



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-03704
)	
Applicant for Security Clearance)	

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: *Pro se*

02/23/2017

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 refuted the allegations under Guideline E, but he has not mitigated the security concerns under Guidelines F and H. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 23, 2014. On December 2, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines F, H, and E. The 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. The AG 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 on March 16, 2016, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on April 6, 2016, and sent a complete copy of the file of relevant material (FORM) to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. The FORM included Department Counsel's brief and the SOR (Item 1), Applicant's SCA (Item 2), credit bureau reports (CBRs) from February 2014 and July 2014 (Items 3 and 4), and a summary of a personal subject interview (PSI) conducted in August 2014 (Item 5). Applicant received the FORM on April 11, 2016, and did not respond.¹ The case was assigned to me on February 2, 2017.

Findings of Fact²

In his answer to the SOR, Applicant denied the allegations in SOR ¶ 1.a and admitted the allegations in SOR ¶¶ 1.b-1.g and 2.a-2.c. He did not answer the Guideline E allegations in SOR ¶¶ 3.a-3.d, and I have treated his failure to respond as a denial of SOR ¶¶ 2.a-3.d. His admissions are incorporated in my findings of fact.

Applicant is a 50-year-old warehouseman employed by a federal contractor since April 2014. He was employed in the private sector from March 2001 to December 2013, when he was fired for drug involvement. He was unemployed from January 2013 to February 2014, employed for about a month in 2014, and unemployed for about a month before being hired for his current job. He has never held a security clearance.

Applicant has never married. He has three adult children. He has lived with a cohabitant since May 2000.

Under Guideline F, the SOR alleges seven delinquent debts totaling about \$14,256, including a child-support arrearage of about \$7,512 (SOR ¶¶ 1.a-1.g). It also alleges that Applicant failed to timely file his federal and state income tax returns for 2008, 2011, and 2013 (SOR ¶ 1.g). In his answer to the SOR and in the PSI, Applicant admitted all the allegations under this Guideline, except the child-support arrearage, which he claimed was being collected by garnishment of his pay. His admissions are corroborated by his CBRs.

Under Guideline H, the SOR alleges that Applicant purchased and used cocaine and crack cocaine with varying frequency from September 1984 to November 2013 (SOR ¶¶ 2.a and 2.b). It also alleges that he used marijuana once in June 2014 (SOR ¶

¹ Department Counsel informed Applicant that he was entitled to make corrections, additions, deletions, and updates to Item 5. He was also informed that he was entitled to object to consideration of Item 5 on the ground that it was not authenticated. His failure to respond to the FORM constitutes a waiver of any objection to Item 5. See ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016) ("Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive.")

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

2.c). In his answer to the SOR, Applicant admitted all the allegations under this guideline. In the PSI, he told the investigator that he received voluntary inpatient treatment for about 60 days in the 1990s for cocaine addiction. He also admitted using marijuana on August 17, 2014 (not June 2014, as alleged in SOR ¶ 2.c), at a celebration of his and his brother's birthdays.

Under Guideline E, the SOR alleges that Applicant falsified his SCA by failing to disclose his June 2014 marijuana use (SOR ¶ 3.a), failing to disclose his failures to file federal and state income tax returns (SOR ¶ 3.b), failing to disclose his child-support arrearage (SOR ¶ 3.c), and failing to disclose any of his delinquent debts (SOR ¶ 3.d). In the PSI, Applicant told the investigator that he did not disclose any of the conduct alleged in SOR ¶¶ 1.a-1.h because he did not understand the financial questions in the SCA. When confronted with his CBR, he told the investigator that he was unaware of the debts alleged in SOR ¶¶ 1.c-1.e and had forgotten about the debts in SOR ¶¶ 1.b and 1.g.

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, corroborated by his CBRs, 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 or the fraudulent filing of the same"). 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;

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

AG ¶ 20(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.

None of the above mitigating conditions are established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur. He presented no evidence of conditions largely beyond his control, no evidence of counseling, and no evidence a good-faith effort to resolve his debts. His payment of the child-support arrearage by garnishment of his pay does not constitute a good-faith effort. ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011), citing ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009). He has not disputed any of the debts alleged in the SOR.

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 in his SCA and the PSI establish two 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"; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

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;

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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the above mitigating conditions are established. Applicant's drug use was frequent and did not occur under circumstances making it unlikely to recur. The first prong of AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In the PSI, Applicant stated that his last drug use was in August 2014. He did not respond to the FORM, when he had an opportunity to update the information about his drug use. Even if his last drug was in August 2014, it occurred after his declaration in his SCA that he did not intend to use drugs again. He admitted in his PSI that he was addicted to cocaine, but there is no evidence of treatment for drug addiction, except for

the 60-day treatment in the 1990s, which was unsuccessful. Although Applicant declared his intention to abstain from drugs, he continues to associate with the brother, with whom he used drugs. He has not changed his environment, and he has not submitted a signed statement agreeing to automatic revocation of his clearance for any further drug use.

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" Applicant did not answer the allegations of falsification in his answer to the SOR, but in the PSI he denied them.

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).

Applicant admitted the allegation in SOR ¶ 2.c that he used marijuana in June 2014. This allegation apparently was based on his statement in the PSI that he used marijuana in August 2014. The SOR and his answer to the SOR were vague regarding the specific date of use, but his description of his marijuana use in the PSI was specific as to date and was accompanied by a specific description of the event at which it occurred. Based on the limited evidence in the record, I am not satisfied that his use of marijuana predated his submission of his SCA. Thus, I conclude that the allegation in SOR ¶ 3.a is refuted by the PSI.

Because Applicant has limited education and no experience with federal employment or the security clearance process, his explanation in the PSI that he did not understand the questions was plausible. When he was interviewed, he volunteered derogatory information about his drug involvement and failures to file income tax returns, but was unaware of the information in his CBR. It is possible and plausible that he believed the collection of the child-support arrearage by garnishment justified a

negative answer to the question about delinquent child-support payments. I conclude that the disqualifying condition in AG ¶ 16(a) is not established.

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). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

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 not mitigated the security concerns raised by his delinquent debts, drug involvement, and personal conduct. 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.h: **Against Applicant**

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

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

Paragraph 3, Guideline E (Personal Conduct):

FOR APPLICANT

Subparagraphs 3.a-3.d:

For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge