



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03570

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

March 7, 2018

Decision

ROSS, Wilford H., Administrative Judge:

On July 7, 2015, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). (Item 5.) On December 19, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing (Answer) on June 29, 2016, and requested his case be decided on the written record in lieu of a hearing. (Item 4.) On March 23, 2017, Department Counsel submitted the Department's written case. A

complete copy of the file of relevant material (FORM), consisting of Items 1 to 9, was provided to Applicant, who received the file on April 6, 2017.¹

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit additional information. The case was assigned to me on October 1, 2017. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

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 decisions² 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 implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG promulgated in SEAD 4.

Amendment of SOR

In the FORM, Section IV, page 4, Department Counsel proposed to amend the SOR by adding subparagraphs 2.e and 2.f. Department Counsel indicates that the authority for her proposed amendments is ¶ E3.1.13 of the Directive. That paragraph does not deal with amendments to the SOR. Amendments to the SOR are governed by ¶ E3.1.17 of the Directive, which states:

The SOR may be amended at the *hearing* by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for

¹ Department Counsel submitted nine Items in support of the SOR allegations. Item 9 is inadmissible. It is the summary of two unsworn interviews of Applicant conducted by an interviewer from the Office of Personnel Management on June 1, 2016, and August 2, 2016. Applicant did not adopt the summary as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation (ROI) summary is inadmissible in the Government's case in chief in the absence of an authenticating witness. See Executive Order 10865 § 5. In light of Applicant's admissions, Item 9 is also cumulative. Applicant is not legally trained and might not have understood Department Counsel's FORM footnote 1, which described the potential admissibility of Item 9. I therefor reviewed it for any potentially mitigating information that Applicant might have thought would be considered. Any such mitigating information will be discussed later in this Decision.

² 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."

other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or for other good cause. (Emphasis supplied.)

Even though not specifically covered, I shall consider the proposed amendments pursuant to ¶ E3.1.10 of the Directive, which states, "The Administrative Judge may rule on questions on procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner." As a general matter, it is noted that Applicant did not respond to the FORM.

Department Counsel proposed to amend the SOR by adding new subparagraphs 2.e and 2.f. As stated, Applicant chose not to respond to the FORM in general, or to the proposed amendments in particular. Concerning the contents of the FORM, ¶ E3.1.7 of the Directive states, "Department Counsel shall provide applicant with a copy of all relevant and material information that could be adduced at a hearing." Proposed substantial amendments to the SOR are not contained within this ambit. In addition, the proposed amendments in the FORM did not give the Applicant an opportunity to request a hearing, additional time for preparation of exhibits, nor did it inform him that failure to respond to the proposed amendments might result in his case being closed, as provided for under ¶¶ E3.1.4, E3.1.5, and E3.1.17 of the Directive. Department Counsel could have served on Applicant a properly formatted amended SOR, or withdrawn the original SOR and issued a new one. The motion to amend the SOR by adding allegations 2.e and 2.f is denied as I deem it inappropriate under ¶ E3.1.10 of the Directive.

Findings of Fact

Applicant is 41 and married with two children. He has been most recently employed by a defense contractor since January 2011. Applicant first received a security clearance in approximately 2006 during a prior term of employment with the same defense contractor. He seeks to obtain national security eligibility for access to classified information in connection with his employment. (Item 3 at Sections 13A, 16, 17.)

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds.

Applicant admitted all the allegations in the SOR under this Paragraph. Subparagraphs 1.a through 1.w concern past-due debts of Applicant. These include medical debts, credit card debts, and past-due child support. The total amount of money Applicant allegedly owes on those debts is approximately \$34,397. The existence and

amount of the debts is supported by credit reports dated July 22, 2015; and September 22, 2016. (Items 6 and 7.) Applicant also admitted that his wages had been garnished in February 2016 in the approximate amount of \$15,652. (SOR subparagraph 1.x.)

Section 26 of Applicant's e-QIP (Item 5) discusses his financial record. Applicant describes many of the delinquent debts and states that the reason for the financial issue was, "Financial hardship." Applicant elected not to respond to the FORM. He submitted no financial information, such as a budget, from which to make a conclusion that he is now financially stable.

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations. Applicant admitted all the allegations under this paragraph.

2.a. Applicant admitted that he used marijuana from approximately February 1994 to 2011. Applicant allegedly told an interviewer that he stopped using marijuana "to focus on his employment." (Item 9 at 5.)

2.b. Applicant filled out a Security Clearance Application on September 22, 2005. (Item 8.) Section 27 of the application asks whether Applicant had used illegal drugs, including marijuana, within the seven years preceding the date he filled out the application. Applicant responded, "No," to this question. Applicant admitted that this was a false response.

2.c. Applicant admitted that he used marijuana after being granted a security clearance in January 2006.

2.d. Applicant admitted that he was arrested in February 2012 and charged with Public Swearing/Intoxication and Possession of Marijuana. He allegedly stated to an investigator that the marijuana in question was actually his wife's. (Item 9 at 4.)

Applicant did not submit any evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

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 for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, the administrative judge applies the guidelines 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. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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, "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The 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 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 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 information.

Finally, as emphasized in Section 7 of EO 10865, "Any 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Paragraph 1 (Guideline F, Financial Considerations)

The security concern relating to the guideline for 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 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 two conditions that could raise security concerns and may be disqualifying in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant, based on documentary evidence, had 22 delinquent accounts that he could not or chose not to resolve. He also had his wages garnished. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline includes four conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's financial difficulties:

- (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; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence does not establish that any of the above mitigating conditions apply to Applicant. He failed to submit any evidence that would tend to support any of them. There is no basis for me to find that Applicant has mitigated the security concerns of his financial situation. Paragraph 1 is found against Applicant.

Paragraph 2 (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. The following will normally 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.

The following disqualifying conditions are applicable under 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

(c) 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 or sensitive information.

Applicant admitted falsifying a Government questionnaire, using marijuana until at least 2011, using marijuana after being granted a security clearance, and being arrested for possession of marijuana in 2012. Both of the cited disqualifying conditions have application in this case.

The following mitigating condition is potentially applicable under AG ¶ 17:

(c) the offense is so minor, or so much time has passed, or the behavior was 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.

Applicant elected not to respond to the FORM, and there is insufficient other evidence to show that this mitigating condition applies. None of the other mitigating conditions are applicable on their face. Paragraph 2 is found against Applicant.

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 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility and 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 facts and circumstances surrounding this case. Applicant's financial irresponsibility was recent, voluntary, and occurred when he was a mature adult. Rehabilitation was not demonstrated, nor was unlikelihood of recurrence. In addition, Applicant has a history of marijuana use and falsification of a Government questionnaire. Overall, the record evidence as described above leaves me with questions and substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guidelines for Financial Considerations and Personal Conduct.

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 through 1.x:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant national security eligibility and a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge