



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 14-02996
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and F (Financial Considerations). Applicant has mitigated the Guideline J concerns, 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 February 21, 2014. On October 2, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and F. 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 on December 23, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015, and the case was assigned to an administrative judge on February 3, 2015. It

was reassigned to me on March 4, 2015, due to the assigned administrative judge's family medical situation. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 4, 2015, scheduling the hearing for March 23, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified but did not present the testimony of other witnesses or submit documentary evidence. I kept the record open until April 15, 2015, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on April 1, 2015.

Findings of Fact

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

Applicant is a 32-year-old pipe fitter employed by a defense contractor since November 2013. He has never held a security clearance.

Applicant attended a community college from August 2002 to July 2003 but did not receive a degree. He attended a university from August 2005 to May 2009 and received a bachelor's degree in exercise physiology.

Applicant worked as a material handler from June 2009 to April 2010, when he was laid off. He was unemployed for about four months. He worked as a salesman from August 2010 to August 2011, and as an aerostat mechanic from August 2011 to September 2013. He was unemployed for about two months before beginning his current job.

Applicant has never married. For the past two years, he has lived with his fiancée. His fiancée is the mother of one of his two children, ages four and one. (Tr. 17, 27.) His fiancée is employed as a school teacher. (Tr. 29.)

When Applicant submitted his SCA, he disclosed that he was convicted of driving while intoxicated (DWI) in January 2010 and fined \$2,000. In his Answer to the SOR, he denied being jailed for 30 days and placed on probation for 12 months, as alleged in SOR ¶ 1.a. He admitted that he was placed on probation for six months, required to perform 20 hours of community service, and fined \$343. He served his community service by talking to students about the consequences of bad decision-making.

In the same SCA, Applicant disclosed that he was charged with DWI in November 2011, convicted in April 2012, and sentenced to 30 days in jail, to be served on weekends. He disclosed that he was fined \$2,500, required to attend alcohol education classes, required to obtain 40 hours of counseling, and was on probation until his fines and court costs were paid. This conviction is alleged in SOR ¶ 1.b.

In Applicant's Answer, he admitted being charged with a probation violation for not paying his fine and court fees on time. His probation was extended for 12 additional months to enable him to pay his fine and fees.¹ His probation was terminated in February 2015, after he paid the fine and required fees. (AX D.) However, he is required to have an interlock device on his car for another year. (Tr. 43.) He testified that he spent about between \$8,000 and \$10,000 for fines, court fees, and attorney's fees as a result of his two DWI convictions. (Tr. 43, 54.)

Applicant's March 2014 credit bureau report (CBR) (GX 2) reflects four unsatisfied judgments for unpaid rent: a \$475 judgment entered against him in October 2010 (SOR ¶ 2.a); a \$1,027 judgment entered in November 2010 (SOR ¶ 2.b); a \$806 judgment entered in August 2008 (SOR ¶ 2.c); and a \$781 judgment entered in December 2008 (SOR ¶ 2.d). It reflects two medical collection accounts for \$274 (SOR ¶ 2.e) and \$165 (SOR ¶ 2.f). It also reflects five student loans totaling \$64,832, on which payment is deferred (SOR ¶ 2.g). His January 2015 CBR (GX 3) reflects the same four unsatisfied judgments and two student loans totaling \$67,038.

The unsatisfied judgments against Applicant were incurred for rent while in college. He had roommates who moved out, leaving him liable for the entire amount of the rent. He is financially unable to satisfy the judgments. (Tr. 20-22.) He has never contacted the judgment creditors directly regarding partial payments or a payment plan. (Tr. 79.)

In Applicant's Answer and at the hearing, he stated that the \$274 collection account, listed on his CBR as a medical account, actually was for an online class that he tried to drop when his computer failed. (Tr. 23.) He contacted a debt-management company about six months before the hearing, but he has not yet paid the company's initial fee. (Tr. 61.) He has obtained advice from his bank about ways to resolve his debts and improve his credit score. (Tr. 72.)

Applicant has also contacted another debt-management company to help him resolve his student loans, which have been in a deferred status. He realizes that the deferments of his student loans are about to end. He has not yet paid the \$150 fee to start the loan-consolidation process. (Tr. 71.) He intends to pay the \$150 after he files his income tax returns and receives a refund. (Tr. 23-24; AX A.) He has delayed filing his income tax return because he is seeking advice on whether he can claim one of his children, who does not live with him, as a dependent. (Tr. 68-69.)

Applicant and his fiancée each have monthly take-home pay of about \$2,000. Their net monthly remainder is \$200-\$300 per month. (Tr. 62-63.)

Applicant testified that he recognizes that he was an alcohol abuser when he was involved in the two DWI incidents. The collateral consequences of his DWI convictions

¹ The probation violation is alleged in SOR ¶ 1.c, which is mislabeled in the SOR as ¶ 1.a. On my own motion, I have corrected the SOR.

have convinced him to change his lifestyle. He now limits his alcohol consumption to an occasional beer. (Tr. 51.)

Applicant is actively involved in his church, his family, and his community. His pastor submitted a letter describing his involvement with church youth programs and describing him as a strong, dependable person. (AX F.) His fiancée submitted a letter describing his close bonds with his children and his efforts to financially support his family. (AX C.)

Applicant's supervisor at the shipyard describes him as one of his most trustworthy team members. He states that Applicant is dedicated, enthusiastic, and capable of performing tasks usually completed by veteran pipe fitters. (AX E.)

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 J, Criminal Conduct

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 record of arrests and convictions establishes 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 are 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.

Both mitigating conditions are established. The references to passage of time in AG ¶¶ 32(a) and 32(b) focus on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* More than three years have passed since Applicant’s last DWI conviction. He has fulfilled all the conditions of his probation, except for the interlock device. He is remorseful. He has performed well at work and gained the respect of his supervisor. He is actively involved in his church and his community.

Guideline F, Financial Considerations

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 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, 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”).

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 debts are numerous, unresolved, and did not occur under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's financially irresponsible roommates in college and his periods of unemployment and underemployment after graduation from college were conditions beyond his control. However, two of the judgments were filed against him in 2008 and two were filed in 2010, but he has never contacted the creditors about resolving them. He did not contact any debt-management companies or seek financial counseling until recently.

AG ¶ 20(c) is not fully established. Applicant has contacted two debt-management companies and received financial advice from his bank, but his financial problems are not resolved or under control.

AG ¶ 20(d) is not established. Applicant has not paid any of the delinquent debts or made payment agreements with any creditors. He has not paid the initial fees for either of the two debt-management companies he has contacted.

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 J 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 was candid and sincere at the hearing. He appears to have matured since 2011. He is a good employee, a responsible father, and a productive member of his church and his community. However, he lacks the means to begin resolving his debts, and his lack of financial resources is largely attributable to the collateral consequences of his two DWI convictions. Now that he has resolved those consequences, he is in a better position to begin establishing a track record of financial responsibility. He may be able to qualify for a security clearance at some time in the future. However, it is too soon to determine that the security concerns raised by his financial situation are mitigated. See Directive ¶ ¶ E3.1.37-E3.1.39 (reapplication permitted after one year).

After weighing the disqualifying and mitigating conditions under Guideline J and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his criminal conduct, but he has not mitigated the security concerns raised by his delinquent debts. 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 J (Criminal Conduct): FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Paragraph 2, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 2.a-2.g: 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