



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



In the matter of:)
)
) ISCR Case No. 11-12992
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

09/05/2013

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under the guidelines for personal conduct, criminal conduct, and financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On June 27, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 18, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E (personal conduct), J (criminal conduct), and F (financial considerations). This action was taken under Executive Order (EO) 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) implemented on September 1, 2006.

The SOR set forth reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue Applicant's eligibility for a security clearance. On May 1, 2013, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On June 27, 2013, Department Counsel submitted the Government's File of Relevant Material (FORM) that contained documents identified as Items 1 through 11.

On June 27, 2013, the Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. Applicant received the FORM on July 5, 2013, and did not submit any objections or additional matters within the allotted period. The case was assigned to me on August 25, 2013.

Findings of Facts

Applicant is a 30-year-old employee of a defense contractor. He has worked for his current employer since March 2007. He graduated from high school in 2001 and has been attending community college since 2009. He married in May 2005 and divorced in June 2010. He has one child who is five years old. He has not held a security clearance in the past.¹

Under Guideline E, the SOR alleged that Applicant falsified his responses to questions in two e-QIP sections (SOR ¶¶ 1.a and 1.b) and that he was terminated from a job after testing positive for marijuana in December 2006 (SOR ¶ 1.c). Under Guideline J, the SOR alleged that Applicant was arrested for driving while intoxicated (DWI) and other traffic offenses in May 2011 and was found guilty of the DWI offense (SOR ¶ 2.a). Under Guideline F, the SOR alleged that Applicant had 18 delinquent debts totaling \$24,218 (SOR ¶¶ 3.a through 3.r) and that he failed to file his 2009, 2010, and 2011 tax returns as required (SOR ¶ 3.s). In his Answer to the SOR, Applicant denied all of the Guideline E allegations and, in doing so, denied using marijuana, but admitted that he was terminated from a job in December 2006 after testing positive for marijuana. He admitted the sole Guideline J allegation and 16 of the 19 Guideline F allegations. His admissions are incorporated herein as findings of fact.²

From September 2001 to December 2006, Applicant worked as a nuclear technician. In his e-QIP, he gave inconsistent explanations for why he left that job. In Section 13A.3, he stated, "I worked here until I found something else." In Section 13C.1, however, he indicated that he was fired from that job and stated, "They said I tested positive for marijuana – but I didn't smoke. I don't know how they came to that conclusion, but I was fired after that." In responding to a Section 13C.3 -- which asked if he received a written warning or been officially reprimanded, suspended, or disciplined for violating a company rule or policy -- he stated, "I was told that I tested positive for

¹ Item 5.

² Items 1 and 4. In the FORM, Department Counsel amended the sole Guideline J allegation by deleting and/or rearranging language in the original allegation. This amendment is not a substantive change from the original allegation.

Marijuana. I didn't smoke Marijuana, still don't know exactly how that happened." In the e-QIP, he also listed that he was unemployed from December 2006 to March 2007.³

On May 28, 2011, Applicant was arrested for DWI 1st offense and driving under revocation/suspension. Both of those alleged offenses were misdemeanors. During his Office of Personnel Management (OPM) interview on August 10, 2011, he stated that he was driving to a friend's house when the police pulled him over for swerving on the road. He stated that he consumed one beer before driving. The police officer administered him an alcohol breath test, told him that he failed the test, arrested him, and transported him to the local jail. His arraignment was originally scheduled for June 1, 2011, but was apparently continued. Another hearing date was set for June 16, 2011, but also was continued. At some point, he hired an attorney to represent him in that criminal proceeding. On October 6, 2011, he was found guilty of the DWI charge and the driving under revocation/suspension charge was dismissed. He was sentenced to 30 days in jail, 24 months of unsupervised probation, 12 months of restricted driving privileges, \$250 fine, and mandatory attendance in an alcohol and substance abuse program (ASAP). A letter dated December 7, 2012, reflects that he successfully completed ASAP.⁴

In his e-QIP dated June 27, 2011, he responded "no" to the following questions:

Section 22: Police Record

a. [In the last 7 years,] [h]ave you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?

b. [In the last 7 years,] [h]ave you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?

e. Have you EVER been charged with any offense(s) related to alcohol and drugs?

Section 24: Use of Alcohol

a. In the last 7 years, has your use of alcohol had a negative impact on your work performance, your professional or personal relationships, your finances, or resulted in intervention by law enforcement/public safety personnel?

b. In the last 7 years, have you been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?

³ Items 5 and 6.

⁴ Items 6 and 9.

c. In the last 7 years, have you received counseling or treatment as a result of your use of alcohol?⁵

In the OPM interview, Applicant was confronted about the DWI charge and reportedly indicated that he misunderstood the question and thought he did not have to list it because he had not been formally charged in court. In his Answer to the SOR, Applicant denied the falsification allegation involving his responses to the questions in Sections 24a, 24b, and 24c by stating, "I deny, at the time I first filled out the packet I had not been to court and ordered to take any class including ASAP." In his Answer, he denied the falsification allegation involving his responses to the questions in Sections 22a, 22b, and 22e by stating, "I deny, misunderstood that part that said have I ever been arrested and awaiting trial. But again at the time I had not been tried for anything, not been to court and found guilty."⁶

In the OPM interview, Applicant attributed his financial problems to his divorce and child support payments of \$940 per month. He has \$240 deducted from his weekly paycheck for the child support payments. He stated that he lives paycheck-to-paycheck, but is able to pay his monthly living expenses. He indicated that he has not sought financial counseling or debt consolidation services.⁷

Applicant did not provide any proof of payments toward the delinquent debts. In responding to financial interrogatories on December 18, 2012, he was asked about the status of the delinquent debts and stated, "Have not taken care of any of those matters, but I plan to as soon as I can gather some money." He submitted a personal financial statement (PFS) that reflected his total net monthly income was \$1,836 and his total monthly expenses were \$1,865, which left him a negative net monthly remainder of \$29. The PFS does not list any payments toward the delinquent debts.⁸

In his Answer to the SOR, Applicant denied the debts in SOR ¶¶ 1.a, 1.n, and 1.q. He indicated that he either had no knowledge of those debts or did not know how the creditors came up with the alleged amount. Documents in the FORM, however, provide substantial evidence of the denied debts.⁹

Applicant admitted the debts in SOR ¶¶ 1.c and 1.o, but indicated they were duplicates. Both of those debts are from the same creditor and are for similar amounts. The debt in SOR ¶ 1.c is a judgment, while the one in SOR ¶ 1.o is a charged-off

⁵ Item 5.

⁶ Items 4, 5, and 6.

⁷ Items 4 and 6.

⁸ Item 6.

⁹ Items 4, 7, 8, and 10.

account. The evidence supports Applicant's contention that these allegations are for the same debt.¹⁰

In his Answer to the SOR, Applicant admitted that he failed to file his 2009, 2010, and 2011 tax returns as required and stated that he was going to take care of this matter. In responding to interrogatories, he indicated that he was going to set up a payment plan with the Internal Revenue Service for his \$700 tax liability (SOR ¶ 1.r). He provided no documentation showing that he filed the late tax returns or set up the payment plan for the delinquent taxes.¹¹

Applicant did not provide any letters of reference, work evaluations, awards or commendations, or other character evidence.¹²

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 disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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.

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

¹⁰ Items 4 and 11.

¹¹ Items 4 and 6.

¹² Items 3, 4, 5, and 6.

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 EO 10865 provides that adverse 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 E, Personal Conduct

The security concern for personal conduct is set out in 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

The SOR alleged that Applicant falsified his e-QIP by responding “no” to questions that asked him if he had been ordered, advised, or asked to seek counseling

or treatment as a result of his use of alcohol (Section 24b) and if he had received counseling or treatment as a result of his use of alcohol (Section 24c). At the time he completed the e-QIP, he had not been convicted of DWI and had not been ordered to attend ASAP classes. No evidence was presented to show that his responses to the questions in Sections 24b and 24c were false. I find in his favor regarding the portions of SOR ¶ 1.a that pertain to the questions in Sections 24b and 24c.

On May 28, 2011, Applicant was arrested for DWI and driving under revocation/suspension. He was transported to the local jail and processed for those suspected offenses. He had court appearances set for June 1, 2011, and June 16, 2011, that were continued. About four weeks after his DWI arrest, he submitted his e-QIP and responded “no” to questions that asked if he was awaiting trial on criminal charges (Section 22a), if he had been arrested by a law enforcement officer in the last seven years (Section 22b), if he had ever been charged with an alcohol-related offense (Section 22e), and if his use of alcohol resulted in an intervention by law enforcement personnel (Section 24a). In his OPM interview, he indicated that he thought he did not have to list this arrest because he had not been formally charged in court. In his Answer to the SOR, he contended that he misunderstood the part of the questions that asked if he had been arrested or was awaiting trial. His explanations for responding “no” to these questions are not believable. Having just gone through the stressful events of his arrest and preliminary processing in the criminal justice system, he knew and understood that he had been arrested for and was pending trial on an alcohol-related offense when he submitted his e-QIP. I find that he intentionally provided false responses to the questions in Sections 22a, 22b, 22e, and 24a. AG ¶ 16(a) applies.

In December 2006, Applicant was terminated from a job after his employer determined that he tested positive for marijuana use. AG ¶ 16(c) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advise of unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;
- (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;

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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's failure to provide truthful and candid answers during the security clearance process was recent and raises serious security concerns. He failed to establish that any of the above mitigating conditions applied to the substantiated portions of the Guideline E allegations.

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.

The following disqualifying conditions under AG ¶ 31 are potentially applicable:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(d) individual is currently on parole or probation.

Applicant was convicted of DWI in October 2011. His sentence included 24 months of unsupervised probation, which will apparently end in October 2013. The evidence is sufficient to raise the above disqualifying conditions.

I have considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and following are pertinent:

(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 claimed that he consumed one beer before his DWI arrest in 2011. Based on his subsequent conviction for DWI, his claim of consuming only one beer on that occasion is questionable. Although he successfully completed ASAP, his driving privileges were restricted until October 2012. Given that he still remains on probation, I find that sufficient time has not passed to conclude that his criminal conduct will not recur. AG ¶¶ 32(a) and 32(d) partially apply.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (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 accumulated delinquent debts that he was unable or unwilling to satisfy for an extended period. He failed to file his 2009, 2010, and 2011 tax returns as required by law. This evidence is sufficient to raise the above disqualifying conditions.

Several financial considerations 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, significant, and cast doubt on his current reliability, trustworthiness, and good judgment. From the evidence presented, I am unable to determine that his financial problems are unlikely to recur. AG ¶ 20(a) does not apply.

Applicant attributed his current financial problems to his divorce and child support payments. His divorce was a condition beyond his control. To merit full credit under AG ¶ 20(b), an applicant not only must encounter conditions beyond his or her control, but also must act responsibly under the circumstances. In this case, Applicant presented no proof of payments toward the remaining debts alleged in the SOR. He failed to provide a realistic plan for resolving those debts. His PFS reflects a negative net monthly remainder. He failed to establish that he filed his tax returns for 2009, 2010, and 2011. Based on the record evidence, I am unable to find that he acted responsibly under the circumstance or that his financial problems are under control or are being resolved. AG ¶¶ 20(c) and 20(d) do not apply. AG ¶ 20(b) partially applies.

The debts in SOR ¶¶ 1.c and 1.o are duplicates. AG ¶ 20(e) applies to the debt in SOR ¶ 1.o.

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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E, 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.

Minimal whole-person evidence has been presented in this case. Applicant provided no letters of reference and no work performance evaluations. For the reasons discussed above, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. In conclusion, Applicant failed to mitigate the personal conduct, criminal conduct, and financial considerations security concerns.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a – 3.n:	Against Applicant
Subparagraph 3.o:	For Applicant
Subparagraphs 3.p – 3.s:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge