



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



In the matter of:)
)
) ISCR Case No. 20-03529
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

04/21/2023

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations), J (Criminal Conduct), D (Sexual Behavior), and E (Personal Conduct). The financial considerations security concerns were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 1, 2022. On June 13, 2023, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F, J, D, and E. The DoD 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), as amended (Directive); and the Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG) (December 10, 2016).

Applicant answered the SOR on August 29, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written

case on February 29, 2024. On February 29, 2024, a complete copy of the file of relevant material (FORM) was sent to Applicant, which included an amendment to correct an administrative error concerning the Article number of the offense he had pled guilty to. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on March 4, 2024, and did not respond. The case was assigned to me on June 5, 2024.

The SOR (FORM Item 1) and the Answer are the pleadings in the case. FORM Item 4 the SCA, FORM Item 5 (Interrogatories dated March 3, 2023), FORM Item 6 (Interrogatories dated June 1, 2023), FORM Item 7 (Criminal Investigation Services Report of Investigation dated October 4, 2019), FORM Item 8 (FBI Identification Record dated August 11, 2022), FORM Item 9 (Full data credit report dated August 11, 2022), FORM Item 10 (Equifax credit report dated June 7, 2023), and FORM Item 11 (Equifax credit report dated February 12, 2024) are admitted into evidence without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted each SOR allegation with a brief statement. His admissions are incorporated in my findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 27-year-old systems administrator employed by a defense contractor since June 2020. He graduated from high school in 2014. (Item 4 at 7, 9, 10.) He held a security clearance while serving active duty in the U.S. Navy. (Item 6 at 7.) He served in the Navy from April 2015 to October 2019, when he was administratively separated with an other than honorable discharge (OTH). (Item 4 at 13-14.)

Guideline F

SOR ¶¶ 1.a-1.b: **two delinquent accounts in the amounts of \$8,432 and \$14,621 with his financial institution.** The former, a credit card account, which had been placed for collection and the latter, a loan, which had been charged off. Applicant admitted the debts. He stated he took out the loan in 2017 to cover his living expenses because he had been ordered out of base housing because of the misconduct alleged in SOR ¶¶ 2.a and 3.a and the Navy did not pay him a housing allowance. He told the investigator that he incurred debts but "was unable to specifically explain how he accumulated" these debts". He was eventually awarded back pay in 2019 and he used it to resolve his late rental payments. (Item 6 at 6.) He told the security clearance investigator he had lost track of the credit card debt but that he had made payments on the debt but could not recall them. (Item 6 at 7.) In response to Government interrogatories, he admitted the debts; marked he was making payments on both debts; and marked that he was not providing documentation "showing payment status or proof of payments." (Item 5 at 4-5.) For another debt listed in the Government interrogatories he did provide documentation that the debt was paid. (Item 5 at 5.) The most recent credit report from February 2024 shows the last activity on the credit card account, SOR ¶ 1.a,

was January 2020 and the last payment on the loan, SOR ¶ 1.b, was in December 2021. (Item 9 at 3, 4.)

Applicant provided no documents regarding a budget. He told the investigator that he was going employ a debt consolidation service and, in his Answer, stated he was working with a financial advisor for a credit repair company. He was asked about documentation of payments in the Government interrogatories. He provided no details or documents about his current financial situation and how he would be able to resolve these two debts. He has been employed since 2020. (Item 4 at 10; Item 5 at 4-5; Item 6.)

Guideline J and D

Applicant in October 2017 was arrested and charged with a violation of Uniform Code of Military Justice (UCMJ) Article 120 (Sexual Assault). Pursuant to a pretrial agreement, he pled guilty to the reduced charge of violating UCMJ Article 128 (Assault Consummated by Battery) and received a sentence of 15 days confinement and reduction of rank to E4. He was administratively separated and received an other than honorable discharge from the Navy. Applicant admitted in his Answer to the allegations and cited to the fact he had no further incidents as mitigation. He admitted to placing his hand on the victim's breast while they were in bed, which he believed to be consensual and then moving his hand to her groin area while they were laying together in bed. They had previously had "physical interactions in the past but [had] not had sex. (Item 6 at 4.) The victim pushed him away. The victim described him pushing her pants down and trying to penetrate her vaginally from behind. Applicant was charged under Article 120 (Sexual Assault) and as part of a pretrial agreement, Applicant pled guilty to the lesser offense of Article 128 (Assault consummated by Battery). He was sentenced to 15 days of confinement and reduction in rank to E-4 and agreed to waive his administrative separation board. He was discharged from the Navy with an OTH. He stated he now seeks verbal consent before engaging in physical contact with his girlfriends and he no longer has a relationship with the victim. (Item 6 at 5-6.)

Guideline E

The information set forth in subparagraphs 1.a.-1.b and subparagraph 2.a., above are cross alleged. Applicant admitted both allegations and the facts discussed above are applicable. (Answer; Item 5 at 4; Item 6 at 6-7.)

Applicant did not respond to the FORM, so he did not provide any new evidence to be considered in mitigation. He also provided no character evidence for consideration under the whole-person concept.

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 relating to the guideline 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. 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual 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 in the FORM 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.

Applicant accrued delinquent consumer debts during a period of unemployment after leaving military service. The following mitigating conditions are potentially applicable:

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, or a death, divorce or

separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; 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) and 20(d) do not apply. Applicant's financial delinquencies are ongoing and unresolved. He has been consistently employed since June 2020. It is well-established that the timing of debt payments is a relevant consideration for a judge to deliberate whether an applicant has acted in a reasonable and responsible manner in addressing financial problems but there is no evidence he has acted in a reasonable and responsible manner in addressing these two debts, which casts doubt on his current reliability, trustworthiness, and good judgment. In order to receive full credit under Mitigating Condition 20(d), an applicant must initiate and adhere "to a good faith effort to repay overdue creditors or otherwise resolve debts." He did not establish that he has made a good-faith effort to pay or resolve these debts.

Applicant attributes his debts to when his housing allowance was not paid by the Navy. The first prong of AG ¶ 20(b) therefore applies. For full consideration under AG ¶ 20(b) an applicant must establish that they acted responsibly under the circumstances. He has not done so. He completed his SCA in August 2022. The most recent record evidence (February 2024 credit report) shows both debts remained past due. The reason he lost his on base housing was due to his misconduct, which is not circumstances beyond his control, but the Navy's failure to pay his housing allowance was a circumstance beyond his control. He did not provide sufficient evidence that he acted responsibly under the circumstances to resolve them. AG ¶ 20(b) does not fully apply.

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concern for criminal conduct:

Criminal activity creates doubt about a person'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.

The following disqualifying condition is potentially applicable as detailed in AG ¶ 31:

(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 pled guilty to assault consummated by battery. The above disqualifying condition applies.

32: The following mitigating conditions are potentially applicable as detailed in AG ¶

(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; 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.

AG ¶¶ 32(a) and (d) apply. Applicant's criminal conduct is serious but sufficient time has elapsed since the 2017 criminal behavior that it is unlikely to recur and does not cast doubt on his reliability, trustworthiness, and good judgment. He has obtained a job in 2020 despite his discharge characterization and has been continuously employed with the same company. He has established record of responsible behavior and compliance with rules, regulations. The above mitigating conditions, individually or collectively, are sufficient to mitigate those concerns.

Guideline D: Sexual Behavior

The concern under this guideline is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The sexual assault charge, alleged as part of SOR ¶ 2.b under Guideline J (criminal conduct) is cross-alleged under Guideline D as sexual conduct (SOR ¶ 3.a). The following disqualifying conditions are potentially applicable as detailed in AG ¶ 13:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

14: The following mitigating conditions are potentially applicable as detailed in AG ¶

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant acknowledges he had a past relationship with the victim but his actions on the night in question occurred without him confirming the victim's consent. He pled guilty to assault consummated by a battery. He now seeks verbal consent before engaging in physical contact with his girlfriends. He no longer has a relationship with the victim, and does not engage in circumstances which could make him to be vulnerable to coercion, exploitation, or duress. The behavior no longer serves as a basis for coercion, exploitation, or duress, AG ¶¶ 14(b) and 14(c) are applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are established for SOR ¶¶ 4.a and 4.b.

(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;

SOR ¶ 4.a and 4.b cross-alleges Applicant's debts and criminal behavior (alleged under Guidelines F and J, as noted above) as a personal conduct security concern. Applicant has resolved some debts not alleged but has neglected these consumer debts and there is no evidence of fraud, deceptive, or illegal practices that would make these debts a personal conduct security concern. Therefore SOR ¶ 4.a is found for Applicant.

Applicant's criminal conduct reflects questionable judgment, untrustworthiness, unreliability, unwillingness to comply with rules and regulations, and other characteristics indicating that the individual may not properly safeguard classified or sensitive information. AG ¶ 16(c) is therefore applicable.

The following mitigating conditions under are considered under 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;

(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; and

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

I found for Applicant under Guideline J in SOR ¶ 2.a. Using the same rationale discussed above for criminal conduct, Applicant's positive conduct since leaving the Navy; acknowledgement that he must have verbal consent; that he no longer has contact with the victim; as well as his employment success, establish his past criminal behavior is unlikely to recur and no longer casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are mitigated. AG ¶¶ 17(c), 17(d), and 17(e) are applicable.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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, J, D, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

After weighing the disqualifying and mitigating conditions under Guidelines F, J, D, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the financial considerations security concerns.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1: Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2: Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3: Guideline D:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4: Guideline E:	FOR APPLICANT
Subparagraphs 4.a-4.b:	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.

Charles C. Hale
Administrative Judge