



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-09704
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

02/19/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines E (personal conduct) and F (financial considerations). Clearance is denied.

Statement of the Case

On May 26, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 2, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines E and F. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and referred his case to an administrative judge for a determination whether his clearance should be granted or denied.

Applicant answered the SOR on February 9, 2015, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated July 20, 2015, was provided to him by letter dated August 21, 2015. Applicant received the FORM on September 14, 2015. He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information after receipt of the FORM, which was received without objection from Department Counsel.¹ On October 16, 2015, DOHA assigned the case to me.

Findings of Fact

In his SOR answer, Applicant admitted all of the SOR allegations with explanations. His SOR answers are incorporated in my findings of fact.

Background Information

Applicant is a 62-year-old contract truck driver employed by a defense contractor since October 2011. (Items 4 and 5) He graduated from high school in June 1971. (Item 4) Applicant was previously married, and that marriage ended by divorce. He remarried in 2007.² Applicant listed an adult son on his SF-86. (Item 4) Applicant did not serve in the armed forces. (Item 4)

Personal Conduct

In 1992, Applicant was arrested and charged with sex assault-fondling and felony gross sexual imposition. (Items 4, 5, and 6) He pled guilty to felony gross sexual imposition and was sentenced to two years confinement. (Items 4 and 6) Per Applicant's May 2012 SF-86, he "served 9 months imprisonment and given shock probation with five years and conditions of treatment." (Item 4) However, his July 2012 OPM PSI states that after he was sentenced to two years confinement, he was transferred to a halfway house. (Item 5)

The conduct initially prompting this concern involved Applicant at age 39 taking a bath with his underage stepdaughter and was discovered when his former spouse walked in on him. She reported his behavior to their pastor, which ultimately led to him being arrested and charged. When interviewed by children's services, Applicant admitted to having had sexual contact with his stepdaughter in the past. (Item 5) Applicant could not provide an explanation for his behavior other than at the time he did not think what he did to his stepdaughter was wrong. However, he does now acknowledge what he did was wrong. (Item 5)

¹Applicant's additional information will be referred to as "FORM response."

²Applicant's SF-86 lists the dates of his previous marriage as June 10, 1988 to October 10, 2007, and his current marriage occurring on June 30, 1977. These dates appear to be in error and this discrepancy was not addressed or clarified during Applicant's July 18, 2012 Office of Personal Management Personal Subject Interview (OPM PSI) or in his FORM response.

Applicant stated that he “sought immediate counseling inside and outside the justice system and persisted for the entire five years as supervised by parole officers. I keep accountable to my wife, employer, and pastor in present time.” (FORM response) He further stated that his employer is aware of his record and can vouch for his four-year performance as a driver. (FORM response)

Financial Considerations

Applicant’s SOR contains 19 separate debt allegations totaling \$45,047. (SOR ¶¶ 1.a – 1.w) In his July 2012 OPM PSI, he attributes his indebtedness to poor financial planning and business practices as well as a downturn in the economy. (Item 5) In his SOR answer, Applicant stated that his financial problems occurred “years ago” and were caused by “circumstances largely beyond [his] control.” He added that he “lost [his] employment and faced a business downturn which left [him] unable to meet obligations.” (Item 3) However, no specific periods of unemployment were reported on his SF-86. (Item 4)

In Applicant’s SOR answer, he claimed that he was making good faith payments and disputed the legitimacy of many of the debts. He added that some of his debts were resolved and other debts were unknown to him or he had lost contact with the creditors. (Item 3) Department Counsel correctly noted in her FORM that the record was devoid of any documentation substantiating Applicant’s claims.

Applicant’s FORM response provided documentation that he had paid or was in the process of paying seven debts. However, he did not link or identify his documentation with the applicable SOR debts. Since many of his debts have been sold to credit collection agencies and appear as a different creditor than listed on his SOR, his documentation is of limited value leaving the task of unraveling his documentation to a best guess. Viewing Applicant’s seven documents in the light most favorable to him, one can conclude that he has resolved or is attempting to resolve seven debts that may or may not have been alleged.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 adjudicative guidelines. These guidelines are not inflexible rules

of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 "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. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1.

Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 provides two disqualifying conditions that could raise a security concern and may be disqualifying with respect to Applicant's felony conviction for gross sexual imposition.

(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

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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.

The evidence establishes the disqualifying conditions in AG ¶¶ 16(c) and 16(d), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

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

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Applicant's explanation for his behavior at the time was that he did not think what he was doing was wrong. However, he knows now that what he did was wrong. Applicant's questionable judgment at the time of committing the felonious act that led to his conviction is so egregious that it is not mitigated by the passage of time. Moreover, the offense was not minor and the circumstances under which it occurred casts doubt on Applicant's good judgment. Applicant states that he was "given shock probation with five years and conditions of treatment," yet provides no corroborating documentation to support what treatment or counseling, if any, he received or is receiving.

Even if credit were given to Applicant's statement that he has learned from his actions, it does not mitigate the fact that at the time of the act, he was 39-years-old, and was sufficiently mature to know that sexual contact with his stepdaughter was wrong. This explanation brings into question his ability to exercise good judgment so much so that he cannot be trusted to make sound decisions, and thus should not be trusted to safeguard classified information.

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations."

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

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

(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.

Considering the record evidence as a whole,³ I conclude none of the five financial considerations mitigating conditions above are applicable or partially applicable to explain, extenuate, or mitigate the security concern. The available information shows that Applicant has taken little or no affirmative action to resolve his delinquent debts. As noted, the additional information that Applicant submitted in his FORM response in its present form is of limited use and insufficient to provide him with much relief.

³ See ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

With that said, a security clearance case is not aimed at collecting debts.⁴ Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that [he] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that [he] has established a plan to resolve [his] financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of [his] outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.⁵

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate personal and financial security concerns. By failing to provide such information, and in relying on a scant paragraph of explanation, personal conduct and financial considerations security concerns remain.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,⁶ I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the Guidelines E and F security concerns. Accordingly, Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

⁴ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

⁵ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotations omitted).

⁶ AG ¶ 2(a) (1)-(9).

Formal Findings

Formal findings For or Against the 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 E: AGAINST APPLICANT

 Subparagraph 1.a: AGAINST APPLICANT

Paragraph 2, Guideline F: AGAINST APPLICANT

 Subparagraphs 2.a – 2.w: AGAINST APPLICANT

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Clearance is denied.

Robert J. Tuidor
Administrative Judge