



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



In the matter of:)	
)	
)	ISCR Case No. 21-02286
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

12/16/2022

Decision

DORSEY, Benjamin R., Administrative Judge:

Applicant mitigated the criminal conduct security concern. He did not mitigate the financial considerations and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 29, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (criminal conduct), Guideline F (financial considerations), and Guideline E (personal conduct). Applicant provided a response to the SOR dated January 11, 2022 (Answer), and requested a hearing before an administrative judge. After a delay because of the COVID-19 pandemic, the case was assigned to me on August 23, 2022.

The hearing was convened as scheduled on October 26, 2022. At the hearing, I admitted Government Exhibits (GE) 1 through 11 and Applicant Exhibit (AE) A in evidence without objection. I left the record open until November 2, 2022, for the parties to provide documents to support their case. On October 27, 2022, Applicant submitted AE B, which I admitted in evidence without objection. I received the transcript (Tr.) on November 2, 2022.

Findings of Fact

Applicant is a 59-year-old employee of a government contractor. He has worked for his current employer or a subcontractor thereof since about 2017. He was awarded a high school diploma in 1981, and has taken some online college courses without earning an additional degree. He was married from 1983 until a divorce in 1996. He remarried his ex-spouse in 2019. He has two adult children. He served in the U.S. Army from 1981 until 2001, when he received an honorable discharge. He has been working for government contractors since he retired from the military. (Tr. 18, 21-24; GE 1, 3; AE A)

In March 2014, Applicant was arrested and charged with operating a vehicle while intoxicated (OVWI). On the night of his arrest, he claimed that he was in a hotel as he was traveling for work. He claimed that he had taken NyQuil because he wasn't feeling well. He claimed that his co-workers had gone to a bar and needed to be picked up, so he drove from the hotel to a bar to pick them up. He claimed that he could not find his friends at the bar, so he drove back to the hotel where he was staying. As he pulled into the hotel, he was stopped by a police officer who told him he had been swerving while driving. He claimed that he explained to the police officer that he had taken cold medicine and had not been drinking, but the police officer arrested him on suspicion of OVWI because he had been swerving and because the police officer smelled alcohol on his breath. At the police station, Applicant was administered a breathalyzer that indicated (at least) the presence of alcohol. Based upon the totality of the evidence, including an analysis of Applicant's credibility, Applicant was driving while impaired by alcohol. (Tr. 24-32, 34-39; Answer; GE 3, 5)

Applicant failed to appear in court for his hearing regarding his 2014 OVWI. He claimed that, prior to his hearing date, he contacted the court to let them know that he would be out of the country for work on his hearing date, and that he provided the court the information they requested to justify his absence. Regardless, in February 2015, the court found that he failed to appear and issued a warrant for his arrest. Applicant claimed that when he got back from being out of the country for work, he contacted the court and the court told him that he did not need to take any further action regarding his 2014 OVWI arrest or his failure to appear. He claimed that he has e-mails to this effect but he did not present them as evidence. (Tr. 20, 46-47; Answer; GE 3, 5)

In 2017, Applicant learned from two different sources that he still had a warrant out for his arrest for failure to appear on his 2014 OVWI. One source was the government contractor that conducted his November 2017 security interview. The other source was a security police officer at a military base who pulled Applicant over for expired tags. During his November 2017 security interview, he told the government contractor that he would resolve the outstanding warrant. He claimed that he contacted the court via telephone, paid a fine, and believed that he had resolved the failure to appear. He provided no documentary evidence to corroborate any resolution of his failure to appear in 2017. He also claimed in his testimony and Answer that he did not find out about his failure to appear until 2020 or 2021. When asked about the discrepancies in his Answer and testimony, he was evasive. After several chances to

explain these discrepancies, he eventually claimed that he had made a mistake when he indicated that he found out about his failure to appear in 2020 or 2021. His evasiveness and inconsistent representations regarding his discovery of his failure to appear undermine his credibility. (Tr. 20, 46-52; GE 3, 5)

In 2020, Applicant claimed that, during another security interview, he learned that the warrant for his failure to appear was still outstanding. He hired an attorney. On July 13, 2021, he entered a plea agreement whereby he pleaded guilty to a misdemeanor of operating a vehicle with a blood alcohol content of .08 or greater. Pursuant to his plea agreement, he was sentenced to time served (2 days) and ordered to pay court costs and fees. He was not placed on probation and his license was not suspended. This plea agreement resolved the issue of his failure to appear. While technically breaking the law, given his efforts to resolve his failure to appear, he was not knowingly engaging in criminal behavior while this charge was outstanding. (Tr. 20, 47-50; Answer; GE 3, 5)

Applicant was arrested in 1996 for driving under the influence of alcohol (DUI) while operating a vehicle on a military base. He failed a field sobriety test and, after taking a breathalyzer test, his blood alcohol content was over the legal limit. In 1997, he pleaded guilty in federal district court to a lesser charge of negligent driving in the first degree. (Tr. 22, 35; GE 3, 4)

State A entered a tax lien against Applicant in 2011 for \$912 for unpaid taxes. Applicant claimed that he paid this tax lien in 2018, but he did not provide documentation to corroborate that this lien has been satisfied. During his 2017 security interview, he denied the existence of this lien, but admitted it in his Answer. He claimed that he fell behind on his taxes to State A because he was not making enough money to make ends meet and he was not paying attention. He was also not having enough money in taxes withheld from his income. (Tr. 19-20, 37-39, 42; Answer; GE 3, 6)

Applicant failed to timely pay his federal taxes for the 2008, 2009, 2013, 2015, and 2016 tax years. He claimed that he made a payment arrangement with the IRS in 2017 to pay \$600 per month towards his \$7,600 federal tax debt. He provided documents from the IRS corroborating that he made \$600 monthly payments from June 2017 until April 2018, and a \$3,423 payment in May 2018. He paid these delinquent federal taxes in full in May 2018. Applicant claimed that his federal taxes were delinquent because he was not paying attention and was not withholding enough money in taxes from his income. He claimed that he has changed his withholdings so that he does not owe taxes at the end of the tax year. Applicant did not timely file his 2012, 2013, and 2015 federal income tax returns. He filed his delinquent federal income tax returns in May 2017. Any adverse information not alleged in the SOR, such as Applicant's failure to timely file federal income tax returns and his 1996 DUI, cannot be used for disqualification purposes. It may be considered when assessing the application of mitigating conditions and for the whole-person analysis. (Tr. 19-20, 37-38, 43-44; Answer; GE 3, 7)

Despite being required to do so, Applicant failed to report his 2014 arrest for OVWI on the Questionnaire for National Security Positions he submitted in May 2017

(2017 SF 86) and April 2020 (2020 SF 86). His failure to report the OVWI in the 2020 SF 86 came after a DOD investigator confronted him with the arrest during his 2017 clearance interview. He also lied to a DOD investigator during his 2020 security interview when he claimed that he had not been arrested in 2014 on an alcohol charge. During his April 2021 security interview, he lied to a DOD investigator when he denied ever having been arrested on any other alcohol-related charges despite having also been arrested in 1996. His explanations for why he failed to report the relevant arrests on his 2017 and 2020 SF 86 and during his 2020 and 2021 security interviews were varied and inconsistent. Applicant's explanations included forgetting about the arrests, not understanding the question as provided in the clearance applications, being confused, and claiming that it was actually his cousin with a similar name and Social Security number who had been arrested. These inconsistent representations undermine Applicant's credibility and strain credulity. (Tr. 23-24, 28-32, 34-39; Answer; GE 1-3)

Despite being required to do so, Applicant failed to report his state and federal tax delinquencies on his 2017 SF 86 and 2020 SF 86. He claimed that he made a mistake when he failed to report these tax delinquencies on his 2017 SF 86. He claimed that he did not report these tax delinquencies on his 2020 SF 86 because he thought he did not have to because he had paid his delinquent taxes. (Tr. 32-34; Answer; GE 1-3, 6, 7)

Applicant has filled out approximately 10 security clearance applications throughout his career, so he is not new to the process. Given his lack of credibility based upon his evasiveness and inconsistent and unbelievable explanations, as well as his failure to divulge the required information, he deliberately failed to disclose his 2014 OVWI arrest on his 2017 SF 86 and his 2020 SF 86. He also lied to a DOD investigator regarding this arrest and his 1996 DUI arrest. For the foregoing reasons, he also deliberately failed to disclose his state and federal tax delinquencies on his 2017 SF 86 and his 2020 SF 86. He did admit his federal and state tax delinquencies during his 2017 security interviews before being confronted. (Tr. 32-34, 45-52; Answer; GE 1-7)

Applicant provided character reference letters from two of his supervisors. Both claim that Applicant needs his security clearance to perform his job and recommend that he be awarded one. They note that he is a hard worker and has not had any security related incidents. (AE A, B)

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 J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 is potentially applicable:

(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 drove while he was impaired by alcohol in 1996 and 2014. He also failed to appear in court for his 2014 OVWI. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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 evidence to support that the individual 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.

It has been eight years since Applicant last drove while impaired by alcohol. While his failure to appear on his 2014 OVWI was not fully resolved until 2021, I give Applicant some credit for his unsuccessful efforts to resolve it prior to then. I also acknowledge that he believed the failure to appear had been resolved on multiple occasions. I therefore do not believe that he knowingly engaged in criminal behavior with respect to his failure to appear. The significant amount of time that has elapsed since he has knowingly engaged in criminal behavior is persuasive evidence of successful rehabilitation, that the criminal behavior is unlikely to recur, and that it no longer casts doubt on his reliability, trustworthiness, and good judgment. The criminal conduct security concern is 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 failed to pay his federal and state taxes. 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:

- (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;
- (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 became delinquent on federal and State A taxes because he was not paying attention and did not withhold sufficient taxes from his income. These conditions were within his control. Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information.

See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).

Applicant has provided sufficient evidence that he paid his delinquent federal taxes prior to the issuance of the SOR. However, he has not provided sufficient evidence that he satisfied the State A tax lien or made arrangements with the tax authority for State A to do so. He claimed that he paid this tax lien, but he provided no documentary corroboration that he has done so. It is reasonable to expect Applicant to present documentation about the resolution of specific debts. See, e.g., ISCR Case No. 15-03363 at 2 (App. Bd. Oct. 16, 2016).

While AG ¶ 20(g) is applicable to Applicant's delinquent federal taxes, none of the mitigating factors are applicable with respect to Applicant's tax lien with State A. The financial considerations security concern is not mitigated.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(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.

The Government cross-alleged Applicant's OVWI, his failure to appear, and his guilty plea under Guideline E. As it was mitigated, this behavior was insufficient for an adverse determination under Guideline J. However, that behavior may support 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. The evidence is sufficient to raise AG ¶ 16(c).

Applicant deliberately failed to disclose his 2014 alcohol-related arrest on multiple security clearance applications despite being required to do so. He lied to a DOD investigator about this arrest. He lied to a DOD investigator about his 1996 alcohol-related arrest. He also deliberately failed to disclose his delinquent tax debts on multiple security clearance applications despite being required to do so. He has filled out about 10 security clearance applications in the past, so his claims of being confused or misunderstanding the questions ring hollow. The evidence is sufficient to raise AG ¶¶ 16(a) and 16(b).

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

(a) the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

AG ¶ 17(c) applies to Applicant's OVWI, his failure to appear, and his guilty plea that the Government cross-alleged, because of the passage of time without recurrence as indicated in the analysis of AG ¶ 32(a) under Guideline J. I find in favor of Applicant with respect to SOR ¶ 3(a).

AG ¶ 17(a) does not apply to Applicant's intentional failure to disclose his alcohol-related arrests on his security clearance applications or his lies about these arrests to DOD investigators. Applicant did not volunteer this information until he was confronted and lied about his actions after being confronted.

AG ¶ 17(a) applies to Applicant's intentional failure to disclose his tax delinquencies on his 2017 SCA because he volunteered that information to the DOD investigator during his 2017 security interview prior to being confronted with those facts.

AG ¶ 17(a) does not apply to Applicant's intentional failure to disclose his tax delinquencies on his 2020 SCA because there is insufficient evidence to show that he volunteered this information prior to being confronted.

AG ¶ 17(c) does not apply to Applicant's intentional security clearance application falsifications or his lies to DOD investigators. Falsification of an SF 86 is not "minor" because it "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011). Applicant has repeatedly failed to divulge required information and lied to DOD investigators. At the hearing, Applicant was evasive and inconsistent in his testimony. His dishonesty and lack of candor are frequent and are not unlikely to recur. His behavior leaves me with serious concerns about his reliability, trustworthiness, or good judgment. Personal conduct 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 have considered Applicant's military service and his character references, and I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis.

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 security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:

FOR APPLICANT

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

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge