he was on a flex work schedule. (Items 1, 2)

The SOR also alleges Applicant's 2017 Chapter 13 bankruptcy filing and 2018 dismissal, and his six delinquent debts totaling about \$380,000 (SOR ¶¶ 2.a-2.g). The debts include, among other things, an unpaid commercial lease, an unpaid small business loan, unpaid credit cards, and an unpaid state tax lien. In his response to the SOR, Applicant admitted the SOR debts with the exception of SOR ¶¶ 2.d and 2.g, which he denied. Each of the SOR allegations in SOR ¶ 2 are established through a credit report, the Government's exhibits, and Applicant's admissions. (Items 1-5)

Applicant attributed his financial problems to a failed business venture, whose debts he personally guaranteed, and his unsuccessful attempts to salvage the business by incurring additional individual debt. In 2017, Applicant filed a Chapter 13 bankruptcy to resolve his indebtedness by negotiating lower payments. He then attempted to discharge his debts without payments by converting his bankruptcy to a Chapter 7. However, facing his trustee's claim of abuse, he converted the bankruptcy back to a Chapter 13. In 2018, the court dismissed Applicant's bankruptcy for his failure to confirm a Chapter 13 plan. After his bankruptcy was dismissed, Applicant claimed to have enlisted the assistance of his former bankruptcy attorney to help him resolve his delinquent debts. (Items 1-6)

The \$113,846 small business loan debt alleged in SOR ¶ 2.b has not been resolved. In his response to the SOR, Applicant admitted this debt and claimed that his attorney advised him to give this debt a lower priority than some of his other debts because it was charged off. Applicant provided no documentation showing his efforts to resolve this debt. (Items 1, 2, 4, 5)

The \$18,351 debt alleged in SOR ¶ 2.c has not been resolved. In his response to the SOR, Applicant admitted this debt and claimed that his attorney advised him to give this debt a lower priority than some of his other debts because it was charged off. Applicant provided no documentation showing his efforts to resolve this debt. (Items 1, 2, 4, 5)

The \$12,787 credit card debt alleged in SOR ¶ 2.d has been resolved. In his response to the SOR, Applicant denied that the debt is owed because in August 2020, he received an IRS Form 1099-C. He did not provide evidence of why it was cancelled. He did not address the tax consequences, if any, of this cancellation. (Items 1, 2, 4, 5)

The \$4,894 credit card debt alleged in SOR ¶ 2.e has not been resolved. In his response to the SOR, Applicant admitted this debt and claimed that his attorney advised him to give this debt a lower priority than some of his other debts because it was charged off. Applicant provided no documentation showing his efforts to resolve this debt. (Items 1, 2, 4, 5)

The \$214,000 commercial lease debt alleged in SOR ¶ 2.f has not been resolved. In his response to the SOR, Applicant admitted this debt and claimed that his attorney advised him to prioritize paying the state tax debt listed in SOR ¶ 2.g. over this debt. He claimed that he will discuss a plan to resolve the debt with this attorney. (Items 1, 2, 3, 4)

The \$16,197 state tax lien alleged in SOR ¶ 2.g has been resolved. Applicant provided corroborating documentation to show this lien had been paid. (Items 1, 2, 3, 4)

Applicant stated that he intends to pay some of the debts in the SOR. He did not respond to the FORM, so more recent information about his finances is not available.

Policies

This case is adjudicated 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 adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), 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."

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 the applicant or proven by Department Counsel." The applicant 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.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E (Personal Conduct)

The security concern for personal conduct 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. The following are potentially applicable in this case:

(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; and

(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:

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant consistently and repeatedly committed time-card fraud with his former employer. He charged approximately 500 hours to his former employer for time he spent working at his own restaurant. He continued engaging in this egregious breach of trust despite being warned to stop. The above disqualifying conditions are applicable.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

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

Despite the significant evidence of Applicant's time-card fraud and his admission of it to his employer, Applicant takes the position that he did nothing wrong. There is insufficient evidence that Applicant's misleading and untrustworthy behavior is infrequent or an outlier. His consistent and repeated fraudulent behavior with no admission of culpability leaves me with questions about his reliability and good judgment. Personal conduct security concerns are not mitigated.

Guideline F (Financial Considerations)

The security concern 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.

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;
- (c) a history of not meeting financial obligations; and
- (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 has a history of financial problems, including an unpaid commercial lease, unpaid credit card debts, an unpaid small business loan, and delinquent state taxes. He also filed a Chapter 13 bankruptcy that was dismissed for failure to comply with the rules of the bankruptcy court. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant attributed his financial problems to his failed restaurant business that he opened in January 2016 and closed in March 2017.

While there is insufficient evidence to determine the cause of the failure of Applicant's restaurant business, I will give him the benefit of the doubt and consider it a business downturn. Therefore, for purposes of mitigation, I find that the conditions that resulted in the financial problem were largely beyond Applicant's control.

Applicant provided documentary corroboration that the \$16,196 state tax lien alleged in SOR ¶ 2.g was paid prior to the issuance of the SOR. SOR ¶ 2.g is concluded for Applicant.

Applicant has received an IRS Form 1099-C for the debt listed in SOR ¶ 2.d. However, he did not provide evidence of why the debt was cancelled. He also did not address the tax consequences, if any, of this cancellation. Therefore, Applicant has failed to show that he acted responsibly under the circumstances with respect to this debt.

While Applicant claimed to have hired an attorney to help him resolve his financial issues, he has not provided evidence of what the attorney has done to help. Therefore, I cannot determine that the financial issues are being resolved.

Applicant reasonably attempted to resolve his debts by filing a Chapter 13 bankruptcy in 2017. However, he then attempted to inappropriately have those debts discharged without payments under a Chapter 7. Ultimately, when he was forced to revert his bankruptcy back to a Chapter 13, he was unable to meet the bankruptcy

court's requirements to continue his case and it was dismissed. Thus, I find Applicant's bankruptcy efforts to be of little mitigating value and emblematic of his inability to meet his financial obligations.

There is no documentary evidence of payments or favorable resolution of the other SOR debts listed in paragraph 2. Applicant stated that he intends to pay the remaining SOR debts. However, intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013).

There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. His delinquent debts are substantial and dated, and he has not provided evidence of his plan to resolve them. I am unable to conclude that he acted responsibly under the circumstances, that he made a good-faith effort to pay his debts, or that there are clear indications that the problem is being resolved or is under control. His financial issues are ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. Financial considerations security concerns are not mitigated.

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 E and F in my whole-person analysis. I also considered Applicant's honorable military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and financial considerations 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:

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| Paragraph 1, Guideline E: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Guideline F: | AGAINST APPLICANT |
| Subparagraph 2.a-2.f: | Against Applicant |
| Subparagraph 2.g: | For Applicant |

Conclusion

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.

Benjamin R. Dorsey
Administrative Judge