



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-00795
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

09/13/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations), H (Drug Involvement), and E (Personal Conduct). Applicant has mitigated the Guideline H concerns but not the Guideline F and E concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 22, 2014. On February 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F, H, and E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR in an undated document and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 12, 2016, and the case was assigned to me on May 2, 2016. On May 12, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 7, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I kept the record open until July 11, 2016, to enable him to submit additional documentary evidence. He timely submitted AX C, which was admitted without objection. DOHA received the transcript (Tr.) on June 16, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.d. He admitted SOR ¶ 3.a but offered an exculpatory explanation. He denied SOR ¶ 1.e. He did not expressly admit or deny SOR ¶¶ 2.a-2.c, but offered explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 36-year-old tool technician employed by a defense contractor since April 2013. He was employed by the same contractor from March 2011 to September 2012, when he was laid off and then rehired in April 2013. He has never held a security clearance.²

Applicant married in September 2001. He and his wife separated in October 2001, but they are not divorced. He has a 15-year-old son for whom he paid child support until December 2014, when his son began living with him. (Tr. 26.) He also has a three-year-old son by his fiancée. He and his fiancée do not live together.

Applicant dropped out of high school and received a general educational development (GED) certificate in June 2000. He enlisted in the U.S. Coast Guard in November 2001, but he was discharged before completing boot camp in December 2001, after a urinalysis that was positive for marijuana. (GX 2 at 5.) He enlisted in the U.S. Army National Guard (ARNG) in April 2006 but was discharged in November 2006 after another urinalysis was positive for marijuana. (GX 2 at 4.) Notwithstanding his positive urinalysis, he received an honorable discharge. (AX B.) He held several private-sector jobs from March 2003 to March 2011, but was unemployed from January to March 2005, September 2005 to April 2006, February to November 2009, and June to July 2010.

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

² When Applicant submitted his SCA, he stated that he had never been granted a security clearance. (GX 1 at 38.) At the hearing, he testified that he was not sure whether he had previously been granted a clearance as a contractor employee. (Tr. 27.)

During a personal subject interview (PSI) with a security investigator in September 2014, Applicant disclosed that he started using marijuana when he was six years old. His parents used marijuana, and he took their marijuana cigarettes and smoked them, not knowing that he was smoking marijuana. He also disclosed that he has obtained marijuana from friends and smoked it since he was about 16 years old. (GX 2 at 6.) In his answer to the SOR, he stated that he was not a regular user of marijuana and used it only "once in a while." He testified his last use occurred when he was under stress due to his unsuccessful efforts to reconcile with his wife. After his positive urinalysis while in the ARNG, he promised his ARNG supervisor that he would not use it again. However, he tested positive one more time and was discharged from the ARNG.

The SOR alleges that Applicant failed to file his federal and state tax returns for tax years 2010 and 2011 (SOR ¶¶ 1.a and 1.b). He admitted the allegations in his answer to the SOR. At the hearing, he testified that he was overwhelmed with personal matters, "going through a lot," and his tax returns "just slipped [his] mind." (Tr. 35.) As of May 9, 2016, he owed the IRS \$1,668 in taxes, interest, and penalties. (AX A.) His federal tax debt is not alleged in the SOR. He has not submitted any evidence that he has filed his 2010 and 2011 returns or arranged to pay his federal tax debt.³

In the July 2014 SCA, Applicant answered "no" to a question whether, during the last seven years, he had illegally used any drugs or controlled substances. In his answer to the SOR, he denied falsifying his SCA, explaining that his last drug use was more than seven years preceding his SCA. At the hearing, he testified that his last use was in mid-2006. He then testified that his last use might have been in 2006 or 2007. On further questioning, he testified that it was in mid-2007. Finally, he admitted that he lied by answering "no" to the question, but that he panicked because he was afraid he would lose his job if he disclosed his drug use. (Tr. 48-57.) He testified that he no longer uses marijuana or associates with marijuana users because his fiancée insists on it.

The SOR alleges three delinquent debts that are reflected in Applicant's credit bureau report (CBR) dated August 1, 2014. (GX 3.) The evidence concerning these debts is listed below.

SOR 1.c, delinquent utility bill for \$179, placed for collection in June 2013. Applicant testified that when he moved into his current residence, the utility company informed him that he had a past-due balance, and he paid it in order to obtain electrical

³ Because Applicant's federal tax debt is not alleged in the SOR, it may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered his tax debt for these limited purposes.

service. (Tr. 32.) However, he submitted no documentary evidence showing that his account is current.

SOR ¶ 1.d, collection account for \$84, on which the last activity was in February 2008. Applicant submitted evidence that the debt was paid on June 17, 2016. (AX C.)

SOR ¶ 1.e, child support arrearage for \$1,439, placed for collection. In the September 2014 PSI, Applicant admitted that he fell behind in his child support payment during his periods of unemployment, but that he had paid the arrearage and was current on his payments. (GX 2 at 6.) His August 2014 CBR and the evidence attached to his answer to the SOR reflect that his last reported delinquency was in August 2011 and that his payments are current.

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 § 2.

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.” 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 F, Financial Considerations

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 a person might knowingly compromise classified information to raise money. It encompasses concerns about a person’s self-control, judgment, and other qualities essential to protecting classified information. A person 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 his CBR establish three disqualifying conditions under this guideline: AG ¶ 19(a) (“inability or unwillingness to satisfy debts”), AG ¶ 19(c) (“a history of not meeting financial obligations”), and AG ¶ 19(g) (“failure to file annual Federal, state, or local income tax returns as required . . .”).

The following mitigating conditions under this guideline 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 numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's periods of unemployment were circumstances largely beyond his control, but they were not the cause of his failures to timely file his income tax returns. His failures to fulfill his legal obligation to file federal and state tax returns indicate that he lacks the good judgment and reliability required of persons who are granted access to classified information. ISCR Case No. 14-04159 (App. Bd. Aug. 1, 2016). He has acted responsibly to resolve the debts alleged in SOR ¶¶ 1.d and 1.e. He claimed that he resolved the utility bill in SOR ¶ 1.c, but he failed to produce a payment receipt or a current bill reflecting an up-to-date account, even though he was given additional time to provide it.

AG ¶ 20(c) is not established. Applicant testified that he has obtained tax advice, but he produced no evidence to support his testimony, and he had not filed his past-due tax returns as of the date the record closed.

AG ¶ 20(d) is established for the debts in SOR ¶¶ 1.d and 1.e, but not for the debt in SOR ¶ 1.c.

Guideline H, Drug Involvement

The concern under this guideline is set out in AG ¶ 24: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Drugs are defined in AG ¶ 24(a)(1) as "[d]rugs, materials, and other chemical

compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)."

Applicant's admissions during his PSI, in his answer to the SOR, and at the hearing establish three disqualifying conditions under this guideline: AG ¶ 25(a) ("any drug abuse," defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction"); AG ¶ 25(b) ("testing positive for illegal drug use"); and AG ¶ 25(c) ("illegal drug possession . . .").

The following mitigating conditions are potentially relevant:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) is established. Applicant's last drug use was in 2007. His fiancée strongly opposes drug use, and Applicant knows that drug use will likely cause him his job. I am satisfied that his drug use is unlikely to recur.

AG 26(b) is partially established. Applicant appears to have disassociated himself from his drug-using friends and has abstained from drugs for about nine years, but he has not shown that he has avoided the environment where he used drugs and he has not submitted a statement of intent with provision for automatic revocation of any clearance.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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 relevant disqualifying condition in this case is AG 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" 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 experience and level of education 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).

An act of falsification has security significance independent of the underlying conduct. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsification. See ISCR Case No. 08-11944 at 3 (App. Bd. Aug 15, 2011).

In Applicant's answer to the SOR, he stated that he did not disclose his marijuana use because it predated his SCA by more than seven years. At the hearing, he first testified that his last marijuana use was in mid-2006. He then testified that it might have been in 2006 or 2007, and later testified that it was mid-2007. Finally, he admitted that he lied on his SCA. Based on his initial vague testimony and his later admission that he lied, I conclude that AG ¶ 16(a) is established.

The following mitigating conditions are potentially relevant:

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

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(a) is not established. Applicant did not disclose his falsification in his PSI, and initially denied it in his answer to the SOR. Only after extensive cross-examination at the hearing did he admit that he lied in his SCA.

AG ¶ 17(b) is not established. Applicant's falsification was not "minor." Falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) It was recent, and he repeated it in his answer to the SOR and in his initial testimony at the hearing. His falsification did not occur under unique circumstances.

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 Guidelines F, H, and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guidelines F, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his past drug involvement, but he has not mitigated the concerns raised by his failures to timely file his federal and state tax returns, his failure to document his resolution of the delinquent utility bill, and his falsification of his SCA. 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 F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.c: **Against Applicant**

Subparagraphs 1.d-1.e: **For Applicant**

Paragraph 2, Guideline H (Drug Involvement): **FOR APPLICANT**

Subparagraphs 2.a-2.c: **For Applicant**

Paragraph 3, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 3.a: **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