



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 13-00081
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

11/27/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement), J (Criminal Conduct), E (Personal Conduct), and F (Financial Considerations). Applicant has mitigated the security concerns under Guidelines H, J, and E, but he has not mitigated the Guideline F concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 28, 2013. On July 1, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, J, E, and F. 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 received the SOR on July 9, 2013; answered it on July 15, 2013; and requested a decision on the record without a hearing. Department Counsel requested a

hearing on July 22, 2013, and was ready to proceed on July 31, 2013. (Hearing Exhibit (HX) I.) The case was assigned to me on August 9, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 21, 2013, scheduling the hearing for September 18, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I kept the record open until September 25, 2013, to enable him to submit additional documentary evidence. He timely submitted AX I and J, which were admitted without objection. Department Counsel's comments regarding AX I and J are attached to the record as HX II. DOHA received the transcript (Tr.) on September 27, 2013. My decision was delayed by the furlough of administrative judges from October 1 to October 11, 2013, due to the failure of Congress to timely appropriate funds for fiscal year 2014.

Amendment of SOR

SOR ¶ 2.a cross-alleges the Guideline H drug involvement under Guideline E, alleging, "That information as set forth in subparagraphs 1.a through 1.d, above." There is no SOR ¶ 1.d. Upon motion of Department Counsel, with no objection by Applicant, I corrected SOR ¶ 2.a to substitute "1.c" for "1.d." (Tr. 23-24.)

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 50-year-old sheet-metal mechanic employed by a federal contractor at a naval shipyard. He graduated from high school in June 1981, and he has worked for his current employer since June 1982. He received a security clearance in February 1985. In April 2006, he applied to renew his security clearance, and he disclosed that he had been charged with possession of cocaine in April 2004 and used cocaine about 12 times between February and August 2004.¹ (GX 2 at 4.) In August 2007, DOHA sent him interrogatories concerning his drug use. He received the interrogatories in October 2007, but he did not respond. In November 2007, his clearance was revoked because of his failure to respond. (GX 3; Tr. 6.) In his most recent security clearance application, he again disclosed his previous drug involvement.

Applicant has never married, and he has no children. He was engaged to a coworker at the shipyard, but his fiancée broke off the engagement and moved to another state around 2001. (Tr. 50-51, 58.)

Applicant's father retired from the Navy as a chief petty officer and began to regularly consume alcohol to the point of unconsciousness. His parents separated, and

¹ Applicant mistakenly stated that his arrest for drug use was in April 2004. The court records admitted at the hearing establish that his arrest was in April 2003. (GX 4.)

Applicant assumed responsibility for taking care of his elderly mother. In late 2001 or early 2001, his father began living with him. Applicant began missing work because he was at home taking care of his father. (Tr. 55.) Applicant started using crack cocaine in late 2002 to help him deal with the strain of caring for his father, purchasing it from a known dealer at a nearby convenience store. (Tr. 57.) He used crack cocaine once or twice a week for a six-month period, usually after work and while alone at home. (Tr. 86.) He stopped paying his bills, and his creditors began garnishing his wages. (Tr. 62-65.) In April 2003, he was arrested shortly after making a \$200 purchase of two “dime bags” of cocaine. (Tr. 88-89.)

Court records reflect that Applicant was indicted by a grand jury for felony drug possession. In December 2003, he pleaded guilty to a misdemeanor and was granted a deferred disposition. (Tr. 34-35.) He was fined, ordered to complete 100 hours of community service, obtain counseling, and submit to drug screening for one year. He tested positive for cocaine once, in early 2004, shortly after beginning the drug screening program. (Tr. 93.) He completed the terms of the deferred disposition, and the charges were dismissed in January 2005. (GX 4; AX D.) He did not tell his supervisor about his drug use or his arrest, because he was embarrassed. (Tr. 87, 97.)

Applicant testified that his arrest was the best thing that ever happened to him. He has not used cocaine since early 2004. In late 2004 or early 2005, Applicant’s father moved out of the house, relieving Applicant of the stress of caring for him. (Tr. 85-86.)

Applicant failed to file his federal income tax return for 2003. In his most recent SCA, he listed his reason for not filing his return as “lazy.” (GX 1 at 24-25.) He did not file any state or federal tax returns until 2012. (Tr. 112.) He was entitled to refunds for several years, but those refunds were forfeited when he did not claim them within three years. (Tr. 105-06.) As of September 4, 2013, he owed about \$16,445 in unpaid federal taxes. He also owed \$2,970 for state income taxes, which were collected in full by garnishment of his wages. (AX A, B.)

In 2012, Applicant contacted the Internal Revenue Service (IRS) and negotiated a payment plan providing for monthly \$100 payments. (AX C, I; Tr. 65.) He estimated that his monthly payments plus his expected tax refunds will enable him to pay his federal tax debt within four years. (Tr. 67-68.) He testified that he could afford to pay more per month, but that he likes to have extra money available. (Tr. 111.) He spends about \$50 per week on lottery tickets. (Tr. 74, 108.) He has not sought or received financial counseling.

Applicant received three recognition awards in July 2009, September 2011, and December 2012 for his duty performance at the shipyard. (AX E.) He was cited by name in his employer’s monthly newsletter for his contributions to the construction of a new submarine. (AX F.) He was promoted in August 2013. (Tr. 76.) A joint statement signed by Applicant’s foreman and general foreman recites that they have worked with Applicant for 29 years, have supervised him for six years, and have found him to be a responsible and conscientious employee. (AX G.)

Applicant's sister submitted a letter, describing Applicant as a "wonderful brother and a loving son to our elderly parents." She considers Applicant a hard-working, reliable employee and "a great person." (AX H.)

Applicant enjoys working on older classic cars. He spoke proudly about his pristine vintage luxury car and submitted a photograph of it. (AX J.) He estimated that he spent about \$3,000 on the car during the past 18 months. (Tr. 109.)

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 H, Drug Involvement

The SOR alleges that Applicant smoked crack cocaine about one or two times a week during a six-month period from late 2002 to early 2003, while holding a security clearance (SOR ¶ 1.a). It also alleges that he was arrested and charged with a felony for purchasing crack cocaine in April 2003, while he held a security clearance; that he pleaded guilty and was granted a deferred disposition; and that the charges were dismissed in January 2005 (SOR ¶ 1.b). Finally, it alleges that he tested positive in a court-ordered drug screen while he held a security clearance (SOR ¶ 1.c).

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 security clearance application, responses to interrogatories, and at the hearing establish 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(b): testing positive for illegal drug use;

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

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The following mitigating conditions under this guideline 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;

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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) is established. Applicant's last drug use was almost ten years ago, shortly after he began his court-ordered counseling and drug screening.

AG ¶ 26(b)(1), (2), and (3) are established. Applicant no longer lives in his old neighborhood or associates with drug users or dealers. The stressful environment in which he lived with his father is gone, and he has abstained from drugs for almost ten years.

AG ¶ 26(d) is partially established. Applicant completed his court-ordered drug treatment program and his drug abuse has not recurred. However, there is no evidence of a diagnosis or favorable prognosis.

Guideline J, Criminal Conduct

The SOR cross-alleges the drug involvement in SOR ¶¶ 1.a and 1.b under this guideline (SOR ¶ 2.a). The concern raised by criminal conduct is set out in AG ¶ 30: "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." Applicant's admissions and the documentary evidence admitted at the hearing establish two disqualifying conditions under this guideline: AG ¶ 31(a) ("a single serious crime or multiple lesser offenses")

and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

The following mitigating conditions under this guideline are potentially relevant:

AG ¶ 32(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

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant is regarded as a responsible and conscientious employee. He is intensely proud of his job accomplishments. For these reasons and the reasons set out in the above discussion of Guideline H, I conclude that AG ¶¶ 32(a) and 32(d) are established.

Guideline E, Personal Conduct

The SOR cross-alleges the drug involvement in SOR ¶¶ 1.a-1.c under this guideline (SOR ¶ 3.a). It also alleges that Applicant failed to notify his employer about his drug involvement, as required (SOR ¶ 3.b). The concern under this guideline is set out in pertinent part 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.”

Applicant’s admissions are sufficient to establish SOR ¶¶ 3.a and 3.b. His admissions raise 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;

AG ¶ 16(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. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; 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 under this guideline are potentially relevant:

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.

For the reasons set out in the above discussion of Guideline H, I conclude that AG ¶¶ 17(c) and 17(d) are established. Applicant's disclosure of his drug involvement on both of his SCAs and his candid testimony at the hearing are sufficient to establish AG ¶ 17(e).

Guideline F, Financial Considerations

The SOR alleges that Applicant is indebted to the IRS for unpaid taxes of about \$7,361, for tax year 2004.² 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

² I denied Department Counsel's motion to amend the SOR to allege failures to file federal and state income tax returns from 2002 to 2011, on the ground that it was not necessary in light of the Appeal Board decisions permitting me to consider uncharged misconduct for limited purposes. (Tr. 119-21.) See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted) (Conduct not alleged 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.)

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 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 in his answer to the SOR and at the hearing, along with the documentary evidence submitted by both parties, established 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").

The following mitigating conditions are potentially relevant:

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; and

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

AG ¶ 20(a) is not established. Applicant's federal tax debt is ongoing and is the result of failing to file returns for many years. It did not arise under circumstances making it unlikely to recur.

AG ¶ 20(b) is not established. Applicant sometimes missed work and incurred additional expenses taking care of his father, but he did not act responsibly. He procrastinated for nine years before he contracted the IRS.

AG ¶ 20(d) is not fully established. Good faith within the meaning of 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). Evidence of past irresponsibility is not mitigated

by payment of debts only under pressure of qualifying for a security clearance. Applicant initiated contact with the IRS to resolve his federal tax debt, but he did so after ignoring his obligation to file timely returns and pay taxes for many years. He is repaying the tax debt at a rate well below his ability to pay. He has placed a higher priority on buying lottery tickets than on paying his taxes.

AG ¶¶ 20(c) (receiving counseling), 20(e) (disputed debts), and 20(f) (unexplained affluence) are not relevant. Applicant has not received counseling, disputed the tax debt, or displayed affluence.

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.

I have incorporated my comments under Guidelines H, J, E, and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who has worked for the same employer for all of his adult life. He has earned the respect of his supervisors. On the other hand, he has a passive attitude toward his obligations, demonstrated by his failure to respond to interrogatories, his failures to timely file federal and state income tax returns, and reliance on involuntary garnishments and seizures of tax refunds to pay his debts.

After weighing the disqualifying and mitigating conditions under Guidelines H, J, E, and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his drug involvement and related personal conduct and criminal activity, but he has not mitigated the security concerns based on financial considerations. 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 H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 3.a-3.b:	For Applicant
Paragraph 4, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant

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