



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 12-07410
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

12/04/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations), H (Drug Involvement), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 27, 2012. On May 20, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F, H, and E. The DOD acted under Executive Order 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) implemented by DOD on September 1, 2006.

Applicant answered the SOR in an undated document and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 31, 2015, and the case was assigned to an administrative judge on August 31, 2015. The case was reassigned to me on September 2, 2015, due to workload. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 8, 2015, scheduling the hearing for September 23, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until October 16, 2015, to enable Applicant to submit additional documentary evidence. DOHA received the transcript (Tr.) on October 1, 2015. On October 16, 2015, at Applicant's request, I extended the deadline for submitting additional evidence to October 26, 2015. Applicant timely submitted AX F through AX K, which were admitted without objection.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.b, 1.e, 1.h, 1.j-1.r, 1.u, 2.a-2.e, and 3.a-3.c. He denied 1.c, 1.d, 1.f, 1.g, 1.i, 1.s, and 1.t. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 58-year-old nuclear quality inspector and electrical designer employed by a defense contractor since November 2007. He received an associate's degree in applied science in May 1994 and a bachelor's degree in automated manufacturing technology in May 1999. (AX A.) He served in the U.S. Army from January 1976 to July 1977; but he was discharged before completing his term of service, receiving a general discharge under honorable conditions. He has never held a security clearance. (Tr. 8.)

Applicant married in July 2001, separated in September 2007, and divorced in November 2013. (Tr. 34.) He lived with a cohabitant from September 2011 to June 2014, and his cohabitant shared the household expenses. (GX 3 at 7.)

Applicant and his ex-wife had three children, ages 12, 10, and 6, during their marriage. He paid child support of \$200-\$300 per month until March 2008, when his child support was increased to \$1,200 per month. His child-support obligation ended in June 2014, when he gained custody of his three children. He does not owe any child-support arrearage. (GX 3 at 6; GX 4 at 3; AX K.) He has a 20-year-old son from a previous relationship, but has no child-support obligations for this child.

Applicant was convicted of felony possession of a controlled substance in July 1977 and was placed on probation for one year. He was cited for possession of marijuana in April 1981 and paid a \$25 fine. (GX 3 at 7; GX 4.) During a personal subject interview (PSI) in April 2012, he told the investigator that he purchased marijuana on the street and has grown his own marijuana, but has never supplied or sold it. He told an investigator that he stopped using marijuana in 2007 because of his work, but that he intended to resume his marijuana use when he stops working. (GX 3 at 7.) In response to DOHA interrogatories in April 2015, he disclosed that he used marijuana "very rarely" from July 1975 to July 2007. (GX 3 at 10.) In his answer to the SOR and at the hearing, he recanted his admission that he used marijuana until 2007, and he testified that he stopped using marijuana in 2005. (Tr. 49-50.)

Applicant submitted an SCA in February 2008. He answered “No” to the following question:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.)?

Applicant did not disclose that his marijuana use continued until 2007. (GX 1 at 31.) When he submitted another SCA in February 2012, he answered “No” to the question, “In the last 7 years, have you illegally used any drugs or controlled substance?” He again failed to disclose that his marijuana use continued until 2007. (GX 2 at 34.)

The 20 delinquent debts alleged in the SOR are reflected in Applicant’s credit bureau reports from March 2012 and November 2014 (SOR ¶¶ 1.a-1.t). The evidence concerning these debts is summarized below.

The two student loans for \$38,399 and \$37,599, alleged in SOR ¶¶ 1.a and 1.b, have been consolidated and have been in a rehabilitation program since May 2015. The program requires Applicant to make nine consecutive \$5.00 payments. He had made three payments as of the date of the hearing. (AX G.)

The same debt is alleged SOR ¶¶ 1.c and 1.s. (GX 5 at 3; GX 6 at 2; Tr. 44.) It was satisfied by garnishment in January 2015. (AX H.) In April 2015, Applicant began making regular payments on the \$1,950 debt to a furniture store, alleged in SOR ¶ 1.d; and his payments were current as of the date of the hearing. (AX I.) Applicant made a \$150 payment in April 2015 on the credit card account alleged in SOR ¶ 1.i, a \$60 payment in August 2015, and a \$25 payment in September 2015. (AX J.)

Applicant denied the past-due car loan in SOR ¶ 1.f and the unsatisfied judgment for unpaid rent in SOR ¶ 1.t, asserting that the debts were paid, but he provided no documentation to support his assertions. He admitted the debts in SOR ¶¶ 1.e and 1.g-1.r, and he testified that he could not afford to make any payments on them. The medical debts alleged in SOR ¶¶ 1.n-1.r are all for less than \$200. (Tr. 41-43.)

Applicant filed a Chapter 13 bankruptcy petition in January 2002, which was dismissed. He testified that he filed a Chapter 13 bankruptcy petition because he lost his job as a network engineer and could not afford to pay his living expenses with the entry-level pay he earned as an installer. When he could not afford the monthly payments required under the Chapter 13 payment plan, he converted his bankruptcy to Chapter 7, and his debts were discharged. (Tr. 48, 64-66.)

Before Applicant separated from his wife in 2007, she was earning in the “mid 30s.” Their combined income was about \$85,000-\$90,000. In November 2007, he

moved and changed jobs to be closer to his father. His income was reduced from about \$55,000 per year to about \$38,000 per year when he changed jobs. His annual income has since increased to about \$43,000. (GX 1 at 11-12; Tr. 35-38.)

Applicant's children are in private schools, because he was unhappy with the quality of the education they were receiving in public schools. His children's tuition is about \$5,500 per year. (Tr. 58.)

Applicant testified that he would have been able to resolve most of his delinquent debts if his \$6,000 federal tax refund had not been seized. (Tr. 27; AX B.) He did not timely file his returns for 2010 through 2014 until 2015. When he submitted his previous SCA in February 2012, he answered "No" to a question asking if he had failed to file any federal or state tax returns "when required by law or ordinance." (GX 2 at 36.) He testified that he believed that he had two years to file a return before any penalties were imposed. (Tr. 27-33.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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." See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges 20 delinquent debts (SOR ¶¶ 1.a-1.t) and a Chapter 13 bankruptcy (SOR ¶ 1.u.). The concern under this guideline is set out in AG ¶ 18:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise classified information 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, corroborated by his CBRs, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").¹

The following mitigating conditions under this guideline 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), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

AG ¶ 20(a) is not established. Applicant's delinquent debts are recent, numerous, and were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is not fully established. Applicant experienced several conditions beyond his control: the break-up of his marriage, the subsequent breakup of his relationship with a cohabitant, and his pay reduction in 2002. His pay reduction in November 2007 was not due to conditions beyond his control, because he voluntarily

¹ AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same") also would be relevant if the SOR had alleged it. Since it was not alleged, it may not be an independent basis for denying a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the unalleged conduct for these limited purposes.

decided to move to a location nearer to his father, even though it substantially reduced his annual income.

The second prong of this mitigating condition, responsible conduct, is established for the debts alleged in SOR ¶¶ 1.a, 1.b, 1.d and 1.i and the bankruptcy alleged in SOR ¶ 1.u, but not for the remaining debts alleged in the SOR. Applicant acted responsibly after he lost his job as a network engineer in 2002. He filed a Chapter 13 bankruptcy petition and began a payment plan, but could not afford the monthly payments. His resort to a Chapter 7 bankruptcy was a reasonable and responsible course of action under the circumstances. He has begun a rehabilitation program for the student loans in SOR ¶¶ 1.a and 1.b, brought his payments up to date on the debt in SOR ¶ 1.d, and is making payments on the debt in SOR 1.i

AG ¶ 20(c) is not established. Except for any court-mandated financial counseling that would have been occurred in connection with his 2002 bankruptcy, Applicant has not sought or received financial counseling in connection with his current financial problems, and his financial situation is not under control.

AG 20(d) is established for the debts in SOR ¶¶ 1.a, 1.b, 1.d, and 1.i. The “good faith” required for this mitigating condition means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Applicant is in the process of rehabilitating his student loans alleged in SOR ¶¶ 1.a and 1.b. He has brought his payments up to date on the debt in SOR ¶ 1.d and has made regular payments on the debt in SOR ¶ 1.i.

However, AG ¶ 20(d) is not established for the remaining debts alleged in the SOR. The debts in SOR ¶¶ 1.c and 1.s were satisfied by garnishment. Payment of a debt through garnishment rather than a voluntary effort diminishes its mitigating force. ISCR Case No. 08-06058 at 4 (App. Bd. Aug.26, 2010). He claimed that he satisfied the debts in SOR ¶¶ 1.f and 1.t, but he provided no documentation to support his claim. He admitted that he has made no efforts to resolve the debts in SOR ¶¶ 1.e and 1.g-1.r.

AG ¶ 20(e) is not established. Applicant has not disputed any of the debts alleged in the SOR. He claimed that the debts in SOR ¶¶ 1.f and 1.t were paid, but he submitted no documentary evidence to support his claim.

Guideline H, Drug Involvement

The SOR alleges that Applicant used marijuana from high school to about 2007 (SOR ¶ 2.a), grew marijuana (SOR ¶ 2.b), and intends to resume using marijuana (SOR ¶ 2.c). It also alleges that he was convicted of felony possession of a controlled substance in about 1977 (SOR ¶ 2.d) and cited for possession of marijuana in 1981 (SOR ¶ 2.e).

The concern under this guideline is set out in AG ¶ 24: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).”

Applicant's admissions in his answer to the SOR, his statements during the PSI, and his testimony at the hearing established the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”;

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(h): expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The following mitigating conditions are potentially relevant:

AG ¶ 26(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

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Neither mitigating condition is established. Although Applicant stopped using marijuana in 2007, his statements during the PSI and his testimony at the hearing made it clear that it intends to resume his marijuana use when he is no longer employed by the U.S. Government or a federal contractor.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCAs in February 2008 and February 2012 by deliberately failing to disclose his drug involvement (SOR ¶¶ 3.a and

3.b). It also cross-alleges SOR ¶ 2.c under this guideline (SOR ¶ 3.c). The concern under this guideline 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 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.

The relevant disqualifying condition for the allegation that Applicant falsified his SCAs is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is a well-educated, experienced adult. In his response to DOHA interrogatories in April 2015, he admitted using marijuana from July 1975 to July 2007. His admission was in his own handwriting and was consistent with his earlier admission during the April 2012 PSI. His recantation in answer to the SOR and at the hearing is not credible, and appears to be contrived to justify his failure to disclose his marijuana use in his 2012 SCA. I conclude that AG ¶ 16(a) is established.

The evidence of Applicant's drug involvement establishes the following disqualifying conditions under this guideline:

AG ¶ 16(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 person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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;

AG ¶ 17(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶¶ 17(a) and 17(c) are not established. Applicant made no effort to correct his omissions from his two SCAs. His falsifications were not "minor," because falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) His falsifications were recent and did not happen under unique circumstances.

AG ¶ 17(d) is not established. Applicant has acknowledged his drug use, but he has not acknowledged his falsifications. He has done nothing to change his behavior. To the contrary, he intends to continue his drug use.

AG ¶ 17(e) is established. Applicant has admitted his past drug involvement and has candidly admitted that he intends to continue it.

Whole-Person Concept

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. 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(a):

- (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.

After weighing the disqualifying and mitigating conditions under Guidelines F, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his financial problems, drug involvement, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e-1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraphs 1.j-1.t:	Against Applicant
Subparagraph 1.u:	For Applicant

Paragraph 2, Guideline H (Drug Involvement): **AGAINST APPLICANT**

Subparagraphs 2.a-2.e:	Against Applicant
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Paragraph 3, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraphs 3.a-3.c:	Against Applicant
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Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge