



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



In the matter of:)
)
) ISCR Case: 16-01921
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esquire, Department Counsel
For Applicant: *Pro se*

10/27/2017

Decision

WHITE, David M., Administrative Judge:

Applicant failed to file returns or pay his Federal and state income taxes, as required, for 2012 through 2014. He illegally used marijuana daily from February 1999 through November 2014. Resulting security concerns were not mitigated. Based upon a review of the pleadings and exhibits, national security eligibility is denied.

Statement of Case

On January 23, 2015, Applicant submitted an electronic questionnaire for investigations processing (e-QIP). (Item 2.) On September 13, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F (Financial Considerations), and Guideline H (Drug Involvement). (Item 1.) The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information*, effective within the DoD after September 1, 2006.

Applicant submitted his Answer to the SOR on October 4, 2016, and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 1.) On October 25, 2016, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing five Items, was mailed to Applicant on October 25, 2016, and received by him on October 31, 2016. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant responded to the FORM with additional information on November 30, 2016. He did not file any objection to the FORM's contents, and did not request additional time to provide further response beyond the 30-day period he was afforded. Department Counsel had no objection to the FORM response, which I marked Applicant's Exhibit (AE) A. The case was assigned to me on June 7, 2017. Items 1 through 4 and AE A are admitted in evidence.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as set forth in Appendix A of SEAD 4. I considered the 2006 adjudicative guidelines, as well as the SEAD 4 AG, in determining Applicant's national security eligibility. My decision would be the same under either set of guidelines, but this decision is issued pursuant to the SEAD 4 AG.

Findings of Fact

Applicant is 33 years old, has never married, and has no children. He earned a bachelor's degree in May 2007. He has held his present position as a help desk employee with a defense contractor since December 2014; and is seeking a security clearance in connection with that position. He has never served in the military, worked as a Federal civilian employee, or held a security clearance. (Item 2.)

Applicant admitted all of the allegations in the SOR with some explanations. (Item 1.) His admissions are incorporated in the following findings.

Applicant admitted in his e-QIP and Answer that he failed to either file required Federal and state income tax returns or pay required Federal and state income taxes for tax years 2012 through 2014. He was uncertain of the exact amount of taxes owed, but estimated the three-year total of unpaid taxes to be \$14,000. He claimed that he had problems assembling the documentation necessary for him to file the returns and pay those taxes. He also reported that he worked as a field technician for the company

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

owned by his father during all of 2012 and most of 2013, before accepting full-time employment setting up cell phone tower sites with another company in September 2013. (Item 1; Item 2.)

In his Answer, Applicant said that he had retained a new tax professional to assist him in resolving his income tax filing and payment delinquencies. He submitted copies of two unsigned draft "IRS e-file Signature Authorization" forms for tax years 2014 and 2015, but did not otherwise document any updated status or resolution concerning his Federal or state tax issues from 2012 through 2014. (Item 1.) In his FORM response, he submitted evidence that he made one \$583 payment toward his 2013 state income tax debt, but no information concerning the remaining balances due toward either his state or Federal income tax debts for 2012 through 2014. He also submitted three pages of an IRS response to his October 12, 2016 request for taxpayer information related to his 2012 Federal income taxes. The response confirmed that he had not, as of that date, filed any return for tax year 2012 and that IRS records reflected no information about his income or taxes due for that year. (AE A.) Applicant provided no other information concerning the status of his unfiled returns or delinquent tax debts for 2012 through 2014.

Applicant reported on his e-QIP that he had illegally used "THC (Such as marijuana, weed, pot, hashish, etc.)" from February 2009 through November 2014. He reported the nature and frequency of his use as, "Daily use as a sleep aid." He said that he did not intend to use this drug in the future, explaining, "Quit prior to starting my new job and intend on not using in the future in order to keep my job and hopefully my clearance." He also admitted that he was arrested for possession and distribution of marijuana in a state police sting operation during April 2009. Applicant felt that he was entrapped because the police agents repeatedly asked him to give them some of his marijuana, then insisted on paying him for it despite his telling them that he was not a drug dealer. The state's attorney subsequently declined to prosecute those charges on May 29, 2009. (Item 1; Item 2 at 37-38; Item 3.)

Applicant did not document any financial counseling, chemical dependency assessment, or treatment for drug abuse. He provided no budget information from which to predict his future solvency, or his ability to make any payments toward his delinquent tax debts. He submitted no evidence corroborating his claim that he last abused marijuana in November 2014, prior to starting his current job, and intended not to use it in the future. He offered no evidence to support findings concerning the level of responsibility his duties entail in his defense contractor work, or his track record with respect to handling sensitive information and observation of security procedures there. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing. (Item 1; AE A.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 personal 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.

AG ¶ 19 describes four conditions that could raise security concerns and may be disqualifying in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to 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 what he estimated to be \$14,000 in delinquent Federal and state income tax debts for tax years 2012 through 2014, and failed to file required Federal and state income tax returns for those years. He documented neither the ability nor any effective efforts to satisfy these debts or filing requirements, except for one payment of \$583 toward his 2013 state tax debt that he made the day after he received the FORM. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's admitted delinquent income tax issues:

(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, or 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

(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.

Applicant's multiple delinquent income tax debts are substantial and ongoing. His failure to address these debts in a meaningful way over the past five years creates ongoing concerns about his reliability, trustworthiness, and judgment. He offered no reasonable basis to conclude that such problems will not continue or recur. Mitigation was not established under AG ¶ 20(a).

Applicant neither documented a reasonable basis to claim that his income tax issues arose from circumstances beyond his control, nor showed that he acted responsibly under such circumstances, as required for mitigation under AG ¶ 20(b). He offered no evidence of financial counseling or budget information establishing solvency going forward or ability to repay his delinquencies. He provided insufficient evidence that these problems are being resolved, are under control, or that a good-faith effort toward resolution has been initiated. His single payment toward an unidentified balance due on his delinquent state tax debt was not made until the day after he received the FORM, and it represented less than 5% of his total estimated unpaid taxes for 2012 through 2014. Neither arrangements with Federal or state tax authorities to file the tax returns or pay the amounts owed, nor compliance with such arrangements was demonstrated. Accordingly, Applicant failed to establish mitigation of financial security concerns under the provisions of AG ¶¶ 20(c), 20(d), or 20(g).

Guideline H: Drug Involvement and Substance Misuse

The security concerns under the guideline for drug involvement and substance misuse are set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose 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. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted that he regularly misused marijuana, which he illegally possessed, from February 1999 until November 2014 on a daily basis. He also admitted that he illegally possessed and distributed marijuana during April 2009, despite the state's attorney's decision not to prosecute him for those offenses. The evidence supports security concerns under both of these disqualifying conditions.

AG ¶ 26 provides two conditions that could possibly mitigate the drug-related security concerns raised in this case based on Applicant's explanations:

- (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; and
- (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;
- (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 admittedly abused marijuana for more than 15 years on a daily basis, and claimed, without corroboration, that he has not used it since the month before he began his current employment in late 2014. This established a pattern of recent and frequent drug abuse that did not occur under such circumstances that recurrence seems unlikely. Insufficient evidence was submitted to diminish the resulting doubts concerning his current reliability, trustworthiness, and good judgment. Mitigation under AG ¶ 26(a) was not established.

Applicant acknowledged his illegal use, possession, and distribution of marijuana, but failed to provide evidence of actions to overcome these problems, or establish a pattern of abstinence. The claim in his January 2015 e-QIP, that his last illegal use or possession of marijuana was two months earlier in November 2014, was restated during his April 2016 security interview (Item 3), but was neither repeated nor corroborated by any evidence in his Answer or FORM response. He accordingly failed to establish mitigation under AG ¶ 20(b). Other potential mitigating conditions are inapplicable in the absence of prescription drug abuse or drug treatment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

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

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who is accountable for his choices. He continues to owe more than \$13,000 in delinquent Federal and state tax debts, according to his estimates, and provided no evidence that he filed any of his required income tax returns for 2012 through 2014. He abused marijuana on a daily basis for more than 15 years, until at least November 2014, and provided insufficient evidence to demonstrate rehabilitation or other permanent behavioral changes. The potential for pressure, exploitation, or duress related to all of these issues remains undiminished, and recurrence was not shown to be unlikely.

Overall, the evidence creates significant doubt as to Applicant's judgment, reliability, eligibility, and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising under the guidelines for financial considerations, and for drug involvement and substance misuse.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a and 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 interests of national security to grant Applicant a security clearance. National security eligibility is denied.

DAVID M. WHITE
Administrative Judge