



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



In the matter of:)
)
) ISCR Case No. 15-05344
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

08/17/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On May 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F, financial considerations, and E, personal conduct. The action was taken under Executive Order (EO) 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. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on June 8, 2016, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM). Applicant received it on September 8, 2016. The Government's evidence is identified as Items 1 through 8. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not respond to the FORM, object to the Items, or provide documents. Items 1 through 8 are admitted into evidence. The case was assigned to me on July 21, 2017.

Findings of Fact

Applicant denied the allegations in SOR ¶¶ 1.a through 1.w. He admitted SOR ¶¶ 2.a and 2.b, with explanations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 41 years old. He has never been married. He has a 15-year-old child. He has worked for federal contractors from 2002 for different periods, and other times has been employed in the non-federal sector. He has worked for his present employer, a federal contractor, since 2012.²

In his answer to the SOR Applicant wrote next to the each allegation in ¶¶ 1.a through 1.p, "I deny, debt paid in full." For the debts in SOR ¶¶ 1.q, 1.r, 1.v, and 1.w he wrote next to each allegation, "I deny, consolidated payment arrangement since 2013." For the debts in SOR ¶¶ 1.s, 1.t, and 1.u, he wrote, "I deny, consolidated payment arrangement since 2014."³

Applicant attributed his delinquent debts to periods of unemployment when he did not have medical insurance or his medical insurance did not cover his costs. SOR ¶¶ 1.a (\$553), 1.b (\$304), and 1.f (\$3,196) are state tax liens. SOR ¶¶ 1.l (\$315) and 1.m (\$374) are student loans. Applicant did not provide corroborating documents to show any of the alleged debts are paid or are being paid through payment arrangements. The debts are corroborated by credit reports from November 2013, July 2014, and May 2015.⁴

Applicant was arrested in February 2011 for sexual solicitation.⁵ He completed a security clearance application (SCA) in October 2013. Section 22 Police Record asked, "In the past seven (7) years have you been arrested by a police officer, sheriff, marshal,

² Item 3.

³ Item 2.

⁴ Items 2, 3, 4, 5, 6, 7.

⁵ Item 8.

or any other law enforcement official? In the past seven (7) years have you been charged, convicted or sentenced to any crime in any court?" Applicant responded "no."⁶

The instruction paragraph before section 22 in the SCA states: "For this section report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed." It further states, "Be sure to include all incidents whether occurring in the U.S. or abroad."⁷

Applicant was interviewed in December 2013 and February 2014 by a government investigator as part of his background investigation. The investigator asked him if he had been arrested in the last seven years. He responded to the investigator, "no." He was asked again if he had been arrested in the past seven years. He again responded "no" to the investigator. He was then confronted with his 2011 arrest for sexual solicitation. He told the investigator it never happened. He was asked again if he had ever been arrested for sexual solicitation. He responded by saying he was never convicted. He was reminded the question asked if he had been arrested. He then stated he was arrested for sexual solicitation. He could not recall the date of the arrest. He could not recall the name of the club he had been at prior to the arrest. He was with two other men, who he met at the club, but he could not recall their names. All three men were in Applicant's car when a female approached them. Applicant told the investigator the female started talking to them. He could not recall the specifics of the conversation, but the other two men were actively talking with her, and he was just going along with whatever they said so he would fit in. He told the investigator that he did not proposition the woman; did not offer her money; there was no talk of services; and he did not let her in his car. He said no one took the woman seriously. When he began to leave, undercover police officers arrested him.⁸

In Applicant's answer to the SOR, he explained that while he was parked in his car he was approached and propositioned by a young lady who did not appear to be a prostitute. He stated, "I was lead (sic) into a conversation about sexual acts for compensation. It was my error to entertain the conversation but I did not invite the lady into my vehicle or exchange any money."⁹ As he prepared to leave, he was arrested. He further stated,

Much to my surprise I was a victim of an undercover sting operation conducted by the [local] police and the lady who approached me was an undercover police officer. I was later told by my legal counsel that in [locality] there is a technicality involving sexual solicitation, any conversation involving sexual acts is against the law in [locality] regardless

⁶ Item 3.

⁷ Item 3.

⁸ Item 4.

⁹ Item 2.

of true intent, nature or if caught in the act. I learned this the hard way and have not made this mistake again and will not in the future.¹⁰

After his arrest, Applicant spent the night in jail. He was assigned a court-appointed lawyer, whose name he could not recall. A month later, he appeared in court and was told by the judge if he complied with community service and fulfilled the court's requirements, including taking drug tests, which was standard, the charge would be dropped. A couple of months later, Applicant appeared in the same court and had fulfilled all the court's requirements, which included about 40 hours of community service. He was required to pay court fees, which he did. Applicant told the investigator that because he completed the court's requirements, he was told by his attorney the charge would be removed from his record and it would not be part of his permanent record. Applicant again denied to the investigator that he propositioned the female, offered money or invited her into his car. He stated all he did was talk to her.¹¹

Applicant told the investigator that he did not disclose this information on his SCA because he was not convicted of anything, and he did not consider it a criminal offense since he only had a conversation with the female. He also said he did not disclose it on his SCA because the judge and his court-appointed lawyer told him that this would not be an issue and it would be removed from his record.¹²

Applicant explained in his answer to the SOR that he answered "no" on his SCA regarding being arrested because he "was under the assumption that my police record was clean."¹³ He stated:

To my surprise I found a dismissed misdemeanor on my [locality] record from February 2011. I was aware of the incident but I was not aware that this infraction was on my permanent record. After my court proceedings and fulfillment of all my obligations this misdemeanor charge was dismissed. The Judge and my legal counsel assured me that this incident would not be an issue for me down the road and would not be placed or searchable on my permanent record. To my dismay this was not the case, and since this was the first and only time I was every involved in any criminal proceedings I didn't know this was on [my] permanent record or how and when to remove it.¹⁴

¹⁰ Item 2.

¹¹ Item 4.

¹² Item 4.

¹³ Item 2.

¹⁴ Item 2.

Applicant went on to say he has entered a motion to have his record permanently sealed.¹⁵

Applicant was repeatedly given an opportunity to disclose to the investigator that he had been arrested. Each time he was asked the question, he denied he was arrested. When he was confronted with the arrest, he denied the incident ever happened. When he was again confronted with the arrest, he admitted it, but then follow up that he was not convicted. Applicant's repeated denials goes to his intent when he completed his SCA. He went to court, completed 40 hours of community service, paid court costs and the charge was eventually dismissed. The instructions for completion of Section 22 are clear and require disclosure of any information regardless of whether the case was sealed, expunged, or otherwise stricken. I have considered that he said he was told the incident was not part of his permanent record. However, there is ample evidence to support that he was attempting to keep this information from the government by interpreting the SCA so he would not have to disclose the arrest. This is supported by his repeatedly telling the government investigator that he was never arrested, the incident never happened, and he was never convicted. In addition, he indicated in his answer to the SOR, that he was aware of the incident and aware the misdemeanor charge was dismissed, but he believed it would not be placed or searchable on his permanent record. I find Applicant deliberately failed to disclose his 2011 arrest.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 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

¹⁵ Item 2.

evidence contained in the record. Likewise, I have avoided drawing 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. Directive ¶ E3.1.15, states that 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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 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. 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, or concealment of information about one's conduct, that creates 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 was arrested in 2011 for sexual solicitation. He deliberately failed to disclose his arrest on his October 2013 SCA. AG ¶¶ 16(a) and 16(e) apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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.

Applicant was aware of his arrest. The instructions on the SCA are clear that the arrest was to be disclosed regardless of whether the case was sealed, expunged, or otherwise stricken from the record. Applicant was given several opportunities by the investigator to disclose his arrest, repeatedly denied it, and then denied the incident ever happened. He then told the investigator he did not consider it a criminal offense since he only had a conversation with the female. He also stated he did not realize the offense was in a searchable record. The government relies on those holding security clearances to disclose the information requested. In this situation, Applicant was intentionally trying not to disclose his arrest. AG ¶ 17(a) does not apply.

Applicant stated that his lawyer and the judge told him that his arrest would not be part of his permanent record. There is no evidence that he was told he did not have

to disclose it on his SCA. As stated above, the instructions are clear about closed records. Applicant's repeated failure to disclose his arrest to the investigator and his later rationale that he decided it was not a criminal offense show his state of mind. I find AG ¶ 17(b) does not apply.

Applicant completed community service, drug testing, and paid the court cost as required by the court and the charge was dismissed. It appears this offense was a one-time occurrence, and Applicant has learned from his mistake. It has been six years since the arrest. I find this offense was minor, sufficient time has passed, and this conduct is unlikely to recur. AG ¶¶ 17(c) and 17(d) applies to SOR ¶ 2.a. Applicant's deliberate omission on his SCA is not a minor offense and casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply to SOR ¶ 2.b.

Guideline F: Financial Considerations

The security concern relating to the guideline 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant has unresolved delinquent debts. There is sufficient evidence to support the application of the above disqualifying conditions.

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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 indicated that he accumulated medical debts that he was unable to pay when he was unemployed. This was beyond his control. He did not provide evidence that he acted responsibly in addressing his delinquent debts. He did not provide information about his tax liens or student loans. Applicant indicated that all of the delinquent debts alleged were paid or he had a payment plan. He did not provide any corroborating evidence. Therefore, none of the above mitigating conditions 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 the 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 E and F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant is 41 years old. He has numerous delinquent debts and three tax liens that are unresolved. He failed to provide evidence to support his assertions that they are all paid or being paid. He deliberately failed to disclose on his SCA that he was arrested in 2011. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations, and Guideline E, personal conduct.

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.w:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge