



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



In the matter of:)	
)	
)	ISCR Case No. 22-01236
)	
)	
Applicant for Security Clearance)	

Appearances

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

07/18/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations, or the drug involvement and substance abuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 18, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F and Guideline H. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on December 21, 2022, and he requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 13, 2023, and the hearing was convened

as scheduled on April 11, 2023. The Government offered exhibits (GE) 1-6, which were admitted into evidence without objection. Its exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered Applicant exhibits (AE) A-B. The record remained open and Applicant submitted AE C-G, which were admitted into evidence. I overruled Department Counsel's objection to AE E for being untimely. DOHA received the hearing transcript (Tr.) on May 1, 2023.

Findings of Fact

Applicant admitted all of the allegations with explanations. His admissions are adopted as findings of fact. After a careful review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is 54 years old. He has worked for a defense contractor since March 2021, as a technical specialist. From March 2020 to March 2021, he was unemployed. From 2016 to 2020, he worked in commercial information systems. He holds two master's degrees. He gave conflicting information regarding his marital status. In his security clearance application (SCA), from April 2021, he stated he first married in 1994 and divorced in 1999. During his hearing testimony, he stated the date of this first marriage were from 2000 to 2014. On his SCA, he stated his second marriage began in June 2016, but he testified that he was married for the second time in May 2022. He has two sons from his first marriage, ages 19 and 12. (Tr. 5, 23-24, 34; GE 1)

Financial Considerations (Guideline F)

Under Guideline F, the SOR alleged Applicant: (1) failed to file his 2014 to 2020 federal and state income tax returns, as required (SOR ¶¶ 1.a-1.b); and (2) owed the federal government approximately \$28,733 in delinquent taxes for tax year 2012 (SOR ¶ 1.c).

Applicant's tax difficulties started in approximately 2012. He was running a family business that had about five employees. He attempted to claim a significant amount of business deductions on his personal federal tax return for 2012, which the IRS ultimately disallowed. This resulted in the large tax debt stated in SOR ¶ 1.c. He also claimed that several personal circumstances contributed to him not being able to file his federal and state tax returns for years 2014 to 2020. Those circumstances included the failure of his business, the death of his father, and his divorce. He admitted that a contributing factor to his non-filing of the returns was his not knowing how to deal with the 2012 tax debt and its implications on the succeeding years' tax returns. He did not think he could file subsequent federal tax returns if he had not filed an earlier year's return. He consulted with a tax professional about this and was told to file all his delinquent returns even if he had not filed an earlier return. Applicant failed to follow this advice because he could not afford a tax professional to prepare and file the unfiled returns. (Tr. 27-29, 35-36; SOR answer)

The status of the SOR tax issues is as follows:

SOR ¶¶ 1.a-1.c (non-filed 2014-2019 federal and state income tax return; and federal tax debt of \$24,733). Federal returns: Applicant testified that he hired a tax professional who prepared his 2014-2021 federal tax returns (his delinquent 2021 return was not alleged and will not be considered for disqualification purposes), which were received by the IRS in September 2022. He supplied the supporting documentation showing the filed returns. **State returns:** Applicant testified that he filed all his state tax returns for years 2014-2020 in August or September 2022. He did not provide copies of those filed state returns, but he provided a document from his state's Department of Revenue, which shows that he filed his 2022 state return and it was received in April 2023. It also shows an overall zero balance on Applicant's state tax account. The evidence supports a finding that Applicant filed his 2014-2020 state tax returns in August or September 2022. **Federal tax debt of \$24,733 for tax year 2012.** Applicant testified that he was working with the IRS to pay his federal tax debt, which he thought now approached \$30,000. He provided documentation showing he completed an IRS Form 433-F in April 2023, in furtherance of his request for a payment plan. He also provided a document showing the IRS confirmed receiving one payment of \$1,366 on May 16, 2023. He did not provide an overall payment plan. (Tr. 29-30, 32, 42; AE B-E)

Drug Use (Guideline H)

Under Guideline H, the SOR alleged Applicant used marijuana with varying frequency from about 2010 to 2022 (SOR ¶ 2.a).

Applicant admitted using marijuana at various times from about 2010 to 2022, including after he completed his security clearance application (SCA) in April 2021. He explained that he used marijuana because of a degenerative back condition that caused him extreme pain. He began experiencing this condition in approximately 1997 or 1998. He has been receiving medical care for the condition since that time. In 2010, he moved to a state where use of medical marijuana is legal under state law. He began using marijuana for his back pain and found that it helped. He stopped using it from 2019 to 2020 because the marijuana caused him to become sleepy frequently and he did not like that effect on him. In October 2021, after he began working for his current employer and completed his SCA, his back pain worsened and he began using marijuana again. He continued to use marijuana in February and June 2022 when he experienced back-pain flareups. Applicant testified he was unaware of his employer's drug policy which prohibited use of marijuana by employees even if such use was authorized under state law. He admitted that he did not inform his employer about his use of marijuana. He provided a copy of a drug test result from April 2023 showing a negative result for the presence of marijuana in his system. He also provided a copy of a prescription he received in April 2023 for medication to relieve his back pain. (Tr. 25-27, 33; GE 1-2 (pp. 18-24); AE F)

Applicant produced a character letter from a work supervisor. The supervisor believes Applicant is a loyal and dedicated employee who is dedicated to protect

national security. The letter does not state whether the author is aware of the circumstances of Applicant's case. (AE G).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of EO 10865 provides that 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 F, Financial Considerations

AG ¶ 18 expresses the security concern for financial considerations:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following potentially apply:

- (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 delinquent federal tax debt that remains unpaid, although he has recently made one payment toward that debt. He also failed to timely file his 2014-2020 federal and state income tax returns. I find all the above disqualifying conditions are raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

- (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; 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's federal tax debt is still outstanding. Although he made one payment toward the debt in April 2023, the outstanding balance remains between \$25,000 and \$30,000 on a tax debt incurred in 2012. He has apparently entered a payment plan with the IRS, but he did not document the details of the plan. He gave several reasons for his delayed payment toward his his tax debt and the late filing of his federal and state tax returns. While his father's death, the loss of his business, and his divorce are circumstances beyond his control, the IRS disallowance of deductions on his 2012 personal federal tax return was not such a condition. Regardless, the evidence does not support that he has taken responsible actions to address his tax debt or timely file his federal tax and state tax returns. AG ¶ 20(b) does not apply. He receives some credit for finally filing his 2014-2020 federal and state tax returns in 2022, however, that credit is minimized by his extended delay in filing those returns. Likewise, he receives some credit for entering into an agreement with the IRS to pay his 2012 tax debt, but his delay in doing so minimizes its impact. AG ¶ 20(g) does not fully apply.

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse.

From about 2010 to June 2022, Applicant used marijuana on numerous occasions. I find the above disqualifying condition applies.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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; and

(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.

Applicant used marijuana on a regular basis from 2010 to June 2022. Of increased concern, is his admitted multiple uses of marijuana after having completed his SCA in April 2021. While he provided a negative drug test result from April 2023 and a copy of his prescription to address his reoccurring back pain, it is too soon to determine whether Applicant will discontinue his use of marijuana to manage his back pain issues. He did not provide a signed statement of intent to abstain from future use. Given his pattern of use, his abstinence beginning in 2022 is not sufficient to overcome his prolonged marijuana use, or to convince me that recurrence is unlikely. The frequency and recency of his past use, and his uses after he completed a first SCA in 2021 cast doubt upon his current reliability, trustworthiness, and good judgment. Neither AG ¶¶ 26(a) or 26(b) apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the 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 guideline 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 considered his medical condition, his civilian employment, and his family circumstances, but I also considered his lack of progress in resolving his federal tax debt and timely filing his 2014-2020 federal and state income tax returns. Applicant has not established a track record of financial responsibility. I also considered his recent uses of marijuana.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations and Guideline H, drug involvement and substance abuse.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1,c:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Robert E. Coacher
Administrative Judge