



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



In the matter of:)
)
) ISCR Case No. 15-04097
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant was discharged from the Navy under other than honorable conditions after he misused a government credit card for personal purposes. His financial delinquencies are ongoing and remain unresolved. Applicant did not mitigate the security concerns under Guideline F, financial considerations, or Guideline E, personal conduct. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On October 26, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. The action was taken 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 effective within the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.¹ Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant answered the SOR on November 21, 2016, and requested a hearing. Department Counsel mailed the Government's exhibits to Applicant on February 17, 2017.² The case was initially assigned to another administrative judge but was assigned to me on June 15, 2017. On June 19, 2017, a Notice of Hearing was issued scheduling the hearing for August 3, 2017. The hearing convened as scheduled.

At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified but submitted no exhibits. At the close of the hearing, I held the record open until August 17, 2017, to afford Applicant the opportunity to submit additional documentation. He timely submitted three documents, which were admitted as Applicant's Exhibit (AE) A. The record closed on August 17, 2017.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a through 1.i, 1.k, 1.m, 1.n, and 2.c. He denied SOR ¶¶ 1.j, 1.l, 1.o, 1.p, 2.a, and 2.b. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 40 years old. He married his first wife in 2005. They separated in 2009 and were later divorced. The marriage produced no children. Applicant remarried in 2015. He and his wife have a five-year-old son. He also has two stepchildren, ages 12 and 18, and an 18-year-old daughter, who is the product of a prior relationship. (Tr. 23-26; GE 1; GE 2)

Applicant graduated from high school in 1995. He served in the United States Navy from 2003 to 2013. His highest rank was a petty officer second class (E-5), but he was reduced to E-4 shortly before he was discharged. He was discharged from the Navy under other than honorable conditions in January 2013. (GE 1. 6)

Since Applicant left the Navy, he has been employed as a welder in the defense industry. He has worked for his current employer since May 2013. He submitted a

¹ Applicant was e-mailed a copy of the new AGs along with the Hearing Notice and the Pre-Hearing Guidance Memo on June 19, 2017, and he confirmed receipt the same day. Hearing Exhibit (HE II) The new AGs are also available on the DOHA website, at <http://ogc.osd.mil/doha/DIRECTIVE%202017.pdf>.

² Hearing Exhibit (HE) I.

security clearance application (SCA) in June 2013. (GE 1) He does not currently hold a clearance. (Tr. 10)

In 2004, Applicant was serving on a Navy ship involved in anti-narcotics operations off the coast of Columbia. He testified that after a drug bust, he and several other crew members came into incidental contact with the drugs when some of the cocaine bales broke in transit, and cocaine residue got on their skin while they were working on deck in hot weather. Applicant later tested positive for cocaine and received nonjudicial punishment (NJP) under Uniform Code of Military Justice (UCMJ) Article 112A (wrongful use and possession of a controlled substance). (SOR ¶ 2.a) Applicant indicated in his interview that he contested the charge at admiral's mast and was exonerated when the positive test was not found to be a "usage amount." (Tr. 28-29; 77-79; GE 2).³

Applicant's debts are attributable to a variety of circumstances. He and his first wife began living separately in 2009. He deployed to Afghanistan in 2010. While he was deployed, his wife had power of attorney over his financial affairs. Applicant's financial issues began during this period even though he was sending her money. He acknowledged, however, that he was financially responsible for any bills his wife incurred on his behalf. (Tr. 31-32)

Applicant and his wife continued to live separately after he returned from Afghanistan. When he returned, she complained to his command that he was not providing her sufficient financial support. Applicant testified that his master chief told him to make sure he paid his wife \$600 a month. He had difficulty meeting that obligation. (Tr. 30-34)

Applicant's wife vacated their apartment and moved to her home state. He believed the rent was being paid through an allotment, but later learned from the apartment complex that the unit was vacant because his wife had moved out. The resulting debt (SOR ¶ 1.d) remains unpaid. (Tr. 33-36)

It is not entirely clear when Applicant and his first wife divorced. He testified that they divorced either "at the end of 2010." (Tr. 24), or in 2011 (Tr. 71). Applicant listed his marital status as "separated" on his May 2013 SCA (GE 1 at 19-20), and he indicated in his July 2013 background interview that he was "currently attempting to obtain a divorce." (GE 2 at 4).

In about 2012, Applicant was the leading petty officer for his unit, and was responsible for authorizing government credit card use by unit members when they had to travel for government business. He was also about to transfer to a new unit. He testified that because he had begun dating the woman who would become his second wife, he was told by his master chief that he had to get a divorce before he transferred, or else he would be sent to NJP. (Tr. 38-43)

³ The only Government exhibit supporting SOR ¶ 2.a is Applicant's interview summary, GE 2.

Applicant could not afford a divorce lawyer, so he used a government credit card to pay for one. He also acknowledged that he hid that fact from his command. Applicant put about \$1,400 on the government card. Some of the charges were legitimate, such as when he was authorized to use the unit's government vehicle. But he also put about \$900 on the card to pay for the divorce lawyer. (Tr. 38-44, 75-77)

As the program administrator, Applicant would "run reports" on the unit's credit card use every week, so he knew when his credit card usage would appear in the report. He used the card to pay the lawyer right after running the weekly reports, so his usage would not show up right away. His plan was to pay the money back after he was paid each week. (Tr. 38-44)

Applicant's actions were discovered when his name came up on the report as someone owing money on the credit card account even though he had not traveled. He was told to pay the money back within two weeks. He repaid the money days later but was sent to NJP shortly after reporting to his new command in November 2012. (Tr. 42-45; GE 6)

As a result, Applicant received NJP for violations of UCMJ Article 92 (failure to obey a lawful order or regulation); Article 107 (false official statement), Article 121 (wrongful appropriation), and Article 134 (conduct prejudicial to good order and discipline). (SOR ¶ 2.b) Applicant was reduced in rank to E-4. (GE 6)⁴

Applicant chose not to contest the NJP. The Navy instituted separation proceedings, and he chose to accept a discharge under other than honorable conditions, in January 2013. (SOR ¶ 2.c) Applicant explained in responding to an interrogatory that he "waived his rights, because [he] was frustrated and upset over the whole issue." (GE 2 at 10; Tr. 42-54)

Applicant's departure from the Navy adversely affected his finances, though he has been employed in the defense industry ever since. The SOR alleged that he incurred 16 delinquent debts, most of which he admitted. The debts total about \$16,779. The debts, including the ones Applicant denied, are proven by his credit reports (GE 3, 4, 5).

The SOR debts include two tax liens, for \$675 and \$909; (¶¶ 1.a and 1.b); a past-due electric bill for \$542 (¶ 1.c); an unpaid apartment lease for \$1,510 (¶ 1.d), a past-due rental account for \$500 (¶ 1.e); a \$39 child support debt (¶ 1.f); a charged-off consumer debt for \$5,101 (¶ 1.g); a debt in collection for \$110 (¶ 1.h); a charged-off consumer debt for \$704 (¶ 1.i); three consumer debts in collection, for \$1,108, \$1,083, and \$176) (¶¶ 1.j, 1.k and 1.l); a charged-off phone or cable bill for \$140 (¶ 1.n) and two unidentified medical debts in collection, for \$72 and \$33 (¶¶ 1.o and 1.p).

⁴ The details of Applicant's charges under the UCMJ for SOR ¶ 2.b are taken from GE 6, Applicant's incident report from the Defense Department's Joint Personnel Adjudication System (JPAS).

Applicant testified that he believed the two tax liens (§§1.a and 1.b) were federal liens, and that they were later resolved when the IRS kept some of his refunds. (Tr. 71-74) In fact, his credit reports show that both debts are state tax liens, owed in his home state. (GE 1, 3, 4, 5) Applicant indicated in his background interview that he did not have to pay state taxes to that state when he was in the Navy, and that he resolved the debts in 2013. (GE 2) The debts nonetheless are unresolved.

Applicant's November 2015 credit report (GE 5) reflects that he underpaid his October 2015 child support obligation, leading to a \$39 delinquency. (SOR ¶ 1.f) At the hearing, he stated that he had been paying \$104 every two weeks in child support for his daughter, automatically through an allotment. He said these payments recently ended because she is now 18, but provided no corroborating documentation. (Tr. 57-59). Given the small amount of the delinquency, I accept Applicant's testimony.

Applicant contacted the creditor for debt ¶ 1.g earlier this year to verify what he owes. He is waiting for them to send a letter to him. (Tr. 79-80)

Applicant denied the consumer debt at ¶ 1.j because it was his ex-wife's debt, but he also acknowledged that he is responsible for it. He denied the consumer debt at ¶ 1.i because he did not recognize it. He had not researched either account to verify their current status. (Tr. 60-61)

Applicant denied the medical debts at §§ 1.o and 1.p because he believed they had been paid through the Department of Veterans Affairs. He had not researched either account to verify what he might owe. (Tr. 61-63). Applicant believed that the cable bill at ¶ 1.n had been paid, but he provided no documentation. (Tr. 63)

For much of the last 18 months, Applicant has lived and worked at locations away from his home of record. His wife remains there, and she pays most of the household bills. Applicant has two car payments (\$260 and \$400) that are paid by automatic withdrawal, and he pays some accounts over the phone. He pays \$1,250 a month in rent. He has a few hundred dollars in his checking account and lives paycheck to paycheck. His wife has been unemployed since being laid off in January 2017. (Tr. 64-70) Applicant provided no documents to detail his assets, or his monthly income or expenses.

Applicant indicated that he was working on paying off his debts one at a time. He contacted a debt resolution company, but found it too expensive. He intends to resolve the debts himself. He was recently given a raise, from \$22 to \$25 an hour, so he hopes to have more money available to pay his debts. (Tr. 56-57, 68)

Applicant testified that he loved his time in the Navy and hoped to make it his career. He testified he was awarded five Navy Achievement Medals and two Good Conduct Medals during his career. (Tr. 29) He provided letters of recommendation from three people he served with, a naval officer, a warrant officer, and a senior enlisted member, all of whom attested to his trustworthiness. (AE A)

Policies

It is well established that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”¹³

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(a), 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 national security eligibility will be resolved in favor of the 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 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.

¹³ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

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

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) . . . failure to pay annual Federal, state, or local income tax as required.

Applicant has numerous unresolved delinquent debts, including two unresolved state tax liens, and other consumer debts. AG ¶¶19 (a), (b), (c) and (f) apply.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

None of the mitigating conditions apply. Applicant did not establish that his financial problems resulted from circumstances beyond his control. His debts originated while he was deployed in 2010. However, Applicant did not act responsibly in handling the situation when he returned. Most importantly, he did not act responsibly when, as the leading petty officer tasked with administering his unit's government credit card program, he abused his position of authority by using a government credit card to pay for a divorce lawyer.

Applicant's finances were also negatively affected when he left the Navy. However, it is beyond doubt that his separation from the Navy was due to his own misconduct. AG ¶ 20(b) does not apply.

With the exception of SOR ¶ 1.f, Applicant did not establish that any of the SOR debts have been, or are being, paid or resolved. He did not initiate a good-faith effort to repay his creditors, and did not establish or document a track record of steady payments towards resolving his debts. AG ¶ 20(d) does not apply. Nor has he established that any of the debts are not his responsibility. AG ¶ 20(e) does not apply.

Applicant did not establish that the tax liens at SOR ¶ 1.a and 1.b have been, or are being, resolved. AG ¶ 20(g) does not apply.

Applicant's financial problems are ongoing and unresolved. They continue to cast doubt on his current judgment, trustworthiness and reliability. AG 20(a) does not apply.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . .

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

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

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . .

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal professional, or community standing.

Applicant's misuse of a government credit card, and abuse of his fiduciary responsibility and authority as administrator of his unit's government credit card system call into question his judgment, trustworthiness and reliability. He hid his credit card misuse from his command. When Applicant's actions came to light, they had a direct effect on his personal, professional, and community standing, because a captain's mast was held, and he was later discharged from the Navy under other than honorable conditions. As to SOR ¶¶ 2.b and 2.c, his actions satisfy AG ¶ 16(e)(1). I make this finding even though the language of the allegations addresses the consequences of Applicant's misconduct (the NJPs and the discharge), rather than the misconduct itself. AG ¶¶ 16(c), 16(d)(3), and 16(d)(4) also apply. However, since SOR ¶¶ 2.b and 2.c both relate to the same misconduct, one of the allegations (SOR ¶ 2.c) must be resolved in Applicant's favor as duplicative.¹⁴

¹⁴ When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005 (same debt alleged twice)).

Applicant denied SOR ¶ 2.a, concerning his NJP in 2004 for wrongful use and possession of a controlled substance. Applicant had a positive drug test after coming into incidental contact with illegal drugs during an anti-narcotics operation. He challenged the findings at an admiral's mast, and was exonerated. The Government submitted no documentary evidence supporting this allegation beyond Applicant's own explanations. I find that Applicant rebutted SOR ¶ 2.a. No disqualifying conditions apply. In the alternative, the allegation is unsubstantiated, and is therefore mitigated under AG ¶ 17(f).

AG ¶ 17 sets forth the applicable mitigating conditions under Guideline E:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

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

The discovery of Applicant's misconduct (and the fact that it led to his discharge from the Navy) reduces or eliminates any ongoing vulnerability to exploitation, manipulation or duress as a result. AG ¶ 17(e) applies.

Applicant misused his credit card because he was in financial difficulty, and could not afford a divorce lawyer. This occurred almost five years ago. However, his financial problems have continued and are unresolved. The circumstances that led to his offense are therefore ongoing, and the conduct continues to cast doubt on his reliability, trustworthiness and good judgment. AG ¶ 17(c) does not apply. Similarly, while Applicant acknowledged his behavior, he has not provided sufficient evidence to establish that the circumstances that led to it are unlikely to recur. AG ¶ 17(d) does not apply.

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(d):

(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 F and E in my whole-person analysis. As a petty officer in the United States Navy, Applicant abused his position of trust and authority when he misused a government credit card for personal purposes in 2012. He was given NJP, and in 2013 he was discharged from the Navy under other than honorable conditions. His actions occurred almost five years ago. However, the financial instability that led to his misconduct has continued. Applicant has not established that the Defense Department can trust him with access to classified information. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility for access to classified information.

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.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g – 1.o:	Against Applicant
Paragraph 2: Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.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 interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge