



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



In the matter of:)	
)	
)	ISCR Case No. 14-02052
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

08/18/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct; Guideline F, financial considerations; and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On July 10, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, criminal conduct; E, personal conduct; and F, financial considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on August 25, 2014, and requested a hearing before an administrative judge. The case was assigned to me on June 12, 2015. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 19, 2015. I convened the hearing as scheduled on July 28, 2015. The Government offered exhibits (GE) 1 through 4, and 6 through 9, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A, which was admitted into evidence without objection. The record was held open to allow Applicant to submit additional documents, which he did. They were marked AE B through N, and were admitted into evidence without objection.¹ The record closed on August 4, 2015. DOHA received the hearing transcript (Tr.) on August 5, 2015.

Procedural Issues

Department Counsel moved to withdraw SOR ¶ 1.f. There was no objection and the motion was granted.²

Findings of Fact

Applicant admitted all of the allegations in SOR except ¶¶ 2.c, 3.d through 3.h and 3.j. His admissions were incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 54 years old. He has an associate's degree. He served in the Navy Reserve from 1982 to 2006 and was honorably retired in the paygrade E-6. He married in 1990 and divorced in 2010. He has a child who is 23 years old and another who is deceased. Applicant remarried in 2011 and is legally separated from his wife. He has worked for his employer since 1987.³

In 1987, Applicant was charged with driving under the influence of alcohol (DUI). He pled guilty to the charge and was sentenced to probation, community service, and his driver's license was suspended for six months. In 1993, Applicant was charged with battery-family violence. He was found guilty and fined. In 2005, Applicant was charged with DUI. He was later found guilty of reckless driving and speeding. In 2006, he was charged with DUI and found not guilty by a jury. In December 2007, he was charged with battery-family violence and placed on probation. The family violence incidents occurred with his first wife. Applicant's above criminal conduct was raised as a security concern, and he had a hearing before a DOHA administrative judge in September 2008. He was granted a security clearance. The above criminal offenses were raised again in the latest SOR under ¶¶ 1.a, 1.b, 1.e, 1.g and 1.h.⁴

¹ Hearing Exhibit I is Department Counsel's email memorandum with comments, but no objections to Applicant's exhibits.

² Tr. 13.

³ Tr. 33-37.

⁴ Tr. 70-73; GE 8, 9.

In February 2012, Applicant was charged with battery-family violence. He and his second wife had a mutual altercation. In May 2013, Applicant and his wife had another mutual altercation. Both parties were arrested. He was fined and ordered to attend a domestic violence intervention program, which he did. The 2012 charge was later dismissed. The 2013 charge is still pending. He filed for divorce the end of May 2013. It is pending.⁵

Applicant was suspended from work for two weeks without pay in March 2013. He admitted he was suspended due to internet abuse. He was surfing the web when he was working. He stated his offense was defined as using company assets while working. He explained he was manning a building while recuperating from a hip operation and had nothing to do, so he used the internet.⁶

In May 2013, Applicant was initially terminated from work because he failed to notify his employer of his whereabouts. Applicant was in jail at the time, due to the battery-family violence charge. He testified that he contacted a friend and asked him to contact his employer, but the employer's rule required that an employee personally make the contact. His employer and Applicant's union reached an agreement to change the termination to a suspension. He was suspended for two weeks.⁷

Applicant attributed his financial problems to his divorce from his first wife. He indicated the divorce left him with most of the marital bills, and he was financially unable to pay them. Applicant lost income when he was suspended from his job and during periods when he was convalescing due to hip surgery and was on partial disability.⁸

Applicant admitted he failed to file his 2010, 2011, 2012, and 2014 federal and state income tax returns. He attributed his failure to his first wife having his financial records when she left in 2010. He did not know why he did not file in 2011. He contacted an accountant about a year and a half ago and thought he was going to owe the Internal Revenue Service (IRS) about \$6,000. He did not file his 2014 tax returns because he was afraid he would owe more money. He contacted the same accountant about six to nine months ago, but not about his 2014 tax returns. He did not have any further contact with the accountant prior to the hearing. He indicated that he filed his 2013 federal income tax returns on time and owed \$138, which he said he paid. He believes he owes the IRS about \$6,300 based on what the accountant told him when he last contacted him.⁹

⁵ Tr. 38-46, 73-83; Answer to SOR; GE 2, 8, 9. Applicant also saw a personal counselor during this period of time due to stressors in his life.

⁶ Tr. 66-70, 76; AE A.

⁷ Tr. 58-66; 76-77; AE A.

⁸ Tr. 37.

⁹ Tr. 47-56, 90-97; GE 1, 4, 6. Applicant admitted during his testimony that he failed to file his federal income tax returns for additional years that were not alleged, and he also failed to file his state income tax

Subsequent to his hearing, Applicant provided a letter from the accountant that stated he had prepared Applicant's 2010, 2011, 2013, and 2014 federal and state income tax returns, which were mailed to the proper taxing agencies. The accountant provided a copy of the certified mail receipt dated July 31, 2015. After review of the documents, I believe Applicant was confused about the year in which he filed on his own. It appears he filed his 2012 tax returns, but failed to timely file his 2013 tax returns.¹⁰ According to the returns, Applicant may be entitled to refunds for certain tax years. Applicant explained that the taxes owed for 2009 alleged in SOR ¶ 3.a (\$4,525) were the result of an early withdrawal from a 401k account. He did not pay the taxes owed. If he is entitled to refunds, they will likely be used to offset his tax debt, but it is unknown at this time what the current balance may be and if any other taxes are owed. Applicant also took a loan from his 401k account to purchase a car for his second wife. Applicant requested that he be permitted to pay the taxes he owes through an installment plan with the IRS. That request has not been acted on.¹¹

The SOR alleges tax liens in ¶¶ 3.c (\$80 in 2009), 3.d (\$80-2010), 3.e (\$81-2011), 3.f (\$81-2012), and 3.g (\$82-2012). The tax liens pertain to state real and personal property taxes. Applicant indicated the taxes were for a boat that his first wife was required to pay. Applicant provided documents to show he paid the 2008, 2009, and 2010 taxes in August 2013. He did not provide documents to show the 2011 and 2012 tax liens have been satisfied or that the debt belonged to his first wife.¹²

Applicant denied he owed the judgment in SOR ¶ 3.h (\$6,477), which he said was a debt owed to his first wife as part of their divorce settlement. He provided documents to show his wages were garnished to pay the judgment. The debt is resolved.¹³ He stated his second wife is responsible for the debt in SOR ¶ 3.j (\$1,485). He did not provide proof that it is her debt or that it is paid. He acknowledged he owed the debt in SOR ¶ 1.3 (\$11,609), and it is not paid.¹⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

returns for the same years. I have not considered the additional years or the failure to file his state income tax returns for disqualifying purposes, but will consider them when making a credibility determination and analyzing the whole-person.

¹⁰ AE C, G, H, I, J, K, L, M, N (page 2 of the three-page document in AE H, L, N were not provided).

¹¹ Tr. 101-108; GE 3 6.

¹² Tr. 97; GE 3, 6; AE F.

¹³ AE D and E.

¹⁴ Tr. 56-58, 84, 100-101.

disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested four times for battery-family violence with two different wives between 1993 and 2013. He was convicted of DUI in 1987, and a 2005 DUI charge was reduced to reckless driving and speeding. He was charged again with DUI in 2006 and was found not guilty. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following two are potentially applicable:

- (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
- (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 had alcohol-related incidents and four criminal charges related to family violence with both of his wives beginning in 1987 through 2013. Applicant is separated from his second wife. He has completed a domestic violence intervention course. His May 2013 battery charge is still pending. There is insufficient evidence to conclude his criminal behavior happened under unique circumstances. Although it appears he does not drink and drive any longer, he has a significant and long history of criminal conduct. His conduct casts doubt on his reliability, trustworthiness and good judgment. There is insufficient evidence to conclude either of the above mitigating conditions applies.

Guideline F, Financial Considerations

The security concern for financial considerations 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to timely file federal income tax returns for 2010 and 2011.¹⁵ He is indebted to the IRS for \$4,525 for taxes owed in 2009. He has tax liens for unpaid real estate and property taxes. He has other delinquent debts that are not paid or resolved. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's attributed his financial problems to his 2010 divorce. He was suspended from his job, which also impacted his finances. His income was reduced

¹⁵ Applicant failed to file his 2013 and 2014 federal and state tax returns that are not considered for disqualifying purposes, but will consider it when analyzing the whole-person and Applicant's credibility.

when he was receiving disability because of hip surgery. After the hearing Applicant filed his federal tax returns for the tax years alleged and other years that were not alleged. He is aware of the 2009 federal tax debt, but it is not resolved. The judgment was satisfied through garnishment. He paid two small property tax liens, but the others are unresolved. Although he requested to pay his tax debt through an installment plan, none has been accepted and no payments have been made. Applicant's past conduct casts doubt on his reliability, trustworthiness, and good judgment. Based on his pattern of conduct, I cannot find that his behavior happened under unique circumstances or that it is unlikely to recur. AG ¶ 20(a) does not apply.

I have considered Applicant's testimony about the reasons for his financial problems and his failure to file his federal income tax returns and pay his debts. The reduced income due to his surgeries and his divorce were beyond his control. His reduced income due to his suspensions and his failures regarding his tax obligations were within his control. In order to fully apply AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. There is minimal evidence Applicant took any steps to address his financial problems until he received the SOR. He filed his delinquent federal tax returns after his hearing. He paid two small property tax liens (2009 and 2010), and a 2012 judgment was paid through garnishment. He did not provide a plan for resolving his remaining financial problems. He has a 2009 federal tax lien that has not been paid. An installment payment plan has not yet been accepted by the IRS. I find AG ¶ 20(b) only partially applies.

There is no evidence Applicant has received financial counseling. There is insufficient evidence to conclude Applicant's financial problems are resolved or under control. He has not initiated a good-faith effort to pay the remaining overdue creditors. AG ¶ 20(d) applies to SOR ¶¶ 1.c and 1.d. AG ¶¶ 20(c) and 20(d) do not apply to the remaining financial allegations.

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 conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(c) 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant has a history of family violence charges and offenses involving alcohol. In 2013, he was suspended from work for misusing company resources while at work. He was originally terminated from employment because he failed to follow the appropriate rules when he was absent from work due to his arrest. That termination was later overturned and resulted in a suspension. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under 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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's past behavior involving criminal offenses and suspensions from work is not minor. He received two suspensions in 2013. Based on his pattern of inappropriate behavior, I cannot find that his behavior is infrequent. Applicant has acknowledged some of his behavior. He is no longer living with his second wife, which is a positive step in reducing the potential for additional misconduct. However, based on both Applicant's family and work history behavior, I am not convinced similar behavior is unlikely to recur. His personal conduct casts doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(d) do not apply.

Whole-Person Concept

Under the whole-person concept, the 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. The 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, F, and E 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 54 years old and retired from the Naval Reserve. He has a long history of criminal conduct, financial problems, and personal issues. He has been married twice and in both marriages he had issues with family violence. He was suspended from work twice in 2013. He failed to file his federal income tax returns for several years and only did so after his hearing. He has unpaid federal taxes for 2009, unpaid real estate property tax liens, and other delinquent debts. Applicant failed to meet his burden of persuasion. His past conduct raises questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the criminal conduct, personal conduct, and financial considerations guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs: 1.a-1.e:	Against Applicant
Subparagraph; 1.f:	Withdrawn
Subparagraphs: 1.g-1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs: 2.a-2.c:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT

Subparagraphs: 3.a-3.b:	Against Applicant
Subparagraphs: 3.c-3.d:	For Applicant
Subparagraphs: 3.e-3.g:	Against Applicant
Subparagraph: 3.h:	For Applicant
Subparagraphs: 3.i-3.j:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge