



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



In the matter of:)
)
) ISCR Case No. 15-01689
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esquire, Department Counsel
For Applicant: Sterling DeRamus, Esquire

09/21/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On September 25, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, criminal conduct, F, financial considerations, and E, personal conduct. The action was taken under Executive Order 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) effective within the DOD on September 1, 2006.

Applicant answered the SOR on October 13, 2015, and requested a hearing before an administrative judge. The case was assigned to another judge, and he

proceeded with the hearing on April 18, 2016. At the hearing, Applicant requested a continuance so he could hire an attorney. His request was granted. The case was reassigned to me on June 6, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 22, 2016. I convened the hearing as scheduled on July 19, 2016. The Government offered exhibits (GE) 1 through 10, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A. After the record closed, Applicant submitted an additional document, which was marked as AE B and was admitted into evidence without objection.¹ DOHA received the hearing transcripts (Tr.) on April 22, 2016, and July 27, 2016.

Findings of Fact

Applicant admitted the allegations SOR ¶¶ 1.a through 1.f, 2.a, 2.c, 2.d, 2.e, and 3.a. He denied the allegations in SOR ¶¶ 2.b, 3.b and 3.c. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 48 years old. He earned an associate's degree in 2012 and is pursuing a bachelor's degree. He was married from 1993 to 2000 and from 2003 to 2014. He has five children, ages 32, 23, 17, 15, and 12. He has joint custody of the two youngest children, who physically live with him. He pays child support for the 17-year-old who is from a previous relationship. Applicant served in the military from 1987 to 2009 and had three combat tours. He was honorably discharged in the paygrade E-7. Applicant has worked for his current employer, a federal contractor, since July 2014.²

Applicant attributes his financial difficulties to a reduction in pay when he retired from the military and frequent moves to seek employment.³ The debts alleged in the SOR are supported by credit reports from July 2014 and February 2015.

Applicant completed a security clearance application (SCA) in July 2014. Section 26 asked if any of the following things happened in the past seven years:

You had any possessions or property voluntarily or involuntarily repossessed or foreclosed?

You defaulted on any type of loan?

You had bills or debts turned over to a collection agency?

You had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?

¹ Hearing Exhibit I is Department Counsel's email memorandum.

² Tr. 18-23.

³ Tr. 23-24.

You have been over 120 days delinquent on any debt not previously entered?

You are currently over 120 days delinquent on any debt?

In response to all of these questions, Applicant answered “no.” He also responded “no” to Section 22, which asked if he had ever been charged with any felony offense.

Applicant was interviewed by a government investigator in September 2014. On his SCA he indicated that in the past seven years he did not have any property either voluntarily or involuntarily repossessed. When he was questioned by the investigator, he changed his answer to “yes.” He explained to the investigator that when he retired from the military in August 2009, he could not afford to make two car payments and a motorcycle payment. He contacted the creditor for one of his vehicles and voluntarily returned it in 2008. He was aware he still owed a balance on the vehicle. During his interview he acknowledged the account was charged off (SOR ¶ 1.a-\$22,519). He indicated that he wanted to pay the balance, but was unable at that time. He indicated he intended to begin paying the debt because he was working again, and he did not intend to have future financial difficulties. Applicant explained to the investigator that the reason he did not disclose this debt on his SCA was due to an oversight, and he did not think he needed to because he had discussed the debt with the creditor bank.⁴ At Applicant’s hearing, he confirmed he was unable to pay the car note, and he still owed the debt. However, he stated he disputed the amount of the debt with the credit bureau and the creditor. His dispute was based on what he believed the car was sold for and the deficiency he owed. He testified he disputed it orally, and he had an attorney who assisted him. He did not provide any documents. He acknowledged he did not pay the debt and still owes it, but indicated the debt is not listed on his most recent credit report. There is no evidence this debt was sent to a collection agency or Applicant was advised of such.⁵

Applicant was asked during his interview if he had any other financial issues that were not included on his SCA, and he responded “no.” He was confronted with the debt in SOR ¶ 1.b (\$16,127). He acknowledged he purchased a vehicle in March 2008 for approximately \$21,000. He immediately attempted to return the vehicle, but the car dealer would not accept it. Applicant made a payment on the vehicle and drove it for a month and a half. The car was repossessed later in 2008. Applicant attempted to negotiate a settlement with the dealer, but was unsuccessful. Applicant told the investigator that he intended to make payments to resolve the debt. He explained the reason he did not disclose this debt on his SCA was due to an oversight, and he did not think he had to list it because the car was repossessed. He also stated that he did not receive any correspondence from the creditor. At his hearing, Applicant stated that he disputed the debt with the creditor, but did not do it in writing. The debt is not resolved.

⁴ GE 2.

⁵ Tr. 26-33, 90-93; GE 9; AE A. Applicant provided different dates for when he purchased the vehicle. The credit report supports it was purchased in March 2008.

The 2014 credit report lists this debt as in collection. There is no evidence Applicant was made aware the debt was in collection.⁶

Applicant was again asked by the investigator if he had any other financial issues, and he responded “no.” He was then confronted with the charged-off debt in SOR ¶ 1.c (\$3,444). He acknowledged this was a personal loan from the creditor that he obtained in 2005 to purchase furniture. He made payments on the loan for a period, but after he retired from the military in 2009, he was unable to continue the payments. He told the investigator that he intended to resume payments because he was working again. In addition, the reason he did not disclose this debt on his SCA was due to an oversight, and he thought he did not have to list it because he had discussed the debt with the creditor bank. At his hearing, Applicant testified that he forgot about the debt. He stated that his income tax refund was used to pay some of the debt, but there is still a balance that is not paid.⁷ There is no evidence that this debt was turned over to a collection agency or that Applicant was made aware of this information.

I find Applicant deliberately failed to disclose on his SCA that he had debts that were over 120 days delinquent, debts that had been charged off, and property that was repossessed. I did not find his explanations for his failure to disclose the required information credible. I do not find that he intentionally falsified the question that asked if he had bills or debts that had been turned over to a collection account.⁸

The debts alleged in SOR ¶¶ 1.d (\$853), 1.e (\$503), and 1.f (\$75) were incurred after Applicant completed his SCA. They have been paid or settled and are resolved.⁹

While serving on active duty in February 1999, Applicant received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice, for submitting a false and fraudulent travel claim. He was reduced in grade, forfeited pay, and received extra duties. The claim involved Applicant claiming his family had moved with him, thereby permitting him to receive additional government benefits, when they in fact had not moved.¹⁰

Applicant was arrested in June 1999 and charged with driving while his license was suspended. He testified he drove his car without insurance at the time. He was

⁶ Tr. 33-39, 93-99; AE A.

⁷ Tr. 39-42; AE A.

⁸ I will not consider this information for disqualifying purposes. I will consider it for the limited purpose of analyzing Applicant's credibility, in mitigation to determine rehabilitation and reform, and in my whole person analysis.

⁹ Tr. 43-53, 98-99; Answer to SOR with attachments.

¹⁰ Tr. 75; GE 3, 6.

found guilty and paid the fine.¹¹ In July 1999 Applicant was charged with two counts of criminal trespass. He was found guilty of one charge and received six months of probation.¹² In August 1999 Applicant was arrested and charged with felony aggravated assault and aggravated stalking. The charges were nolle prossed.¹³ He credibly testified that he did not know the charges against him were a felonies and believed he only had to report criminal arrests from the past seven years.¹⁴

In 2007 Applicant was charged with burglary 1st degree, assault 4th degree domestic violence minor injury, and wanton endangerment. Applicant had an altercation with his estranged wife and her boyfriend. He pled guilty to wanton endangerment. He was placed on probation for two years and completed its terms.¹⁵

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 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

¹¹ GE 7, 8.

¹² GE 3, 7.

¹³ GE 3.

¹⁴ Tr. 63-74, 76-90, 99-114.

¹⁵ Tr. 53-63.

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 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.

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.¹⁶

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

¹⁶ See ISCR Case No. 11-05365 at 3 (App.Bd. May 1, 2012).

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

Applicant has a history of delinquent debts beginning in 2008 that remain unpaid. 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;
- (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 has been aware since approximately 2009 that he has several large delinquent debts as alleged in SOR ¶¶ 1.a, 1.b, and 1.c. He indicated to the government investigator in 2014 that he was unable to pay the debts at the time they were due because he had been discharged from the service and was having financial difficulties. He told the investigator that he was working, and he intended to pay the debts. He did not. He is relying on the fact that two of them are no longer listed on his credit report to avoid paying them. Although they may no longer be enforceable because they are more than seven years past due, his behavior casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant attributed his financial problems to underemployment because of a decrease in his income when he was discharged from the service in 2009. This was a condition beyond his control. For the full application of AG ¶ 20(b), Applicant must have

acted responsibly under the circumstance. Applicant has not made payments towards resolving the debts in SOR ¶¶ 1.a and 1.b, despite his promise to do so. He indicated that his tax refund was applied to the debt in SOR ¶ 1.c, but did not provide documentary proof. He has paid the smaller debts in SOR ¶¶ 1.d, 1.e, and 1.f. However, Applicant did not submit evidence that he acted responsibly in resolving the financial delinquencies. AG ¶ 20(b) partially applies.

There is no evidence Applicant received financial counseling. There is insufficient evidence to conclude that his financial problems are under control. AG ¶ 20(c) does not apply.

AG ¶ 20(d) applies to the recently resolved smaller delinquent debts alleged in SOR ¶¶ 1.d, 1.e, and 1.f. Applicant indicated he disputed the balances owed on certain debts, but did not do it in writing. He did not provide documentary evidence to substantiate the basis of his dispute or evidence of action he has taken to resolve the issues. AG ¶ 20(e) does not apply.

Despite evidence of some mitigation under this guideline, it is insufficient to mitigate the financial considerations security concerns.

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:

(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

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

Applicant went to an Article 15 nonjudicial punishment hearing in 1999 for filing a false and fraudulent claim. In the same year, he was arrested for driving with a suspended license, was found guilty, and paid a fine. In 1999 he was charged with felony aggravated assault and aggravated stalking. The charges were nolle prossed. In 1999 he was charged with two counts of criminal trespass and was convicted of one and placed on probation. In 2007 he was arrested and charged with burglary 1st degree, assault 4th degree domestic violence minor injury, and wanton endangerment. He was found guilty of wanton endangerment and was placed on probation for two years. Applicant's criminal conduct (SOR ¶¶ 2.a through 2.e) was cross-alleged under the personal conduct guideline (SOR ¶ 3.a). AG ¶ 16(e) applies to Applicant's conduct.

There is no evidence that the debts in SOR ¶¶ 1.a and 1.c, which were charged-off, had been transferred to a collection agency, as is alleged in SOR ¶ 3.b. Regarding the debt in SOR ¶ 1.b, which is listed in the credit report as a collection account, there is no evidence that Applicant was aware "that it had been turned over to a collection agency," as alleged. Therefore based on the allegation as written, the Government's evidence is insufficient. I find in favor of Applicant for SOR ¶ 3.b.

I considered Applicant's testimony regarding his failure to disclose that he had been charged with a felony in 1999. Applicant was credible in explaining he knew he was arrested and charged with offenses, but did not know any of the charges were felonies. I also believe he was confused when he thought he only had to disclose charges that were within the past seven years. I find his failure to disclose the felony charges was not deliberate. I find Applicant refuted the allegation in SOR ¶ 3.c.

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

I have found for Applicant regarding the falsification allegation in SOR ¶ 3.b because it was not alleged properly. However, I found that Applicant was aware of the delinquent debts in SOR ¶¶ 1.a, 1.b, and 1.c and that he had property that had been repossessed when he completed his SCA, and he deliberately failed to disclose them. I did not find his testimony credible. He was aware he had two vehicles that were repossessed. He was aware that he had charged-off debts that were unpaid. He was aware that he had defaulted on a loan. He was aware that he was over 120 days

delinquent on debts. Although this conduct was not alleged, and I did not consider it for disqualifying purposes, I have considered Applicant's falsifications for the limited purpose of analyzing the above mitigating conditions regarding the criminal conduct that was cross-alleged under the personal conduct guideline in SOR ¶ 3.a. Applicant's failure to be truthful and honest on his SCA, during his interview and at his hearing, shows a continuing pattern of personal conduct that involves questionable judgment, lack of candor, and dishonesty. There is insufficient evidence to conclude that he has acknowledged his behavior, and it is unlikely to recur. I cannot find that his criminal offenses are minor or mitigated by the passage of time because of his recent falsifications.¹⁷ The above mitigating conditions do not apply.

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 went to an Article 15 nonjudicial punishment hearing in 1999 for filing a fraudulent claim. In the same year, he was arrested for driving with a suspended license, was found guilty, and paid a fine. In 1999 he was charged with felony aggravated assault and aggravated stalking. The charges were nolle prossed. In 1999 he was charged with two counts of criminal trespass and was convicted of one and placed on probation. In 2007 he was arrested and charged with burglary 1st degree, assault 4th degree domestic violence minor injury, and wanton endangerment. He was found guilty of wanton endangerment and was placed on probation for two years. 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:

¹⁷ See 18 U.S.C. § 1001, which provides that "whoever . . . , knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation, or (3) makes or uses any false writings or documents knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years"

(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 has a history of criminal conduct that began in 1999 and his last arrest and conviction was in 2007. Although he has not been arrested in the last nine years, and the specific falsifications were not properly alleged and are not considered for disqualifying purposes, his failure to be honest on his SCA is considered when for the limited purposes of analyzing the mitigating conditions under this guideline. The same analysis provided under the personal conduct guideline applies under this guideline. I conclude that AG ¶ 32(a) is inapplicable because an insufficient time has elapsed since his most recent criminal behavior, and I cannot conclude his behavior is unlikely to recur. I have considered that it appears Applicant has been steadily employed for several years. AG ¶ 32(d) has minimal application. Despite some mitigation, it is insufficient to mitigate the criminal conduct security concerns.

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, 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 48 years old. He is retired from the military. He has a history of criminal activity dating back to 1999 and financial difficulties dating back to at least 2009. Although, some of the debts alleged in the SOR may no longer be enforceable, Applicant did not provide evidence that he paid or resolved them, except for the smaller ones in SOR ¶¶ 1.d, 1.e, and 1.f. In 2014 he told the government investigator he would begin making payments on these debts, but did not, and now is relying on the fact they may be unenforceable. He has a poor track record of being fiscally responsible. Despite providing some evidence in mitigation, it is insufficient. I have considered Applicant's falsifications when analyzing the whole person and conclude his conduct raises questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant failed to mitigate the security concerns under the personal conduct, financial considerations, and criminal conduct 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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraphs 1.d-1.f:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against Applicant
Paragraph 3, Guideline E	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For 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