



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 14-00586
)
 Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

11/21/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s use of marijuana between 2002 and 2008, at times while holding a security clearance, is mitigated. However, he deliberately failed to list his drug use in his last two security clearance applications. Finally, he has had persistent and recurring financial problems, including a failure to pay his 2007 taxes on time. Applicant’s response and the information he presented are not sufficient to mitigate the resulting security concerns. Applicant’s request for continued access to classified information is denied.

Statement of the Case

On September 23, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his eligibility for a security clearance he first received in 1999. After the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it was clearly consistent with the national

interest to continue Applicant's security clearance. On October 28, 2009, DOD issued a Statement of Reasons (SOR) alleging facts which raised security concerns addressed in the adjudicative guideline¹ for financial considerations (Guideline F). Applicant responded to the SOR and requested a hearing, which was held on March 11, 2010. On May 7, 2010, an administrative judge from the Defense Office of Hearings and Appeals (DOHA) issued a decision² in which he found that Applicant had mitigated the Government's security concerns about Applicant's finances.

On June 6, 2013, Applicant submitted another EQIP to renew his clearance eligibility and obtain a higher level of clearance. After the ensuing background investigation, DOD issued an SOR on May 12, 2014, alleging facts which raise security concerns addressed in the adjudicative guidelines for illegal drug use (Guideline H), personal conduct (Guideline E), and financial considerations (Guideline F).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on August 5, 2014, and I convened a hearing on September 11, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 5. Applicant testified, presented one witness, and offered Applicant's Exhibit (Ax.) A, which contains 12 documents.³ All exhibits were admitted without objection. I held the record open after the hearing to receive from Applicant additional relevant information. Applicant's timely post-hearing submission has been included in the record, without objection, as Ax. B. DOHA received the transcript of hearing (Tr.) on September 25, 2014.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana about 50 times between 2002 and 2009 (SOR 1.a); and that Applicant's illegal drug use occurred while holding a security clearance he received in 1999 (SOR 1.b). Under Guideline E, the Government alleged that when Applicant submitted his previous EQIP in September 2008, he deliberately omitted the fact that he used marijuana as alleged in SOR 1.a (SOR 2.a). It was also alleged he again deliberately omitted the drug use alleged in SOR 1.a when he submitted his most recent EQIP in June 2013 (SOR 2.a). Under Guideline F, the Government alleged that Applicant failed to file his 2007 tax return as required (SOR 3.a); and that he owed \$162,943 for 13 delinquent or past-due debts (SOR 3.b - 3.n). At hearing, the Government moved to withdraw the SOR 3.a allegation to conform to the evidence.⁴ I granted the motion. (Tr. 82 - 83)

¹ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

² A copy of the decision in ISCR Case No. 09-02313 is included in the record as Hearing Exhibit (Hx.) 1.

³ Cites to this Ax. A will denote the pertinent subsection; e.g., section 7 of the exhibit will be cited as "Ax. A7."

⁴ See Directive, E3.1.17.

In response to the SOR (Answer), Applicant admitted with explanations the SOR 1.a, 1.b, 2.a and 2.b allegations. As to the Guideline F allegations, Applicant denied SOR 3.a, and 3.e - 3.n, with explanations, and he admitted with explanations SOR 3.b - 3.c. In addition to his admissions, I make the following findings of fact.

Applicant is 38 years old and works for a defense contractor providing technical support and instruction to the military regarding his company's products. A recent performance evaluation reflects well on his judgment and trustworthiness. Applicant has been married to his current wife since March 2013. A previous marriage began in October 1998, but ended by divorce in July 2008. Applicant holds an associate's degree, and he is currently taking additional online college courses in business administration. (Gx. 1; Ax. A2; Ax. A8; Tr. 16)

Applicant has been working for his current employer since May 2011, and requires a top secret clearance for this work. Applicant first received a security clearance in 1999 for his work with a defense contractor for whom he worked until September 2006. He left that job to work in real estate investment, but he returned to defense contracting work with a previous employer as an engineering consultant in June 2007. (Gx. 1; Tr. 64)

Applicant first smoked marijuana in 2002. His first wife used marijuana, but Applicant generally did not want to be included in her drug-related activities. Applicant never bought or sold marijuana. He started using the drug at the behest of his first wife when he started having trouble sleeping. He estimates he used marijuana for that purpose, and occasionally in social settings with his ex-wife or with a relative who lived nearby, about 50 times until 2008 or 2009. Applicant passed a pre-employment drug test before starting work with his current employer. Although his company has a drug testing program in support of its drug-free workplace policies, Applicant has not been tested for drugs through work. In September 2014, he tested negative for illegal drugs in a test he procured. Applicant also presented information showing that he has been treated clinically for his sleep difficulties, and that he has been prescribed legal medications that have made his use of marijuana unnecessary. Applicant claims that most of his drug use occurred when he was not working for defense contractors. His current wife has known him since 2010 and has never seen him use any illegal substance. (Answer; Ax. A3; Tr. 29 - 30, 33 - 34, 56 - 59, 61 - 63, 70 - 72)

Applicant did not list his drug use in either his 2008 EQIP, which was submitted to renew his clearance eligibility, or in the 2013 EQIP he submitted for a top secret clearance. Applicant explained that in 2008, he had stopped using marijuana and did not consider that information to be important as it was no longer part of his life. He provided a similar rationale for his failure to list his drug use in 2013. Further, Applicant testified that he "did not understand the ramifications of answering [EQIP questions about drugs] falsely." During Applicant's DOHA hearing in 2010, the subject of illegal drug use was not raised by the SOR. He acknowledged that during both his 2008 and 2013 background investigations he was interviewed by Government investigators. He does not remember if he was asked about illegal drug use in either interview, but he

admits he did not disclose his drug use because he “thought it was an old issue.” Applicant first disclosed his drug use in response to DOD interrogatories in March 2014. He acknowledged at hearing that his drug use was likely uncovered through interviews of personal references he provided in his 2013 application for a top secret clearance. (Answer; Hx. 1; Gx. 1; Gx. 2; Gx. 3; Tr. 30, 60 - 61, 64 - 65)

Applicant’s 2010 DOHA hearing⁵ focused on his financial problems. The SOR, dated October 28, 2009, alleged that he owed about \$570,000 for 11 past-due or delinquent debts. Most of the debts were for mortgages and equity loans related to Applicant’s brief venture into real estate investment. The administrative judge decided in favor of Applicant because Applicant incurred the debts through circumstances beyond his control – the collapse of the housing market in 2007 and Applicant’s divorce – and because Applicant was showing good judgment in his efforts to resolve those debts. (Hx. 1)

Credit reports obtained subsequent to Applicant’s 2013 application for clearance showed that Applicant still carries some of the mortgage debt alleged in the 2009 SOR, and that he has acquired new debts since 2010. Among his new debts is a tax lien obtained in 2009 by the Internal Revenue Service (IRS) for \$11,635 in unpaid 2007 federal income taxes (SOR 3.d). It has been reduced by a payment of \$5,153.60 from an involuntary levy of Applicant’s bank account in 2012. Applicant has hired a lawyer to negotiate a repayment plan with the IRS. (Gx. 1; Gx. 4; Gx. 5; Ax. A7; Tr. 34 - 35, 40 - 42)

The debt alleged at SOR 3.i is a \$20,700 second mortgage debt obtained during Applicant’s real estate business for one of his investment properties. In response to the SOR and at hearing, Applicant had asserted that the loan was satisfied through a short sale in 2009. However, in his post-hearing submission, he stated that his review of his records showed that the mortgage had actually been foreclosed. (Answer; Gx. 3 - 5; Ax. B; Tr. 49 - 51)

The debt alleged at SOR 3.k is also a second mortgage on one of his investment properties. The property was sold as part of a short sale settlement in which Applicant agreed to pay \$15,000. He provided \$3,000 and financed the remaining \$12,000 through the promissory note that is now alleged as a delinquency. Applicant repaid the note at \$100 each month, and the balance is now about \$6,000. (Answer; Gx. Ax. A11; Tr. 52 - 54)

The debt alleged at SOR 3.n was a delinquent credit card account for \$12,459. In October 2013, the debt was forgiven and a Form 1099-C was issued attributing \$9,662.02 to Applicant as income. On his 2013 tax return, Applicant claimed that this amount should be excluded as a “discharge of indebtedness to the extent insolvent (not

⁵ At the hearing in the present case, I informed the parties that I would consider the facts and conclusions contained in the administrative judge’s decision in Applicant’s 2010 case. (Tr. 65 - 68)

in a Title 11 [bankruptcy] case.” There is not enough information in the record from which to determine if exclusion of the forgiven debt is proper. (Ax. B)

As to his remaining debts, he does not recognize the medical debt at SOR 3.f, but he has not acted to resolve the debts at SOR 3.b and 3.c, which are the subject of civil judgments against him totaling \$12,323. He provided documentation regarding dismissal of a civil suit by the same creditor as in SOR 3.c; however, that suit is unrelated to the SOR 3.c judgment. (Ax. A6; Tr. 34, 37)

As to the debts at SOR 3.g, 3.h, 3.j, 3.l and 3.m, Applicant is trying to have them removed from his credit report as they have been charged off by the original creditor as business losses and are beyond the statute of limitations for collection. (Answer; Tr. 44 - 48, 51 - 52)

Applicant asserts that his current finances are much improved and that he has demonstrated good financial management. In support of his claim, he cites a higher credit score. He and his current wife have also made significant adjustments in their expenses. They have obtained cheaper transportation and they avoid unnecessary entertainment costs, such as dining out. Applicant also cites his compliance with the obligations from his divorce decree. It specified that he would retain the marital residence, but would pay his ex-wife \$46,725 as her share of the equity in the house after he refinanced the mortgage and her name was removed from the mortgage and deed. Applicant was also required to pay his share of a joint credit card. To do so, he borrowed \$18,000 from his mother. Since June 2008, he has been paying his ex-wife \$500 each month and still owes her \$31,925. He has been repaying his mother \$600 each month and now owes her about \$200. (Ax. A5; Ax. A9 - 12; Tr. 34 - 35, 72 - 75)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

⁶ See Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁹

Analysis

Drug Involvement

Applicant used marijuana between 2002 and 2008 or 2009. He held a security clearance the entire time. He estimates he used marijuana about 50 times over that period. He first used drugs at age 27 when his first wife, a regular marijuana user, suggested he try the drug to help him sleep better. Applicant also used the drug socially with his first wife and one of his relatives who lived nearby. He stopped using drugs around the time of his divorce and after he was clinically treated for sleep difficulties and other issues. This information raises a security concern expressed at AG ¶ 24, as follows:

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.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; AG ¶ 2(b).

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, 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), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, Applicant's conduct requires application of the disqualifying conditions at AG ¶ 25(a) (*any drug abuse (see above definition)*) and ¶ 25(g) (*any illegal drug use after being granted a security clearance*).

In assessing the applicability of the pertinent mitigating conditions under AG ¶ 26, I have considered several issues. First, Applicant has not used marijuana since 2008 or 2009. His circumstances have changed, in that, he no longer associates with persons involved with illegal drugs. His current wife does not use drugs, Applicant has been treated for his sleep problems, and there is little likelihood that he will use marijuana again. These facts support the following AG ¶ 26 mitigating conditions:

(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

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) an appropriate period of abstinence.

On balance, available information shows that Applicant's past drug use is no longer a security concern.

Personal Conduct

Applicant deliberately made false statements to the Government when he failed to disclose his drug use in his two most recent security clearance applications. This information raises a security concern about personal conduct, which is addressed at AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful

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

More specifically, the disqualifying condition at AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) applies.

Applicant started using marijuana to help with trouble sleeping, but after receiving qualified medical treatment and appropriate medications, he stopped using marijuana. Applicant claims he decided to omit information about his drug use from his 2008 and 2013 EQIPs because he was no longer using marijuana and felt it was no longer important information. He also claims he omitted the information because he did not fully realize the ramifications of doing so. Applicant was interviewed by a Government investigator after each EQIP was submitted. In neither interview did he avail himself of the opportunity to correct his EQIP omissions.

Applicant did not make any good-faith effort to correct his falsifications. Available information reasonably suggests that he would not have disclosed his drug use in response to Government interrogatories had investigators not already learned of his conduct from other sources. His lack of candor about his past conduct continues to cast doubt on his current suitability for access to classified information. There is no basis for application of any of the mitigating conditions at AG ¶ 17.

Financial Considerations

In Applicant's 2008 EQIP he disclosed several significant delinquencies related to his failed real estate investment activities of 2006 and 2007. In a DOHA hearing in 2010, the administrative judge determined that Applicant showed good judgment in response to his financial problems. It was also determined that Applicant had established a meaningful track record of debt repayment and debt reduction.

In Applicant's 2013 EQIP, he again disclosed several significant delinquencies, some of which still remained from his real estate activities. Much of the debt at issue here was accrued after Applicant returned to work as a defense contractor in 2007. Available information shows that only two of the debts alleged in the SOR in the present case have been addressed by Applicant. He has paid about half of the debt for a promissory note at SOR 3.k, and the debt at 3.n was simply forgiven after being written off as a business loss, and the amount owed was declared on a Form 1099-C as possible income for tax year 2013.

By contrast, his 2007 tax debt was reduced through an involuntary bank levy, but the lien against him is still in place and he has not yet begun negotiations with the IRS to resolve the remaining balance. Applicant originally stated that the mortgage debt at SOR 3.i had been satisfied through a short sale; however, it was actually foreclosed and

no information was presented as to whether Applicant's obligation for that debt has been resolved. As to his remaining personal debts, he is relying on the statute of limitations against collections to avoid repaying those debts.

Available information is sufficient to raise a security concern about Applicant's finances. That concern is expressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*).

Applicant presented information showing that he is repaying his ex-wife as required by the terms of his divorce, but that he still owes her more than \$30,000. To his credit, Applicant has nearly completed his payments on an \$18,000 loan from his mother, and he has not accrued any new unpaid debts since about 2011. However, two civil judgments have not been addressed and Applicant did not present information showing how he intends to resolve those obligations. Of the mitigating conditions listed under AG ¶ 20, applicability of the following pertinent factors must be considered:

(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; and

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

These mitigating conditions do not apply because Applicant's financial problems have continued since he was cleared in 2010. Although the amount at issue is much lower than in Applicant's previous case, his total debt is still significant. Although

Applicant's financial problems are rooted in his real estate activities and his divorce, at least seven years have passed without definitive action on many of his debts. Additionally, he has new debts that have not been acted upon, and Applicant is relying on the statute of limitations rather than trying to establish payment plans for many of his debts. There has been no good-faith effort to repay his debts, and he has not sought professional counseling or other financial assistance in resolving his debts.

The questions about his judgment raised by his financial problems persist. On balance, the positive information about his decreased spending, and about his repayment of debts to his mother and ex-wife is not sufficient to overcome the adverse information about his lack of action regarding his tax lien and his other delinquent accounts. None of the pertinent mitigating conditions under this guideline apply.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E, F, and H. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 38 years old and presumed to be a mature, responsible adult. He has a good record of performance with his current employer, and his second marriage appears to be more stable and productive than his first. His illegal drug use is behind him; however, his untruthfulness about that conduct weighs heavily against a finding that he can be trusted in a classified environment. On two occasions, he deliberately interfered with the Government's ability to properly assess his suitability for access to classified information. Combined with his ongoing financial problems, available information sustains the doubts raised by the Government's information. Because protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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 H:	FOR APPLICANT
Subparagraphs 1.a - 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a:	Withdrawn
Subparagraphs 3.b - 3.n:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge