



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 12-01294
)
 Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Jr., Esq., Department Counsel
For Applicant: *Pro se*

11/26/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 8, 2011. On June 25, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines E and F. DOD acted 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) implemented by DOD on September 1, 2006.

Applicant answered the SOR on July 22, 2013, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on September 10, 2013. On September 11, 2013, a complete copy of the file of relevant

material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on September 23, 2013. He responded on September 24, 2013, and submitted additional documentary evidence, to which Department Counsel did not object. The case was assigned to me on October 29, 2013.

Findings of Fact

In his answer to the SOR, Applicant denied the allegations in SOR ¶¶ 1.a and 1.b under Guideline E. He admitted the allegations in SOR ¶¶ 2.a-2.d under Guideline F. His admissions are incorporated in my findings of fact.

Applicant is a 30-year-old senior consultant employed by a federal contractor since October 2010. He received a bachelor's degree in computer science in April 2006. He has never married.

When Applicant submitted his SCA in September 2011, he disclosed that he used marijuana twice in March 2007 and used ecstasy twice in August 2007. (Item 4 at 31-32.) During a personal subject interview (PSI) in October 2011, he told the investigator that he used marijuana twice in March 2007 and used ecstasy only once in August 2007, explaining that the entry reflecting that he used ecstasy twice was a typographical error. He affirmatively declared that there were no instances of drug use after 2007. (PSI, attached to Item 5 at 4.) However, in response to DOHA interrogatories on March 15, 2013, he disclosed that he used marijuana and ecstasy again in April 2010. (Item 7 at 3.) The record does not reflect what motivated Applicant to disclose his 2010 drug involvement.

In his answer to the SOR, Applicant denied intentional omission of relevant information from his SCA or during his PSI. He stated that when he submitted his SCA and was questioned during the PSI, he "did not recall from memory the specific dates of the use of marijuana and ecstasy." As corroboration of his explanation, he cited his successful completion of a polygraph examination administered by another government agency. He did not state whether the polygraph examiner asked him to explain why he did not fully disclose his drug use in his SCA and PSI.

When Applicant submitted his SCA, he also disclosed that he was currently delinquent on the payments on a home that was his previous residence. He stated that he had applied for modification of the loan and was awaiting a decision from the lender. (Item 4 at 36-37.) During his PSI, he stated that he had not made any payments on the loan since December 2009 or January 2010, that he was still awaiting a decision on his application for a loan modification, and that he intended to resume making payments when the loan modification was completed. He attributed his financial problem to poor budgeting. He told the investigator that he had no other financial problems. (PSI at 1.)

Applicant's credit bureau report (CBR) dated September 16, 2011, reflected a real estate mortgage in foreclosure with a balance due of \$211,000; a real estate

mortgage in foreclosure with a balance due of \$339,000; and a real estate mortgage in foreclosure with a balance due of \$325,550 (Item 8 at 5, 10.) The property with the \$211,000 mortgage was Applicant's residence in another state before he moved to his current residence to accept a job with his current employer. (Item 4 at 8) The other two mortgages were on investment properties. In his PSI, Applicant stated that these were his father's investment properties and he cosigned on the loans but had no other involvement with the properties. (PSI at 5.) When the real estate market declined, they were unable to rent or sell the investment properties and unable to afford the payments. The lender foreclosed on the investment properties in September 2009. (Attachment to Answer.)

In his response to the FORM, Applicant denied that he engaged in a "strategic default" after realizing that the two properties were a bad investment. He presented documentary evidence of the foreclosure action, but he produced no evidence of the sale prices for the two properties and no evidence showing whether he owed any deficiency after the foreclosure sales.

In response to DOHA interrogatories in April 2013 and in his answer to the SOR, Applicant stated that the mortgage holder on his former residence had approved a short sale. In his response to the FORM, he stated that the short sale had not closed, but he provided documentation showing that the lender offered to accept a deed in lieu of foreclosure.

Applicant's CBR dated March 5, 2013, reflected a delinquent medical bill for \$450. (Item 9 at 1.) In his answer to the SOR, Applicant provided documentation that he had a payment arrangement for the delinquent medical bill and had made three \$56.25 payments in March, April, and May 2013. He stated that he was awaiting confirmation of his final payment of \$281.25, and he provided a confirmation number for the final payment. As of the date he submitted his response to the FORM, he had not yet received written confirmation of the final payment.

Applicant filed a petition for Chapter 7 bankruptcy in August 2013. The mortgage holder on his former residence, the lender for his investment properties, and the creditor holding any deficiency after foreclosure on the investment properties are listed among the creditors in his bankruptcy petition. The schedule of creditors with unsecured claims lists a default judgment obtained by the mortgage holder on the investment properties, and the amount claimed is listed as \$780,968, which does not correspond to any of the CBR entries. (Response to FORM.)

In his answer to the SOR, Applicant attached an email from his employer stating that he had received "an initial ISSATS clearance" and requesting that he receive a briefing in preparation for access to sensitive compartmented information (SCI). In his answer to the FORM, Applicant stated that he had completed a polygraph examination and had been granted a clearance and eligibility for access to SCI. Based on these representations, I ordered Department Counsel to submit a supplemental brief addressing reciprocal clearances. Department Counsel responded and submitted

documentary evidence that Applicant had not received a clearance, but instead had received an “interim declination” of his application for a clearance. (Supplemental Brief, Exhibits A and B).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA when he deliberately failed to disclose his use of marijuana and ecstasy in 2010 (SOR ¶ 1.a). It also alleges that he deliberately falsified material facts during his PSI by telling the investigator that he had no instances of illegal drug use after his uses of marijuana and ecstasy in 2007 (SOR ¶ 1.b).

The concern under this guideline 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.

The disqualifying condition relevant to Applicant’s SCA is AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire” The disqualifying condition relevant to Applicant’s PSI is AG ¶ 16(b): deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official . . . or other official government representative.”

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's explanation for his failures to disclose his most recent drug use in his SCA and his PSI is that he remembered three isolated incidents of drug experimentation in 2007 but did not remember drug use that occurred shortly before he began his current job and only a year before he submitted his SCA. I find this explanation implausible and unconvincing. I conclude that AG ¶¶ 16(a) and 16(b) are established.

The following mitigating conditions under this guideline are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

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;

AG ¶ 17(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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(a) is not established. Applicant's disclosure of his drug involvement in 2010 was not prompt; it occurred 19 months after he submitted his SCA. The record does not reflect whether his disclosure was prompted by the other government agency's security investigation or was a good-faith effort to correct the information.

AG ¶ 17(c) is not established. Applicant's falsifications were not "minor," because they undermined the integrity of the security investigation. It is a felony to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. His falsifications were recent and did not occur under unique circumstances making them unlikely to recur.

AG ¶ 17(d) is not established. Applicant has not acknowledged his intentional falsifications, but instead has offered an implausible, unconvincing explanation for them.

AG ¶ 17(e) is established. Applicant's eventual disclosure of his more recent drug involvement has eliminated his vulnerability to exploitation, manipulation, or duress.

Guideline F, Financial Considerations

The SOR alleges a delinquent medical collection account (SOR ¶ 2.a), a delinquent mortgage account in foreclosure (SOR ¶ 2.b), and two delinquent mortgages that have been foreclosed (SOR ¶¶ 2.c and 2.d). The concern under this guideline is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his CBR, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). The following mitigating conditions are potentially applicable:

AG ¶ 20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) is not established. Applicant's delinquent debts are recent, numerous, and did not occur under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant has offered no explanation for the delinquent medical debt. In his PSI, he attributed his financial problem with the mortgage on his former residence to poor budgeting. However, his financial problems related to his investment properties were due to a downturn in the housing market, which was a circumstance beyond his control. He acted responsibly regarding the medical debt through a payment agreement and multiple payments. He acted responsibly regarding his former residence, by seeking a loan modification, exploring a deed in lieu of foreclosure, and obtaining approval for a short sale. He has submitted virtually no information about his efforts to rent or sell his investment properties, efforts to avoid foreclosure, and efforts to resolve any deficiency before resorting to Chapter 7 bankruptcy.

AG ¶ 20(c) is established. Applicant has received counseling in connection with his Chapter 7 bankruptcy. If a discharge is granted, his current financial problems will be under control.

AG ¶ 20(d) is partially established. Good faith within the meaning of this mitigating condition means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). A bankruptcy discharge does not constitute a “good-faith effort.” “[A]n applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of this [mitigating condition.]” ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006). A security clearance adjudication is aimed at evaluating an individual’s judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant’s conduct in incurring and failing to satisfy the debt in a timely manner. See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). I conclude that AG ¶ 20(d) is established for the medical debt alleged in SOR ¶ 2.a and the past-due loan payments on Applicant’s former residence alleged in SOR ¶ 2.b, but not for the debts related to the investment properties alleged in SOR ¶¶ 2.c and 2.d.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable

participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline E and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is well educated. He has worked for his current employer for about three years. The record contains no information about his performance evaluations and no indication of his personal and professional reputation among his peers and supervisors. My ability to judge Applicant's sincerity and credibility is limited, because he requested a decision based on the record. After weighing the disqualifying and mitigating conditions under Guidelines E and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct and financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Subparagraphs 2.c-2.d:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge