



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



In the matter of:)
)
) ISCR Case No. 16-03189
)
Applicant for Security Clearance)

Appearances

For Government: Ray Blank, Esq., Department Counsel
For Applicant: *Pro se*

10/30/2017

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline F (financial considerations), Guideline G (alcohol consumption), Guideline H (drug involvement and substance misuse) or Guideline E (personal conduct). Applicant's eligibility for access to classified information is denied.

Statement of the Case

On January 19, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F, G, H, and E. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's file of relevant material (FORM) on July 7, 2017. Applicant received the FORM on July 10, 2017, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, and he provided no response to the FORM. The Government's evidence, identified as Items 1 through 17, is admitted without objection. The case was assigned to me on October 23, 2017.

Findings of Fact¹

Applicant is 38 years old. He graduated from high school in 1997 and has been employed as a mechanical designer by a federal contractor since August 2002. Applicant reports no military service, and he has never married. Applicant has held a previous security clearance since April 2005.

On June 10, 2015, Applicant completed a Security Clearance Application (SCA),² and in section 22 (police record) he disclosed several arrests.³ In section 23 (illegal drug use) he disclosed his use of marijuana (MJ) for several years, including while he possessed a security clearance. He stated “I have not used since 2012 and don’t intend to because it is not worth the trouble”⁴ He also disclosed that he had purchased a condominium (condo) with his fiancée, and when they broke-up in 2007, she was supposed to make payments on the condo. She stopped making these payments in 2009, and the condo was foreclosed upon by the mortgage lender in September 2013.

In his Answer to the SOR dated February 17, 2017, Applicant admitted to the allegations in SOR ¶¶ 1.a through 1.e, with explanations. He admitted to failure to timely file his federal-income taxes as required for tax years 2010, 2011, 2012, 2013, and 2015, but he did recently file for 2015, and he is owed a refund of \$2,000. Applicant also admits to his failure to file state income tax returns as required for 2011 through 2015 (SOR ¶ 1.b). He is making voluntary payments of \$200 each month on the \$28,911 federal-tax lien (SOR ¶1.c) and \$110 each month on the \$7,245 state-tax lien (SOR ¶ 1.d). Approximately 25% of his wages are garnished each month to pay the \$16,782 judgement lien alleged (SOR ¶1.e) and Applicant claims to have paid over \$15,000 to date, on that delinquent debt. However, he provided no Response to the FORM and no documents to substantiate his assertions. He denied the allegations in SOR ¶¶1.f and 1.g without substantiation. Yet, these delinquent debts are reflected in his credit bureau reports.⁵

In his Answer to the SOR,⁶ Applicant also admitted all of the allegations in SOR ¶¶ 2.a through 2.d, with explanations. All of his admissions are adopted here as findings of fact including his DUI arrest; 2010 alcohol treatment; and 2012–2013 drug and alcohol treatment. During the latter treatment, he was diagnosed with cannabis dependence, alcohol abuse, and alcohol dependence. Nonetheless, he continues to drink on social

¹ Unless stated otherwise, the source of the information in this section is Applicant’s June 10, 2015 Security Clearance Application (SCA) (Item 4) and his summary of clearance interview by a background investigator dated April 6, 2016 (attached to Item 9).

² Item 4.

³ Item 4.

⁴ Item 4, section 23.

⁵ Items 6 and 8.

⁶ Item 2.

occasions but never to excess. In his clearance interview on April 26, 2016, Applicant stated that he was drinking six drinks a night, three times a week, while he was separating from his fiancée. Since December 2010, he only has two or three beers per month.

Applicant signed an outpatient-addictions-treatment-services (OATS) contract on December 28, 2012, by which he agreed, *inter alia*, to abstain from all mood-altering substances including alcohol.⁷ Also, the stated goal of his treatment plan at a drug and alcohol-rehabilitation facility in 2013 was to abstain from mood altering substances, and Applicant signed this individual treatment plan, after being diagnosed as alcohol dependent according to the treatment records attached to his responses to interrogatories.⁸

Applicant also admitted to the allegations in SOR ¶¶ 3.a through 3.g, including three arrests for possession of MJ in 1998, 2008, and 2012, and using MJ after being granted a security clearance in 2005.⁹ In his response to interrogatories on December 13, 2016,¹⁰ Applicant explained that he used MJ recreationally, twice-a-month, from 1997–1999; 2007 to March 2008; and from December 2011 to December 2012. He has attended alcoholics anonymous (AA) and narcotics anonymous (NA) courses as part of his treatments. He stopped using MJ in 2012, and he received the employee of the quarter award from his employer in April 2013.

Applicant also admitted the allegations under Guideline E (personal conduct) at SOR ¶¶ 4.a through 4.c in his Answer to the SOR. In response to SOR ¶4.b, he states that his 2006 arrest for credit-card fraud was a misunderstanding and no theft was intended. The case was *nolle prosequi'd* by authorities. Applicant pointed out that in addition to 135 days jail time (suspended), community service, and alcohol treatment, he was sentenced to serve one year of probation vice two years, as alleged in SOR ¶ 4.c.

Policies

DOD took action in this case under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AGs) implemented by DOD on September 1, 2006.

⁷ Item 9, attachment.

⁸ Item 9, attachment.

⁹ Item 4.

¹⁰ Item 9.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017.¹¹ Accordingly, I have applied the June 8, 2017 AGs in this decision.

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

¹¹ Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to financial considerations is set out in AG ¶18:

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance abuse, 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.

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.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (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’s delinquent debts alleged in the SOR are confirmed by his credit reports, and his clearance interview of April 2016. The Government produced substantial

evidence to support the disqualifying conditions in AG ¶¶ 19(a), (b), (c) and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.¹² Applicant has not met that burden. Most of the delinquent debts have not been adequately addressed with corroborating documentation.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control . . . 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 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; 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 filed his federal income tax returns late for each tax year from 2010 to 2013, as reflected in the tax transcripts attached to his answers to interrogatories.¹³ He only recently filed his 2015 tax return, and he has produced no evidence to show that he has filed his state income tax returns for tax years 2011 to 2015. He has offered no adequate explanation for this. Applicant admitted to all of the delinquent debts alleged in the SOR except for those in SOR ¶¶ 1.f and 1.g, but these are reflected on his credit reports. The AG ¶¶ 20(d) and (g) mitigating conditions partially apply. Otherwise, the AG ¶ 20 conditions above do not apply.

¹² Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

¹³ Item 9, attachments.

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following is potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;

(e) the failure to follow treatment advice once diagnosed; and,

(f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

Applicant had an alcohol-related incident, the DUI arrest in November 2009, and treatment in 2010 and 2013, when he was diagnosed as alcohol dependent. Nonetheless, Applicant disclosed that he continues to drink alcohol socially, but not to excess. He disclosed his continuing transgressions in his SCA and he has admitted them in his Answer to the SOR. AG ¶ ¶ 22(a)(d)(e) and (f) are applicable.

AG ¶ 23 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has

demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and,

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant's last alcohol-related incident was in May 2009. He has completed treatment, attended AA meetings, and reduced his alcohol intake.¹⁴ An inference can be drawn that Applicant has confronted his condition, and he is trying to cope with his dependence. However, since he still uses alcohol, Applicant has not met his burden in establishing that sufficient time has elapsed since his last alcohol-related event, and he has taken responsible measures to insure that it never happens again. The above-mentioned mitigating conditions do not apply.

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and

¹⁴ Items 2, 4, and 9.

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used MJ while holding a security clearance. He also was arrested three times for possession, received a diagnosis of cannabis dependence and admits to using MJ with varying frequency from June 1997 to December 2012. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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 has provided evidence of completion of substance abuse-courses or rehabilitation, and attendance at NA meetings, but no favorable prognosis from a medical professional. He used MJ for 15 years. He has abstained from drug use since 2012, and improved his performance at work. However, he did not provide any evidence that he has disassociated from friends who use illegal drugs, or any letter of intent to abstain in the future. Applicant appears to be sincere in his intent to abstain going forward, but that is insufficient to mitigate the well-established pattern of illegal-drug use, particularly while possessing a security clearance. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) and AG ¶ 26(b) are only partially applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The Concern. 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. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified information. This includes but is not limited to, considerations of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized - - release of sensitive corporate or government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;

- (3) a pattern of dishonesty or rule violations;

- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

- (2) while in another country, engaging in any activity that is

illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States; and

Applicant has admitted to using MJ for 15 years, getting arrested for possession three times, and using MJ while he possessed a security clearance. He was also found guilty of assault on a police officer and theft-second degree in May 2010. AG ¶¶ 16 (d) and (e) apply and the focus shifts to a determination of which, if any of the mitigating conditions apply.

Under AG ¶ 17, conditions that could potentially mitigate security concerns include:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

My analyses above under administrative guidelines F, G, and H are the same under this administrative guideline E, and are herein incorporated by reference. Applicant has completed two substance-abuse courses and had counselling through attendance at AA and NA meetings. While AG ¶¶ 17(c),(d) and (e) may have some applicability, they are not enough to overcome Applicant's well-established pattern of violating the law and ignoring rules, such as when he used MJ while possessing a security clearance and when he assaulted a police officer.

Whole-Person Concept

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

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the

individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked over 15 years for a federal contractor directly supporting DOD's mission and he held a security clearance since 2005. He has completed substance-abuse courses and counseling. Most importantly, Applicant did not resolve the specific violations alleged in the SOR, and he has not unequivocally declared his intention to refrain from further use of illegal drugs.

Applicant's finances, past drug involvement, and continuing alcohol misuse remain security concerns. These offenses were not minor or infrequent, and they were not committed under such unusual circumstances that they are unlikely to recur. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement or taken steps to alleviate the stressors or circumstances that contribute to his alcohol consumption, to insure that such behavior does not recur. He has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines F, G, H and E.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.g:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a through 2.d:	Against Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraphs 3.a through 3.g:	Against Applicant

