



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 16-01338

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

04/03/2018

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant did not present sufficient information to mitigate the concerns raised under the financial consideration guideline. However, he mitigated the criminal conduct and the personal conduct security concerns. Access to classified information is denied.

Statement of the Case

On June 22, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). On October 24, 2016 the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

Specifically, the SOR set forth security concerns arising under Guideline J (criminal conduct), Guideline F (financial considerations) and Guideline E (personal conduct). Applicant timely answered the SOR and requested a hearing. The case was assigned to me on September 26, 2017. The hearing was scheduled for January 18, 2018. Government Exhibits (GX) 1-8 were admitted into evidence without objection. Applicant testified, but he had no exhibits at the hearing. I left the record open until February 1, 2018, and Applicant submitted Applicant Exhibits (AX) A-D, which were admitted into the

record without objection. The transcript was received on January 25, 2018. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

While this case was pending a hearing, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing then *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs.¹

Findings of Fact

In Applicant’s SOR response, he denied the SOR allegations under criminal conduct with the exception of SOR 1.c. He admitted ten SOR allegations under financial considerations, and denied the remaining SOR allegations. Applicant admitted the two allegations under personal conduct. He also provided extenuating and mitigating information.

Applicant is a 36-year-old security officer who has worked for a defense contractor since 2016. He is single and has four children. In 2001, he graduated from high school. He attended a technical institute for two years obtaining a degree in a pharmacy technician program. (GX 2). Applicant believes he held a position of trust from 2010 to 2015. (Tr. 14)

Criminal Conduct

In February 2002, Applicant was charged with failure of bailee to return property under \$200, a felony. He denied this incident, as he stated that he returned a rental car and paid in cash because he did not have a credit card. He testified that the paperwork was not reported properly. The charge was dismissed. (SOR 1.a) In October 2009, Applicant was charged with Assault and Battery – Family Member. He denied any wrongdoing because the mother of his child became angry with him and she was the aggressor. She began hitting him and throwing things at him. He attempted to leave, but she called the police. (Tr. 25) The charge was dismissed. (GX 8) (SOR 1.b) Applicant admits that on December 16, 2009, he was arrested and charged with Assault and Battery – Family Member. This incident involved his younger sister who was dating a known drug dealer. Applicant physically restrained her from leaving the house, and she called the police. Applicant was found guilty and sentenced to 40 hours of community service, fined, and ordered to stay away from his sister, and one year of probation. Applicant took responsibility for his actions and successfully completed the necessary requirements for

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

the case. (SOR 1.c) As to the April 22, 2011 charges, Applicant denied the assault and battery charge, as well as a trespassing charge. He stated that this was his mother's house and his younger sister was there. The police were called because Applicant was to not associate with this sister after the 2009 arrest. Applicant did not know that she would be at his mother's house. (SOR 1.d)

Applicant was credible in his description of the above incidents. He stated that his family is predominately female and that they are aggressive. He is sad that he does not have any communication with them since the above incidents. Applicant has not talked with his mother in four years. He stated that he was always the man of the house for his mother and sisters and was responsible from an early age. (Tr. 26) He submitted copies of the Orders and Record of Proceedings for the criminal charges which confirm his recollection of the events and his successful completion of community service. (AX A) The Government Exhibits also confirm Applicant's testimony. (GX 6-7)

Applicant volunteered at the hearing that he was fined in 2014 (this is not alleged in the SOR) for possession of marijuana. He stated that he was in someone's home and the police came and were looking for a weapon. They found marijuana in the house and charged him. There is nothing in the record concerning this incident except Applicant's testimony. He does not use marijuana. He was credible in that the case was nolle prossed. He also explained that he mentioned this during a 2015 investigative interview. The Government did not rebut his account.

Financial

The SOR alleges 16 delinquent debts totaling approximately \$10,000 that also includes a 2010 state tax lien in the amount of \$3,284. There are collection accounts, medical accounts and parking tickets. (GX 4)

Applicant worked for one agency from 2010 until 2015. He was unemployed for three months before his current employment. (Tr. 35) He provides child support for his four children. Applicant earns \$17.25 hourly. He believes his monthly net income is about \$2,200. He has a cohabitant who shares the household bills. He does not know her income. She has one child. Applicant stated that they have a joint bank account. He has a small 401(k), but was not sure how much it was worth. He rents his home and his car loan is paid. (Tr. 35)

When Applicant was interviewed in 2014, he stated that he was not aware of many of the collection accounts or the state tax lien. He did know that he owed medical accounts. He stated that he would research the debts and if valid would begin to pay them. (GX 4, 8)

Applicant denied the state tax lien at SOR 2.a. He stated that it was not his and that he never lived in that state. He also stated that he disputed it and that it should not appear on his credit report. He had no documentation to support his claim. (Tr. 39) Applicant's 2017 credit report still reflects the state tax lien. (GX 5) He acknowledged that he had not been in contact with the state.

Applicant denied the collection account at SOR 2.b in the amount of \$1,963, but he had no documentation to support a dispute. In his answer to the SOR, he stated that the debt had been removed from the credit report.

As to SOR 2.c and 2.d, both medical accounts totaling \$1,020 respectively, Applicant answered that the two debts had been resolved. He testified that it had been settled, but he could not remember when he paid it. He was given the opportunity to submit a post-hearing submission showing a receipt, but he did not do so. He also said at the hearing that the accounts had been removed from his credit reports. (Tr.41)

As to SOR 1.e, Applicant answered that it was in the process of being resolved, but he testified that it has not been paid. It was a \$76 insurance fee. He has not contacted the creditor.

Applicant denied SOR 1.f, a collection account in the amount of \$295, at the hearing and stated that he never had a cable bill with that company. In his answer, he stated that it was resolved. He acknowledged that he did not contact the creditor. He believes that if the account no longer appears on his credit report that it has been resolved. (Tr. 45)

As to SOR 1.g through 1.i, these are collection accounts for parking tickets that total about \$1,300. Applicant admitted the debts in his answer to the SOR. He explained that they are now being disputed. (Tr. 46)

Applicant denied two collection accounts in SOR 1.m and 1.n for a total of approximately \$400. Applicant stated that they were not his debts and they had been removed from his credit report. At the hearing, he was not sure what these debts represented, but had not contacted the companies to dispute them.

At the hearing, the Government moved to withdraw the child support collection account in the amount of \$4,657, as it is now not at issue. (Tr. 7) The SOR allegation 2.o was withdrawn.

The final SOR allegation at 2.p, in the amount of \$40 was denied by Applicant. He stated that the debt was not his and was removed from his credit report.

When Applicant was interviewed in 2014, he told the investigator that he was not aware of the many delinquent accounts on his credit reports save for the medical accounts. He told the investigator that he would research the debts and if valid would pay them. (GX4)

As post-hearing submissions, Applicant submitted portions of his 2018 credit bureau report. To his credit there are many other accounts reflecting that he pays as agreed. Also, his 2017 credit bureau report (GX 5) does not reflect any delinquent accounts beyond the state tax lien. He did not report any financial counseling.

Personal Conduct

Applicant denied SOR allegations 2.a and 2.b under personal conduct. His answer to the SOR that he deliberately falsified Section 22 – Police Record on his 2014 SCA was that he misread the question and thought that it only referred to convictions. He stated that his employer was aware of the incidents before he was hired. Applicant reported on his 2010 Declaration for Federal Employment that he had been convicted for assault. (GX 3) He noted at the hearing that he made a mistake and that he should have answered “yes” to the question.

As to 2.b, Applicant denied that he intentionally falsified his answer on his 2014 security clearance application in reference to Section 26- Financial because he had no idea that he had so many delinquent debts. At the hearing Applicant explained he was not sure why he had not answered “yes” to both questions but he told the investigator in 2014 about the criminal incidents. He also noted that he had answered that question correctly in an earlier application. Applicant, upon questioning, was adamant that he never received a notice of a state tax lien. He also explained that when he worked for another government agency from 2010 until 2015, he answered questions about the criminal conduct.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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, nothing should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Financial Considerations

18. *The Concern.* 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.

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

- (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;

(e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators; and

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant incurred delinquent debt in the amount of almost \$10,000, and there is evidence of a state tax lien in the amount of \$3,284. Applicant paid his child support. He was unemployed for about three months. However, he did not provide a nexus between the unemployment and the many delinquent accounts. In 2014, when Applicant was put on notice of the delinquencies, he stated that he would research the debts and make arrangements to pay accounts. Applicant stated that he contacted credit bureaus and disputed debts and accounts were removed. He stated that he paid two accounts. However, Applicant did not provide any documentation to support his claims. The fact that accounts are removed is not sufficient mitigation. Applicant was given an opportunity to provide information after the hearing. He supplied portions of a credit report from 2018 that show he is paying other accounts as agreed, but it is not possible to decipher if he actually disputed the other accounts. He did not seek financial counseling. He still has the state tax lien on his 2017 credit report. He has been employed, with the exception of three months before his current job. He accumulated debt, which he has not resolved. He also did not contact the state directly concerning the tax lien. He stated that he paid for two medical accounts in the SOR, but he presented no evidentiary materials. The debts have been outstanding for a number of years. The facts support the disqualifying conditions listed above.

20. Conditions that could mitigate security concerns include:

(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;

(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;

(f) the affluence resulted from a legal source of income; 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.

In light of the information presented in the record none of the above mitigating conditions apply.

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 lists conditions that could raise a security concern and may be disqualifying including:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶¶ 31(a) and 31(b) apply because in 2002 Applicant was charged with failure of a bailee to return property. He explained the situation and the charge was nolle prossed. Applicant was involved in a series of family assault situations in 2009 and 2011. He was convicted in one case. The others were dismissed. When he was arrested in 2009 and found guilty, he completed 40 hours of community service, paid his fine and completed probation successfully.

AG ¶ 32 describes conditions that could mitigate security concerns including:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and

does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Criminal conduct security concerns are mitigated. Applicant took responsibility and does not have contact with his family. He supports his four children. He is not happy that he has no contact with his mother or sisters, but he has learned that it is best for him to avoid any future conflicts. He has mitigated the criminal conduct concerns.

Guideline E, Personal Conduct

The security concern for personal conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. And Applicant has admitted he incorrectly answered "no" on an SCA, in which he was asked about the past seven years with regard to criminal and financial issues. Therefore, the following disqualifying condition applies:

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, and

AG ¶ 16(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 judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified or sensitive information.

This guideline provides seven potential mitigating conditions under AG ¶ 17. Two are potentially applicable under these facts:

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; and

AG ¶ 17(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.

Under these facts, AG ¶ 17(c) applies because Applicant noted his conviction on a December 2010 Declaration for Federal Employment. He made a mistake by not answering "yes" in 2014. Also, he was not aware of the financial delinquencies on his credit report. He was candid with the investigative officer in 2014. It is noted, however, that Applicant appeared genuinely sincere when he attributed his incorrect SCA answer to misreading the question and the fact that he had informed his former employer of the criminal incidents. He did not intentionally falsify his 2014 security clearance application.

Between 2002 and 2011, Applicant was charged with domestic assault and battery incidents. Each case was dismissed, except for one. He was found guilty and completed probation, community service and took responsibility for the family situation. He does not see his family. He cares for his four children. He has according to the records in the file no other arrests since 2011. At the hearing, he volunteered that there was an incident with possession of marijuana in someone else's home. The facts were not clear and there is no factual evidence of an exact charge or disposition of the case. He explained the situation and was credible. Since the last criminal incident according to the SOR was 2011, I find that a sufficient passage of time has gone by and Applicant has mitigated the criminal conduct concern.

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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guidelines G and J are incorporated 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 a 36-year-old security officer who has worked for his defense contractor since 2016. He states he held a position of trust in his former position with another agency. He supports his four children. He was involved in a series of criminal incidents involving family assaults, but he has removed himself from the situation. He was convicted in one case and the others were dismissed. He completed his requisite requirements. The last incident was in 2011. He has mitigated the criminal conduct concerns.

Applicant has not provided documentation or evidence concerning efforts to address and resolve the SOR debts at issue. He stated that he has disputed many accounts and paid two accounts and that he has no idea about the state tax lien. However, he has been on notice since 2014 and he has not produced any evidence to show that he has resolved any delinquent debts or the state tax lien. He has not met his burden to overcome the financial considerations concern.

Applicant was credible in his explanations concerning the questions in his 2014 security clearance application. I find that he did not intentionally falsify his 2014 security clearance application. He has mitigated the personal conduct concern.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Criminal conduct, and personal conduct security concerns are mitigated. Applicant has not mitigated the financial considerations concerns.

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 J:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2n:	Against Applicant
Subparagraph o:	Withdrawn
Subparagraph p:	Against Applicant

Paragraph 3, Guideline E: FOR APPLICANT

Subparagraphs 3.a-3.b: 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge