



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



In the matter of:)
)
) ISCR Case No. 14-01796
)
Applicant for Security Clearance)

Appearances

For Government: James Norman, Esq., Chief Department Counsel
For Applicant: *Pro se*

07/17/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant refuted the security concern under Guideline E (personal conduct), but failed to mitigate those concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On February 8, 2013, Applicant submitted a security clearance application (SCA). Based on a review of Applicant’s SCA and the ensuing investigation, Department of Defense (DOD) adjudicators issued Applicant a Statement of Reasons (SOR) on June 18, 2014, 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*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006. The SOR alleged security concerns under Guidelines F and E.

On July 14, 2014, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On March 27, 2015, Department Counsel prepared a File of Relevant Material (FORM) that contained documents marked as Items 1 through 8. On April 2, 2015, Applicant received a copy of the FORM and was given 30 days from its receipt to submit objections and supply additional information. On April 29, 2015, he submitted a response to the FORM. The case was assigned to me on May 15, 2015.

Findings of Fact

Under Guideline F, the SOR alleged that Applicant had 21 delinquent debts totaling about \$14,299 (SOR ¶¶ 1.a-1.u) and that he issued three insufficient fund checks to the IRS between March 2012 and February 2013 (SOR ¶ 1.v). The SOR alleged under Guideline E that Applicant falsified his SCA in 2002 by failing to report that he used marijuana from about November 1982 to September 1984 while holding a security clearance (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted each Guideline F allegation and denied the Guideline E allegation. His admissions are incorporated as findings of fact.¹

Applicant is a 56-year-old training specialist who has been employed by a defense contractor since February 2008. He attended college for about four years, but had not received a degree. He served on active duty in the Army from September 1977 to September 1992 and in the National Guard from January 1996 to February 2012. He received honorable discharges for his military service. He is married. In his SCA, he listed four children, ages 22, 23, 30 and 35; two stepchildren, ages 26 and 30; and a deceased child. He held a security clearance in the past.²

In 2006, Applicant's wife was diagnosed with a chronic, disabling disease and was no longer able to work. He became the family's sole means of support. Due to her inability to work, they lost about \$24,000 in annual income. They have been working with a lawyer to obtain disability compensation for his wife, but that has been a lengthy process. They also incurred medical bills that were not covered by their health insurance. In 2011, his son was killed in a car accident while returning home from school. The loss of his son seriously impacted the family emotionally and financially. In 2012, he retired from the National Guard after 32 years of service, which has further reduced his income. He will not receive military retirement pay until he reaches age 60. He applied for VA disability compensation and started receiving those payments in August 2014. The amount of his monthly disability compensation is about \$900. As of July 2014, his VA benefits were apparently in an overpayment status and the VA was proposing a recoupment action.³

¹ Items 1, 2.

² Items 2, 3, 5.

³ Items 2, 5; Response to the FORM.

Applicant's credit reports reflect that the date of first delinquency (DFD) or date of last activity (DLA) for the alleged debts range from July 2007 to December 2013. Six of the debts had a DFD/DLA in 2013. In February 2013, Applicant was questioned about his delinquent debts during an Office of Personnel Management (OPM) interview and indicated he had not received credit counseling.⁴

In his July 2014 Answer to the SOR, Applicant stated:

- a. that he would arrange monthly payments on the debt in SOR ¶ 1.a;
- b. that he would resolve the debts in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, 1.q, and 1.r before the end of 2014; and
- c. that he admitted owing the debts in SOR ¶¶ 1.g, 1.n, 1.o, and 1.p, but disputed the listed amounts, and indicated, if the amounts were found to be correct, he would make payments to satisfy the debts.

Despite his representations in his Answer to the SOR, Applicant provided no proof that he resolved any of those debts, made any payment arrangements for them, or made any payments towards them.⁵

In his Answer to the SOR, he also claimed the debts in SOR ¶¶ 1.h and 1.k are the same debt. However, these debts have different "opened dates" and balances. Insufficient evidence was presented to show these accounts are the same debt.⁶

In his Response to the FORM dated April 29, 2014, Applicant provided proof that his federal student loan (SOR ¶ 1.t) had a balance of \$4,555; that it was in forbearance from July 10, 2014, to October 9, 2014; and that the government provided him a six-year repayment schedule with payments starting on October 10, 2014. His most recent credit report dated March 26, 2015, reflected this debt was not past due, which supports a determination that he had been making the \$34 monthly payments from October 2014 to March 2015.⁷

In his Response to the FORM, Applicant provided proof that he resolved the debts in SOR ¶¶ 1.f (\$66), 1.l (\$3,954), and 1.m (\$551). The details of how he resolved those debts are unknown. He indicated that he brought up-to-date the debt in SOR ¶ 1.r, but did not provide proof to confirm that statement.⁸

⁴ Items 5, 6, 7, 8.

⁵ Item 2.

⁶ Items 2, 6, 7, 8.

⁷ Item 6; Response to FORM.

⁸ Response to FORM.

In his Response to the FORM, Applicant indicated that he contacted the creditors of the debts in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, 1.n, 1.o, 1.p, and 1.s for the purposes of making repayment arrangements, but noted that he had not paid off or made payments for those debts. He did not provide any information about what arrangements were made, when payments on those debts would begin, or the amount of those payments.⁹

In the Response to the FORM, Applicant indicated that he was disputing the debts in SOR ¶¶ 1.g and 1.q. However, he provided no documentation substantiating the basis of the dispute.¹⁰

In his SCA, Applicant disclosed that he owed the federal government about \$6,000 in past-due taxes for 2008 (SOR ¶ 1.u). This problem arose because he received severance pay from a job and income taxes were not withheld from that payment. When he filed his 2008 income tax return, he did not have the money to pay those taxes. In the OPM interview, he indicated the IRS withheld his subsequent tax refunds to offset the past-due taxes. In his Response to the FORM, he provided an IRS document that reflected the IRS withheld his 2014 income tax refund of \$921 and applied it to taxes he owed for 2010. He still owes the IRS \$935 in past-due taxes for 2010. Why his income taxes were past-due for 2010 is unknown.¹¹

Applicant's most recent credit report reflected that he had three past-due debts that were not alleged in the SOR. These were a loan that was past due for \$808, a cable/cellular account that was past due for \$943, and his mortgage that was 30 days past-due for \$780. This credit report also reflected that he opened an automobile loan for \$15,183 in November 2014 and another loan in December 2014 for \$1,114.¹²

Applicant provided no evidence that he received financial counseling. He did not provide a monthly budget. It is unknown whether he has any discretionary income remaining each month after payment of his expenses.

In his SCA dated February 8, 2013, Applicant disclosed that he used hashish from about November 1982 to September 1984 while holding a security clearance. In his OPM interview, he indicated that he ex-wife supplied the hashish and he smoked it

⁹ Response to FORM.

¹⁰ Response to FORM.

¹¹ Items 1, 2, 3, 4; Response to FORM. Unalleged delinquent debt will not be considered in applying the disqualifying conditions, but may be considered in applying the mitigating conditions and making a whole-person assessment.

¹² Item 6.

due to peer pressure. He stopped smoking it because he knew that conduct was illegal and the Army was starting a drug testing program.¹³

In his SCA dated May, 9, 2002, Applicant answered “No” to the question that asked whether he “EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety.” In his Answer to the SOR, Applicant stated that he did not remember purposely falsifying his response to that question and, if he answered it incorrectly, it was a mistake. He stated that he admitted to such drug use during previous investigations. Statements he made during previous investigations were not included in the FORM.¹⁴

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, in reaching a decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in

¹³ Item 3.

¹⁴ Item 4; Response to FORM.

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), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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 [his or 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

Guideline F, Financial Considerations

The security 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 and the record evidence established two disqualifying conditions in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Insufficient evidence was presented to establish that the dishonored checks alleged in SOR ¶ 1.v amount to a deceptive or illegal financial practice such as check fraud under AG ¶ 19(d). The dishonored checks will still be considered in determining whether he has acted responsibly in handling his financial obligations.

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.

Applicant's delinquent debts are ongoing. Insufficient evidence was presented to conclude his financial problems are unlikely to recur. Since 2006, Applicant's wife has been unable to work due to a chronic disease. In 2011, he and his wife lost a son in an automobile accident. His wife's illness and the loss of their son were conditions beyond their control that contributed to their financial problems. Although he resolved the debts in SOR ¶¶ 1.f, 1.l, and 1.m and is making payments on the federal student loan in SOR ¶ 1.t, Applicant does not merit full credit under AG 20(b) because he did not establish that he has acted responsibly in addressing his delinquent debts over the years. Many of the alleged debts are recent delinquencies. Some are relatively small debts (under \$100), but they remain unresolved. His most recent credit report reflected delinquent

debts not alleged in the SOR. Little is known about Applicant's financial situation. He did not provide documentation showing his income, expenses, and net monthly remainder. Insufficient evidence was presented to show that his financial problems are being resolved and are under control. His financial problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(c) do not apply. AG ¶ 20(d) applies to the debts that he has resolved or that are being resolved.

In his Response to the FORM, Applicant indicated that he is disputing the debts in SOR ¶¶ 1.g and 1.q. AG ¶ 20(e) does not apply because he provided no documentation showing he has a legitimate basis for disputing those debts.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 describes a condition that could raise security concerns and may be disqualifying in this case:

(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.

On his SCA dated February 8, 2013, Applicant disclosed that he used hashish back in the early 1980s while he possessed a security clearance. In his SCA dated May 9, 2002, he did not disclose that he used illegal drugs while holding a security clearance. He claimed that he did not remember the circumstances of the earlier nondisclosure of such illegal drug use and any failure to report it must have been a mistake. He also claimed he previously disclosed such illegal drug use during security investigations. His claims are plausible. I find that the evidence does not support a conclusion that Applicant intentionally falsified his SCA 13 years ago. AG ¶ 16(a) is not applicable. Personal Conduct security concerns are concluded for Applicant.

Whole-Person Concept

In the adjudication process, an administrative judge must carefully weigh a number of variables known as the whole-person concept. Available information about the applicant as well as the factors listed in AG ¶ 2(a) should be considered in reaching

a determination.¹⁵ I gave due consideration to the information about Applicant in the record and concluded the favorable information, including the mitigating evidence, does not outweigh the security concerns at issue. Applicant failed to meet his burden of persuasion. The record evidence shows a lack of financial responsibility that weighs against granting a security clearance. Following the *Egan* decision and the “clearly consistent with the national interest” standard, doubts about granting Applicant’s eligibility for a security clearance must be resolved in favor of national security.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a–1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g–1.k:	Against Applicant
Subparagraphs 1.l–1.m:	For Applicant
Subparagraphs 1.n–1.s:	Against Applicant
Subparagraphs 1.t–1.v:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Decision

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

James F. Duffy
Administrative Judge

¹⁵ The adjudicative process factors listed at AG ¶ 2(a) are as follows:

(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.