



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 15-01098
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2018

Decision

HESS, Stephanie C., Administrative Judge:

While Applicant mitigated the potential security concerns raised by his marijuana use while holding a security clearance, and his inadvertent omissions during his background investigation and military enlistment process, he failed to mitigate the security concerns raised by his financial delinquencies. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on March 29, 2011. On November 14, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines H (Drug Involvement), F (Financial Considerations), and E (Personal Conduct). The DOD acted under Executive Order (Ex. 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 DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on February 26, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 1, 2016, and the case was assigned to another administrative judge who scheduled a hearing for September 20, 2016. On September 14, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant the hearing was canceled. The case was assigned to me on January 24, 2017. On October 17, 2017, DOHA notified Applicant that the hearing was rescheduled for November 21, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted into evidence without objection. Applicant testified and I left the record open until December 5, 2017, to allow Applicant to submit documentary evidence. DOHA received the transcript (Tr.) on December 1, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision is decided based on the amended AG effective June 8, 2017.

Findings of Fact

Applicant is a 37-year-old help-desk supervisor employed by a defense contractor since February 2011. He served on active duty in the U.S. Air Force from October 2001 until April 2007, and received an other than honorable discharge. He married in September 2002 and divorced in November 2007. He and his fiancé have a four-year-old daughter. He has been working abroad since 2011. He was granted his first security clearance in 2001. (GX 1; Tr. 22.)

Under Guideline H, the SOR alleges that Applicant was arrested and charged with possession of marijuana in 2009. It further alleges that Applicant tested positive for marijuana twice in 2007, which resulted in non-judicial punishment and an other than honorable discharge from the Air Force. The SOR also alleges that Applicant used marijuana while holding a security clearance. Applicant admits these allegations.

Under Guideline F, the SOR alleges 16 debts totaling \$29,619 and an additional charged-off account for the balance of a repossessed vehicle. Applicant denies 10 of these allegations and admits the others. The delinquent debts are reflected in Applicant's September 2012 and January 2015 credit bureau reports, and discussed during his 2012 personal subject interview. (GX 4; GX 5; GX 2.)

Under Guideline E, the SOR alleges that Applicant intentionally falsified his 2011 e-QIP by failing to disclose his 2007 marijuana use and subsequent non-judicial punishment, and his 2009 marijuana-related arrest. It further alleges that Applicant intentionally omitted details about his 2009 arrest during an interview in November 2012, that Applicant failed to disclose earlier marijuana use on his enlistment papers for the Air Force, and cross alleges Applicant's marijuana use after having been granted a security clearance. Applicant denies these allegations.

Applicant enlisted in the Air Force in 2001. A short time later, while stationed abroad, Applicant met and married his former wife. Their relationship was difficult, and after returning to the United States in 2004, their marriage steadily disintegrated. They separated in late 2006. (Tr. 27-29.) Applicant was very upset over the state of his marriage, and had withdrawn from his friends and social life. At the approach of New Year's Eve in 2006, his friends cajoled him into going out to party with them. Over the course of what was a four-day weekend, Applicant smoked marijuana several times. Several weeks later, Applicant tested positive in a drug screening. Ultimately, in March 2007, Applicant received a non-judicial punishment and an administrative discharge under other than honorable conditions. (GX 7; Tr. 28-31.)

Following his discharge from Air Force, Applicant moved to another city, started a better-paying job, and began getting on his feet. In 2009, Applicant was driving a friend's car to work when he entered a driver's license checkpoint. Unconcerned, Applicant presented his driver's license to the police officer. However, Applicant's driver's license had been administratively suspended for unpaid moving violations fines, and a bench warrant had been issued for Applicant's arrest. As a result the arrest, the police officer searched the car Applicant was driving. The police officer found a small amount of marijuana, and charged Applicant with possession of marijuana. (Tr. 31-34.)

In July 2010, Applicant began working as a help-desk technician in a job that required a security clearance. He has not used marijuana since prior to undergoing the requisite drug screening for that position. Applicant is subjected to random drug screening by his current employer. Applicant has no intention of using marijuana in the future, and is particularly motivated not to resume usage since becoming a father over four years ago. Alcohol and illegal drugs are not available in the country where Applicant has been residing for the past seven years, and Applicant does not associate with anyone who uses marijuana. (Tr. 34-37.)

Applicant's financial difficulties began when he was married. Applicant's former wife opened a number of accounts without Applicant's knowledge, did not make the required payments, and left Applicant with the debts when they divorced in 2007. (Tr. 21.) However, Applicant did not begin addressing his delinquent accounts until his daughter was born in 2013. Applicant's fiancé, who previously experienced financial difficulties, is helping Applicant work on his credit and be more responsible about his spending. They have a written budget, and Applicant recently opened a credit-card account, which has about a \$7,000 balance. Applicant drives a company car while abroad, but in 2016 purchased a vehicle for \$22,000, which he stores stateside. He made a significant down payment, and has not been late with his monthly payments. He purchased the car for his once-a-year visit, because he was tired of spending so much money on rental cars. (Tr. 50-55.)

Applicant testified about the delinquent SOR accounts as follows:

SOR ¶¶ 2.a, \$451 and 2.c, \$407 were paid to Applicant for school costs as part of his military benefits. He is not personally responsible for these debts and thinks they are paid;

SOR ¶¶ 2.b, a \$361 medical account, 2.f, at \$272 Internet/cable bill, and, 2.l, a \$209 collection account are owed by Applicant's former wife and he thinks they are unpaid;

SOR ¶¶ 2.c, \$271 credit-card collection account, 2.d, \$6,694 Federal tax lien from 2006, 2.m. and 2.n, a \$75 and a \$61 computer accessory bill, and 2.p, a \$381 collection account are paid;

SOR ¶¶ 2.h, \$1,879 collection account, 2.i, a \$41 collection account, and 2.k, a \$484 collection account, are unknown to Applicant and he did not attempt to contact the creditors. These debts are unpaid;

SOR ¶ 2.j, \$718 collection account, has now been charged-off and fallen off Applicant's credit report. He did not pay this debt; and

SOR ¶¶ 2.g and 2.o, a \$17,295 balance for repossessed vehicle, is unpaid. Applicant will contact this creditor and pay this account.

While Applicant asserted that he has paid several of the SOR debts, he did not provide any documentation in support of those assertions. Further, the \$6,694 Federal tax lien, as well as SOR debts 2.a through 2.c, totaling \$1,083, remain on Applicant's January 2015 credit report. (GX 5.)

Applicant lives within his means, and has a monthly net remainder of approximately \$4,000 to \$5,000. His savings account balance is approximately \$21,000. (Tr. 60.) Applicant is in the process of purchasing his first house. (Tr. 51.) Applicant testified that he intends to resolve the remainder of his delinquent accounts. (Tr. 51-52.) Applicant does not have any recent delinquent debts. (GX 5.)

When filling out his e-QIP, Applicant failed to list his 2007 marijuana use while holding a security clearance, and his 2009 marijuana-related arrest. Applicant also answered "no" when asked in Section 15, if he had ever received a discharge that was not honorable. Applicant credibly testified that he rushed through filling out his e-QIP, omitted required information, that he was not trying to hide anything, and the omissions were not intentional. Applicant's explanation is supported by the fact that when asked about his military service in Section 14, Applicant provided his dates of service and listed that he had been discharged under other than honorable conditions. (GX 1.) Additionally, when applying for his current position, before completing the e-QIP, Applicant was required to submit his military discharge document (DD-214), which lists Applicant's discharge as other than honorable. Applicant admits that he should have paid better

attention while filling out his e-QIP. He does not specifically recall the details of his personal subject interview in 2012, but did not intentionally omit the details of his 2009 marijuana-related arrest. He does not recall filling out his military enlistment application in 2001, but knows that he did not intentionally omit any information. Applicant believes that it is not possible to hide information from the Government, and would not attempt to do so. (Tr. 62-69.) Applicant was candid, straightforward, and sincere while testifying.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s 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.” See 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 H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Applicant's admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse; and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions may also apply:

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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's last use of marijuana was in 2010, nearly eight years ago. His marijuana use resulted in an other than honorable discharge from the military in 2007, and an arrest for possession of marijuana in 2009. He suffered the consequences of his actions, accepted responsibility, stopped using marijuana, and moved on with his life. Since the birth of his daughter more than four years ago, Applicant has been resolutely committed to not using marijuana in the future. Alcohol and illegal drugs are not available in the country where Applicant has been residing for over seven years. This conduct happened under circumstances that are unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant's last use of marijuana in 2010 is not recent. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). Applicant does not associate with people who use marijuana, and it is not in social settings where marijuana is being used. He will not use marijuana in the future. Applicant has mitigated the Guideline H concern.

Guideline F, Financial Considerations

The concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's testimony, corroborated by the record evidence, establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

However, a person can mitigate concerns about his ability to handle and safeguard classified information raised by his or her financial circumstances by establishing one or more of the mitigating conditions listed under the guideline. The relevant mitigating conditions in this case are:

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

AG ¶ 20(d): individual initiated and is adhering to 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.

Although Applicant testified that he has paid several of the SOR debts, he did not provide any evidence in support of these assertions. He further asserted that he was not responsible for SOR debts 1.a and 1.e, which total \$858, claiming that they should have been paid as part of his military benefits. However, he has not disputed these debts with the listed creditor. The \$6,694 tax lien, as well as three other SOR debts totaling \$1,083, remain on Applicant's most recent credit bureau report. Applicant admits that the \$17,295 delinquent balance for his repossessed vehicle remains unpaid.

Applicant received the SOR more than two years before the hearing, and has provided no documentary evidence that he has paid or otherwise resolved any of the delinquent accounts. He has not contacted the creditors of the debts that he does not recognize. He testified that the \$718 collection account alleged in SOR ¶ 1.j has fallen off of his credit bureau report. However, this does not resolve or mitigate the security concern raised by his delinquent debt. Since receiving the SOR, Applicant has purchased a \$22,000 vehicle, and amassed \$21,000 in a savings account. Applicant lives within his means and does not have any recent delinquent accounts. However, while Applicant stated that he has been working to improve his credit for several years, and will pay or

otherwise resolve the SOR debts, his delinquent accounts remain unresolved. None of the mitigating conditions applies.

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

Conditions that could raise a security concern and may be disqualifying include:

AG ¶ 16(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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

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).

Applicant credibly explained that he rushed while filling out his e-QIP, and did not intentionally omit derogatory information on his e-QIP. He does not recall specifically his 2012 personal subject interview, or his 2001 military enlistment application, but would not have intentionally omitted information. The credibility of Applicant's testimony is bolstered by the fact that he listed his other than honorable discharge on his e-QIP in response to a question about prior military service, then inadvertently failed to list it in response to a later question on the e-QIP. Further, Applicant submitted his DD-214, which listed his other than honorable discharge, to his employer prior to completing the e-QIP. Applicant's demeanor was sincere, forthcoming, and candid. I found his explanation to be credible and consistent with the record evidence. The personal conduct concern is resolved in Applicant's favor.

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(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.

I have incorporated my comments under Guidelines H, F, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant has worked for his current federal contractor employer for more than seven years. He has not incurred any recent delinquent debt, and is current on his ongoing financial obligations. Applicant is dedicated to his family and to his job. Applicant's testimony was credible and sincere. However, Applicant's unresolved delinquent SOR debts remain a concern.

After weighing the applicable disqualifying and mitigating conditions under Guidelines H, 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 delinquent debts. 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 2.a – 2.p:	Against Applicant
Paragraph 3 Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 3.a – 3.g:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge