



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



In the matter of:)	
)	
)	ISCR Case No. 21-02115
)	
Applicant for Security Clearance)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

05/05/2023

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance. Although the financial concerns are mitigated, Applicant has failed to meet his burdens of production and persuasion to mitigate the personal conduct security concerns raised by his being the subject of an Army investigation into a conspiracy to defraud the Government to obtain a federal contract or his subsequent 2012 debarment. Clearance is denied.

Statement of the Case

On November 12, 2021, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the personal conduct and financial considerations guidelines. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to*

Classified Information or Eligibility to Hold a Sensitive Position, implemented on June 8, 2017. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance.

Applicant answered the SOR and requested a decision without a hearing. The Government submitted its written case on March 2, 2022. The Government provided Applicant a complete copy of the file of relevant material (FORM) and the Directive. He acknowledged receipt on April 7, 2022. In addition to the FORM, Applicant also received a copy of the Government's evidence against him, which included summaries of two background interviews with investigators from the Office of Personnel Management (OPM) in October 2019 and April 2021, respectively. The FORM provided sufficient notice to Applicant of his ability to amend or object to the summaries as well as the potential consequences for choosing not to do so. Applicant did not respond to the FORM or raise any objections to the documents offered by the Government. Accordingly, the attachments to the FORM are admitted to the record as Government's Exhibits (GE) 1 through 9.

Findings of Fact

Applicant, 57, has worked as an employee of multiple federal contracting companies since at least December 1999. He has spent his entire career working overseas and is currently working on a federal contract in Europe. He served in the United States Army from 1990 to 1997. He was initially granted access to classified information during his military service. It is unclear from the record if he has held a security clearance continuously since 1990. He also reported being granted access to classified information in 2009.

Applicant completed his most recent security clearance application in October 2018. He disclosed one delinquent debt, an \$8,000 child support arrearage, which is now resolved. The ensuing investigation revealed that in 2012, the Army sought to debar Applicant from Government employment for six years after an investigation substantiated allegations that Applicant participated in a conspiracy to defraud the Government. The investigation also revealed that Applicant owed over \$37,000 on four delinquent debts. (GE 1 – 9)

In November 2013, the Army Criminal Investigation Command (CID) Expeditionary Fraud Resident Agency, issued a report of investigation in which Applicant and his federal contractor employer were among several subjects investigated as participants in a conspiracy between October 2004 and September 2009, to defraud the U.S. Government to obtain a contract to supply bottled water to a U.S. military installation in the Middle East. The investigation determined that Applicant, the operations manager for a federal contracting company, acting on behalf of his employer, gave a junior Army officer \$2,000. In turn, the officer provided procurement sensitive information to Applicant's employer. The investigation determined that both Applicant and his employer committed the offenses of conspiracy, bribery, and bid-rigging in violation of multiple federal statutes.

In December 2012, the Army took administrative action against Applicant, imposing a civilian debarment against him for six years. In February 2013, a trial attorney with the Department of Justice Public Integrity Division determined that there was insufficient probable cause to find Applicant committed the offenses of conspiracy, bribery, and bid-rigging. Other than the Commander's Report of Disciplinary or Administrative Action, which notes the debarment without explanation, there is no other documentation, as required by Federal Acquisition Regulations (FAR) § 9.406-3, about the details of the debarment, specifically the notice of proposal to debar, the written findings of fact – which are required whenever the decision to debar is not based on a conviction or civil judgment, or the debarring official's decision – which would have specified the actual term of debarment imposed. (GE 5-6)

Applicant offered little information about the CID investigation or his eventual debarment during the background investigation or in response to the SOR. He did not disclose the debarment on his October 2018 security clearance application in response to Section 25: Investigations and Clearance Record: "Have you **EVER** been debarred from government employment?" He also failed to disclose his employment with the federal contracting company identified in the CID investigation.

During the October 2004 to September 2009 period covered by the CID investigation, Applicant reported on his security clearance application that he worked for Company A as a production control clerk from December 1999 to February 2005. He also reported that he worked for Company B as a production control lead from March 2005 to December 2009. Both positions for Company A and B occurred on the same military installation in the Middle East identified in the CID report. Applicant also reported that he worked for Company C between December 2008 and December 2009, as a supply technician for a contract on a U.S. military installation in Asia. During the period when his debarment was issued and in effect, Applicant disclosed employment with Company D, also a federal contracting company on the same military installation in the Middle East identified in the CID investigation. There is no explanation for why he failed to disclose the employment identified in the CID investigation, or how he remained an employee of a federal contracting company, or on a U.S. military installation after receiving the debarment.

In an October 2019 interview with a background investigator, Applicant was asked to explain why he did not disclose the debarment on his security clearance application. Applicant told the investigator that he forgot about that period. He explained his involvement in the investigated conspiracy as involuntary. He explained that his friend, a senior Army officer, asked him to give an envelope to a junior Army officer. Applicant claimed that he was unaware of the contents of the envelope and did not suspect anything was amiss until he was interviewed by Army investigators weeks later. The Army CID investigation determined that the senior Army officer also had a financial interest company that employed Applicant. Applicant claimed that he recalled receiving a letter about the debarment. He reported that he complied with the letter and did not challenge the decision. He told the investigator that he was not sure why he was debarred and continued with his life. (GE 6, GE 9)

In a second background interview in April 2021, Applicant told a different investigator that he was unaware of the debarment until his divorce proceedings in 2016. When asked by the investigator how he was able to continue to work on the military installation in the Middle East, he stated that no one told him or his employer that he was required to leave. In his answer to the SOR, Applicant reiterated that he did not learn of the debarment until his 2016 divorce proceeding. He provided a Debarment Termination Notice from the Army, dated October 27, 2016, which indicated that Applicant's debarment was terminated effective October 25, 2016, and that he had been removed from the award management system as an excluded party. (GE 2, GE 9)

The investigation also revealed that Applicant owed four creditors \$37,951 in delinquent debt. Applicant incurred the debts on four credit cards, during a period of unemployment. He also used the credit cards to pay the legal expenses related to his 2016 divorce. He enrolled the four debts in a debt consolidation service. The service, to which he pays \$574 each month, negotiates settlements with the creditors when possible and pays off the accounts. At the time he enrolled in the program, the debts were in good standing. He did not realize that the service would allow the debts to become delinquent before resolving them. As of February 2022, the debt consolidation service resolved the debt alleged in SOR ¶ 1.d (\$9,462). He did not provide any documentation regarding the current state of his finances. (GE 2, GE 7-8)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 AG ¶ 2 describing 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

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 clearance decision.

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

Financial Considerations

Unresolved delinquent debt is a serious security concern because failure to “satisfy debts [or] 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.” (AG ¶ 18). The SOR alleges that Applicant owes over \$37,000 on four delinquent accounts. Applicant’s admissions and the credit reports in the record establish the Government’s *prima facie* case. The following disqualifying conditions apply:

AG ¶ 19(a) inability to satisfy debts; and

AG ¶ 19(c) a history of not meeting financial obligations.

The record contains sufficient information to mitigate the concerns raised by his delinquent debt. He is making a good faith effort to resolve the delinquent accounts by using a debt consolidation service, which has resolved the debt alleged in SOR ¶ 1.d. The following mitigating conditions applies:

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Personal Conduct

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 information. Of special interest is any failure to cooperate or provide truthful answers during national security investigative or adjudicative process. (AG ¶ 15) The redacted Army CID investigation (GE 6), FBI records (GE 4), the Commander’s Report of Disciplinary or Administrative Action (GE 5), the Notice of Debarment Termination (GE 2), as well as Applicant’s admissions (GE 2) are sufficient to establish the Government’s *prima facie* case under the personal conduct guideline. The following personal conduct disqualifying condition applies:

AG ¶ 16(e) 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

characteristic indicating that the individual may not properly safeguard classified or sensitive information.

In 2013, Applicant was one of several subjects of an Army CID investigation into allegations of a conspiracy to defraud the Government to obtain a federal contract – a breach of financial trust potentially disqualifying under the financial considerations guideline. The investigation also substantiated allegations Applicant engaged in criminal conduct to include conspiracy to defraud the government, bribery, and bid-rigging – which may be potentially disqualifying under the criminal conduct guideline. The limited evidence in the record is insufficient for an adverse determination under either of those guidelines. However, there is sufficient evidence to support a negative whole-person assessment under the personal conduct guideline that Applicant may not properly handle classified information.

I disagree with the Government's assertion that "Applicant deserves some mitigation for his involvement in the fraudulent scheme," citing the Department of Justice's determination of lack of probable cause against Applicant and the age of the misconduct with no recurrence of similar behavior. Neither implication in a conspiracy to defraud the government nor debarment are insignificant matters that can easily mitigated by the passage of time. Applicant's minimization of the investigation and debarment, as well as the conflicting statements and omissions in his security clearance application and during this adjudication cast doubt on his current trustworthiness and reliability.

Debarment is the exclusion of an individual or company from doing work with the federal government. According to FAR §9.406.4, the debarment period should not exceed three years. However, the debarment period can be longer under certain circumstances. The Army debarred Applicant for six years, indicating that the Army considered Applicant's conduct a serious violation of the FAR. Also, FAR § 9.406-3, dictates that a contractor facing debarment receive Due Process, including notice of the specific reasons for the proposed debarment and an opportunity to respond.

A proposed six-year debarment, which meant Applicant could not work in his career capacity as a federal contractor for six years, is significant and given its potential financial impact, cannot be easily ignored. Even if Applicant waived his right to Due Process by choosing not to respond to the notice of proposed debarment, it is unlikely that he was not aware of the debarment process as it occurred, or that he did not receive the debarring official's decision. It is also unlikely that he forgot about the debarment as he reported to a background investigator in an October 2019 interview. His statements that he did not learn about the debarment until his 2016 divorce proceeding are not credible.

Furthering the concerns about Applicant's credibility is his failure to report the matter on his security clearance application, though it is unclear why the omission was not alleged as a falsification. The record also contains unanswered questions of potential security significance regarding why Applicant did not list the contracting company from the Army CID investigation on his security clearance application, or how he continued

working as the employee of a federal contracting company on the same military installation during his period of debarment.

The record contains too many inconsistencies, conflicting statements, and unanswered questions to mitigate the security concerns raised by Applicant's debarment and his failure to fully disclose or provide details about the incident. Applicant bears the responsibility to rebut, explain, extenuate, or mitigate facts proven by the Government, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. (Directive, Additional Procedural Guidance, ¶ E3.1.15) Applicant has failed to meet his burdens of production and persuasion. Accordingly, the matter is resolved in favor of the Government and none of the personal conduct mitigating conditions apply.

Based on the record, doubts exist about Applicant's ongoing suitability for access to classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). The purpose of the adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." (AG ¶ 2(a)) In 2013, Applicant was investigated as part of a conspiracy to defraud the government to obtain a federal contract – an act contrary to the Government's interests. Applicant continues to act against the best interests of the Government and in breach of his fiduciary duty as a clearance holder, by failing to provide full, frank, and candid disclosures to the Government about his involvement in the alleged conspiracy and the details of his debarment. Given his long history of dishonesty with the Government, he is not a suitable candidate for ongoing access to classified information.

Formal Findings

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

Paragraph 1, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b	Against Applicant
Paragraph 2, Financial Considerations:	FOR APPLICANT
Subparagraphs 2.a – 2.d	For Applicant

Conclusion

Based on the record, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge