



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-08676
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: Richard L. Morris, Esq.

02/17/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 8, 2015. On June 2, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on July 20, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 29, 2016, and the case was assigned to me on November 10, 2016. On November 14, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 5, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. I kept the record open until December 20, 2016, to enable Applicant to submit additional documentary evidence. He timely submitted AX L through U, which were admitted without objection. DOHA received the transcript (Tr.) on December 13, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.h and denied the allegations in SOR ¶¶ 1.i-1.m and 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old civilian mariner, employed as a storekeeper by defense contractors since April 2005, with periods of unemployment between contracts. He has consistently received top performance evaluations since January 2015. (AX A-G.) He does not have a security clearance.

Applicant served on active duty from March 1988 to January 1995 and received a general discharge under honorable conditions because of a "pattern of misconduct." As part of his discharge processing, he acknowledged being advised that the basis for his discharge made him ineligible to reenlist. He was a second class petty officer (E-5) before his pattern of misconduct began, and he left the Navy as a seaman apprentice (E-2). His misconduct consisted of military nonjudicial punishment for drunk driving in April 1994; a civilian conviction of reckless driving in July 1994; military nonjudicial punishment for drunk driving and unauthorized absence in August 1994; military nonjudicial punishment for disobedience by driving on base after his driving privileges were revoked and unauthorized absence in August 1994, and a civilian conviction of driving under the influence in October 1994.² (GX 5.)

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

² The conduct underlying Applicant's administrative discharge from the Navy was not alleged in the SOR, and it may not be used as an independent basis for denying his application. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the unalleged conduct for these limited purposes.

When Applicant submitted his SCA, he stated that he received an honorable discharge. (GX 1 at 28.) At the hearing, he testified that he completed his SCA while at work, was distracted by a co-worker as he was dealing with the question about the characterization of his discharge from the Navy, and he “just saw honorable, and hit honorable.” He testified that he does not recall seeing “general under honorable conditions” in the drop-down menu for the types of discharges, and he thought a general discharge was the same as an honorable discharge. (Tr. 68-69.) He denied intentionally falsifying his SCA. (Tr. 49.)

Applicant married in June 1995 and divorced in July 2004. He married his current wife in November 2006. He has three children from his first marriage, ages 17, 22, and 24.

Applicant testified that his rotation as a civilian mariner is four or five months at sea followed by a break in employment for four or five months. He is paid only when he is on a ship. When he is at sea, he has a direct deposit to a joint bank account, and he counts on his wife to pay the bills. When he received the SOR, it was an “eye opener,” because he was unaware of the derogatory information in his CBRs. (Tr. 38-39.)

The SOR alleges 13 delinquent debts, including a child-support arrearage, a federal tax lien, and three state tax liens, which are reflected in two credit bureau reports (CBRs) from May 2015 and December 2015. The evidence concerning these debts is summarized below.

SOR ¶ 1.a: child-support arrearage placed for collection in two accounts for \$18,751 and \$6,546. Applicant testified that he has been required by a court order to pay \$728 per month on the arrearage, and he has been making multiple payments totaling \$850-\$900 each month for six or seven years. He could not explain why two separate collection accounts were listed in his CBR. (Tr. 70.) He submitted documentation that he has been making regular payments since October 2007, the payments were increased to \$728 per month around May 2013, and that he has been making monthly multiple payments totaling more than the required \$728 since May 2013. The balance on the arrearage as of November 2016 was about \$15,656. (Tr. 41; AX P.)

SOR ¶ 1.b: bill for satellite television service, placed for collection of \$750. Applicant testified that his current wife opened this account without his knowledge, and that in October 2016 he made an agreement with the creditor to resolve this debt by monthly payments. (Tr. 41-42, 50.) As of the date of the hearing, he had made no payments. (Tr. 54.) On the day after the hearing, the collection agency sent Applicant a bill for a \$125 payment, due on December 15, 2016, five days before the record closed. (AX N.) The bill corroborates his testimony that he made a payment agreement with the creditor. However, in his post-hearing submission, he provided no documentary evidence that he made the \$125 payment or any other payments.

SOR ¶ 1.c: bill for telephone service charged off for \$709. Applicant testified that this account also was opened by his wife without his knowledge, and that he had made an agreement to resolve it by monthly payments. (Tr. 42.) On December 6, 2015, the day after the hearing, he received a bill for a \$125 payment. On December 7, 2015, a collection agency contacted Applicant and informed him that it had purchased the debt, and offered to settle the debt for \$500. (AX N; AX O; AX Q; AX R.) Applicant provided no documentary evidence that he accepted the settlement offer or made any payments.

SOR ¶ 1.d: state tax lien filed in April 2007 for \$1,637. Applicant testified that he was unaware of this debt until he received the SOR. (Tr. 43.) On December 17, 2016, after the hearing, Applicant applied for an installment agreement to resolve this debt, providing for monthly \$250 payments. (AX L.) On the same day, he sent money orders for \$163 and \$45 to the state tax authority. (AX M at 1.) He provided no evidence that the state tax authority agreed to accept installment payments.

SOR ¶ 1.e: state tax lien filed in October 2006 for \$1,799. Applicant testified that he was unaware of this debt until he received the SOR. (Tr. 43.) He testified that the tax lien was for property taxes on a van that was jointly owned but given to his first wife after their divorce. (Tr. 58.) On December 6, 2016, the day after the hearing, Applicant sent a money order for \$75 to the state tax authority. (AX T.) He provided no evidence that the state tax authority agreed to accept installment payments.

SOR ¶ 1.f: federal tax lien filed in May 2009 for \$14,657. Applicant testified that he was unaware of this debt until he received the SOR, and that he tried to make a payment arrangement with the IRS. (Tr. 44, 59.) After the hearing, he submitted a telefax cover sheet sent to the IRS, asking for a “confirmation letter.” (AX S.) He did not submit any documentary evidence of a payment agreement or a response to his telefax.

SOR ¶ 1.g: state tax lien filled in October 2006 for \$1,798. This is the same debt as SOR ¶ 1.e. It was entered on the same day in the same court, and the case numbers are the same, except that the lien in SOR ¶ 1.e has a dash inserted after the first digit of the case number. (GX 3 at 6.)

SOR ¶¶ 1.h-1.m: medical bill, placed for collection of \$746; cellphone bill, placed for collection of \$30; medical bill, placed for collection of \$365; medical bill, placed for collection of \$354; tire store debt, past due for \$653, with a balance of \$958; collection account for \$250. In his answer to the SOR, Applicant admitted the medical bill for \$746, alleged in SOR ¶ 1.h, but at the hearing he denied the debts alleged in SOR ¶¶ 1.h-1.m. He testified that he had no knowledge of these debts, and he suspected that someone incurred them in his name or charged them to his medical insurance without his knowledge. (Tr. 45-48.) After the hearing, he provided a list of the creditors alleged in SOR ¶¶ 1.h-1.m and their telephone numbers, and he stated that none of the creditors had a record of an account in his name and none of the debts are reflected on his current CBR. (AX U.) The debt alleged in SOR ¶ 1.j was placed for collection in March 2010 and would have been deleted from his credit record under the

Fair Credit Reporting Act.³ The debts alleged in SOR ¶¶ 1.h, 1.i, and 1.k-1.m were placed for collection less than seven years preceding the December 2015 CBR. However, none of the debts alleged in SOR ¶¶ 1.h-1.m are reflected in the December 2015 CBR (GX 3.)

Applicant submitted a personal financial statement (PFS) reflecting that he and his wife have monthly income of about \$3,780, expenses of about \$3,393, and a net monthly remainder of about \$387. (AX I.) He testified that when he is not working on a ship, his income consists of unemployment compensation, and it is much higher when he is at sea. At sea, his monthly pay ranges from about \$5,500 to \$8,000 per month, depending on the size of the ship. (Tr. 63.) At the hearing, he was unsure about how the numbers in the PFS were computed, because he trusted his wife to complete it. (Tr. 53-54.) His federal income tax return for tax year 2015 reflected wages of \$105,183. (AX K.)

Applicant's wife submitted a statement attesting to Applicant's qualities as a loving, devoted husband who acts responsibly toward his obligations. (AX I.) His wife's nephew testified that he regards Applicant as a "father figure," who is kind hearted, honest, trustworthy, and loyal. (Tr. 22-26.) One of Applicant's friends for the past 11 years considers him honest, trustworthy, and reliable. (Tr. 31-32.)

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

³ Under the Fair Credit Reporting Act, a credit report may not list accounts placed for collection, charged off debts, or civil judgments that antedate the credit report by more than seven years, or until the statute of limitations has run, whichever is longer. The exceptions to this prohibition do not apply to this debt. 10 U.S.C. § 1681c.

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).

The debt alleged in SOR ¶ 1.g duplicates the debt in SOR ¶ 1.e. 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 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Thus, I resolve SOR ¶ 1.g in Applicant's favor.

Applicant admitted the medical debt alleged in SOR ¶ 1.h in his answer to the SOR, but he denied it at the hearing. He also denied the debts alleged in SOR ¶¶ 1.i-1.m in his answer to the SOR and at the hearing. The Government has the burden of providing substantial evidence to prove disputed debts. It is well settled that adverse information from a CBR report will normally meet the requirement in Directive ¶ E3.1.14 that an allegation be supported by substantial evidence. ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010.) However, in this case the CBRs submitted by the Government are conflicting. The May 2015 CBR reflected the debts in SOR ¶¶ 1.h-1.m; but the December 2015 CBR does not reflect them. Only one debt, alleged in SOR ¶ 1.j, would have been deleted from his CBRs due to passage of time. Due to the contradictory evidence regarding the debts alleged in SOR ¶¶ 1.h-1.m, I conclude that they are not established by substantial evidence.

Applicant's admissions, corroborated by his CBRs and the documentary evidence submitted at the hearing, establish the delinquent debts alleged in SOR ¶¶ 1.a-1.f, and they raise two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). 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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant encountered several conditions largely beyond his control: his marital breakup in 2004, his multiple periods of unemployment between assignments to sea duty, and his wife's unauthorized opening of the accounts in SOR ¶¶ 1.b and 1.c without his knowledge. He has acted responsibly regarding the child-support arrearage. However, he has not acted responsibly regarding the debts alleged in SOR ¶¶ 1.b-1.f. He made no effort to monitor his finances or determine his financial situation until he received the SOR in June 2016. He appears to have made payment agreements for the debts in SOR ¶¶ 1.b and 1.c in October 2016, but he submitted no documentary evidence of any payments made in accordance with the agreements. He took no meaningful action to resolve the tax liens in SOR ¶¶ 1.d-1.f until after the hearing. He continues to trust his wife to manage the family finances, without any meaningful involvement on his part, in spite of his testimony that she incurred debts in his name without his knowledge.

AG ¶ 20(c) is not established. Applicant submitted no evidence of financial counseling and his financial situation is not under control.

AG ¶ 20(d) is established for the child-support arrearage alleged in SOR ¶ 1.a. It is not established for the debts alleged in SOR ¶¶ 1.b-1.f. This mitigating condition requires a showing of good faith. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. While Applicant has taken some steps to resolve the debts in SOR ¶¶ 1.b-1.f, he has done too little too late.

The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, pay the debts alleged in the SOR first, or establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has not presented a coherent and credible plan for resolving his delinquent debts, nor has he submitted evidence of significant actions to resolve them.

AG ¶ 20(e) is not established for the debts alleged in SOR ¶ 1.a-1.f, because Applicant has not disputed them. He denied owing the debts alleged in SOR ¶¶ 1.h-1.m, and I have resolved these allegations in his favor.

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

When Applicant submitted his SCA, he was an experienced adult. He knew that his Navy service had been terminated because of his misconduct. As part of his out-processing, he was specifically informed that his discharge made him ineligible to reenlist in the future. I found his explanation that he considered his discharge to be the equivalent of an honorable discharge implausible and unpersuasive. Thus, I conclude that AG ¶ 16(a) is established.

The following mitigating conditions are potentially relevant:

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

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶¶ 17(a) and 17(c) are not established. Applicant made no effort to correct his falsification. His falsification was not “minor,” because falsification of a security clearance application “strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 (App .Bd. Aug. 8, 2011.) It was recent and did not happen under unique circumstances.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines F and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guidelines F 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 financial delinquencies 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

Subparagraph 1.a:	For Applicant
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Subparagraphs 1.b-1.f:	Against Applicant
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Subparagraphs 1.g-1.m:	For Applicant
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Paragraph 2, Guideline E (Personal Conduct):

AGAINST APPLICANT

Subparagraph 2.a:

Against 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