



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



In the matter of:)
)
) ISCR Case No. 16-04089
)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/16/2018

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has delinquent financial obligations and falsified his Electronic Questionnaires for Investigations Processing (e-QIP). He has failed to mitigate the security concerns under Guideline F, financial considerations and Guideline E, personal conduct security concerns. Applicant's eligibility for access to classified information is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 6, 2017, the DoD Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing financial considerations and personal conduct security concerns. On July 3,

¹ 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 (Sept. 1, 2006 AG) effective within the DoD on September 1, 2006, and as amended on June 8, 2017.

2017, Applicant answered the SOR and elected to have the matter decided without a hearing. On August 25, 2017, Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained 12 attachments (Items 1-12), which were admitted into evidence. On September 8, 2017, Applicant received a copy of the FORM, along with notice of his opportunity to object to the Government's evidence and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. He had 30 days from his receipt of the FORM to submit any additional information in response to the FORM. The response was due on October 8, 2017. No additional information was received from Applicant. On December 19, 2018, I was assigned the case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing the *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.²

Findings of Fact

In Applicant's answer to the SOR, he admitted the 13 delinquent obligations, a garnishment, a judgment, failing to file his Federal income tax returns for tax years 2011 through 2015, falsifying his e-QIP by failing to list his failure to file income tax returns and delinquent financial obligations. He also admitted two driving while intoxicated convictions and an April 2007 court-martial conviction. He denied falsifying a February 2017 response to DOHA interrogatories related to failing to disclose prior illegal drug use. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 36-year-old master trades person who has worked for a defense contractor since October 2015, and he seeks to obtain a security clearance. (Item 3) From May 2005 through August 2007, he was married. He has seven children ages 3 through 16. He served honorably in the U.S. Navy from July 2000 through July 2008, obtaining the grade of E-4. (Item 3, Item 11, Item 12)

In December 2006, Applicant was court martialed for false official statement in violation of Article 107 of the Uniform Code of Military Justice (UCMJ) and for larceny in violation Article 121. After being stopped for speeding, he gave a false statement as to why vehicle tags belonging to another vehicle were on his car. He ultimately admitted to the larceny of the tags because he did not have the money to register and get proper registration for his vehicle. (Item 4) Applicant was sentenced to 30 days confinement, forfeiture of one-half month pay for two months, and reduction to E-3. (Item 11) He did

² 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.

not list the court martial on his November 2015 e-QIP because he was embarrassed about it and thought it had occurred outside the scope of the question, which he believed was seven years. (Item 11)

Since leaving the U.S. Navy in July 2008, Applicant had one period of unemployment; February 2015 through July 2015, after relocating to his current state. (Item 3, Item 11)

In November 2008, Applicant was arrested for driving under the influence (DUI). He was intoxicated and, at that time, was drinking to intoxication approximately three times a week. (Item 11) His preliminary breathalyzer test resulted in a .21% blood alcohol content (BAC). He was found guilty of the charge and ordered to attend Alcohol Safety Action Program (ASAP), pay a \$500 fine, and pay his attorney fees of \$1,000. (Item 11) Eight months later, in July 2009, he was arrested for driving under the influence, second offense. His BAC was .13%. After being found guilty, he was sentenced to 12 months 5 days jail time with 11 months and 15 days suspended, unsupervised probation, and to attend ASAP and counseling. (Item 11) He did not complete ASAP due to moving out of state. In his personal subject interview, he could not recall why he failed to list his second arrest, but did acknowledge that he did not want to look bad and was embarrassed by listing both arrests. (Item 11)

In Applicant's August 22, 2016 personal subject interview, he asserted, but failed to provide supporting documentation that he was paying \$100 monthly on his television service collection debt (SOR 1.h, \$955) He has provided no documentation showing payment on a telephone service collection account (SOR 1.f, \$2,061) and a credit card account (SOR 1.i, \$568). (Item 11) He asserted, but failed to document, that he had arranged to pay \$150 monthly on his student loans (SOR 1.c, \$5,954; SOR 1.d, \$3,104; and SOR 1.l, \$3,636). (Item 11) He asserted, but failed to document, that another education collection debt (SOR 1.j, \$568) had been paid. (Item 11) At the time of the personal interview, he intended to contact the creditor of a \$2,872 collection account (SOR 1.e) and arrange payments. (Item 11) He provided no documentation showing he had done so.

When Applicant completed his personal subject interview, he estimated he was approximately \$20,000 delinquent on his child support obligation (SOR 1.a, \$19,962). (Item 11) He asserted, but failed to provide documentation, that he pays \$700 monthly by garnishment to two of his children and pays \$250 monthly for another child SOR 1.b, \$7,647). His other four children live with him. (Item 11)

In Applicant's SOR answer, he admitted the past-due account (SOR 1.g, \$1,103) and delinquent medical debt (SOR 1.k, \$417). (Item 2) In October 2008, a judgment (SOR 1.m, \$381) was obtained by an apartment complex against Applicant. (Item 8) against Applicant. He provided no documents showing payment of these delinquent obligations.

Applicant admitted failing to timely file his Federal and state income tax returns for tax years 2011 through and including tax year 2015 and that he owed an unknown amount of past-due taxes. (Item 2) In his February 2017 response to written financial

interrogatories he asserted, but failed to provide supporting documentation, that he had filed all the returns and yet owed an undisclosed amount of tax. (Item 12) The FORM put Applicant on specific notice that he had not provided documentary proof concerning his tax filings.

The FORM also put Applicant on notice that his SOR answer had failed to provide documentation that he either paid or successfully refuted the validity of his delinquent debts. He was informed he needed to provide documentary evidence supporting his assertions of payment. Despite this notice, Applicant did not respond to the FORM. He provided no documentation showing what efforts he undertook to pay, contact creditors, or otherwise resolve his delinquent debts. He did not provide any documentation showing the current status of his delinquent debts.

Applicant denied he falsified his February 2017 response to interrogatories by denying any illegal drug use that prevented him from obtaining employment with the Federal Bureau of Investigation (FBI) in 2008 due to illegal drug use. (Item 12) A November 2015 FBI document states, "October, 2008 Quick Hire Automatic Disqualifier: Drug Violation – Not Marijuana, Past 10 Yrs or More than Experimental." (Item 6) The additional FBI documents in the record contain no mention of drug use. (Item 5)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 adjudication process is an examination of a sufficient period and a careful weight 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 protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for the 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.

Under 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person’s relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is

inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

The Government's substantial evidence and Applicant's own admissions raise financial considerations security concerns. AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: AG ¶ 19(a) "inability to satisfy debts," ¶19(c), "a history of not meeting financial obligations," and AG ¶ 19(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," apply to this case. The SOR alleged more than \$49,000 owed on delinquent obligations. Additionally, although asserting he had resolved his tax filing issues, he provided no documentation showing his 2011 through 2015 Federal and state tax returns were filed or that taxes due for those tax years were paid. He provided no documentation refuting the delinquent obligations that were listed in his credit reports and which he admitted to in his SOR answer.

The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Six of the seven Financial Considerations 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 (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 person has received or is receiving 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; 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 Applicant's August 2016 personal subject interview, he stated his child support obligations were being met by garnishment, that he had worked out a repayment agreement on his student loans, and that he was working to resolve his delinquent obligations. He provided no information as to payment on his delinquent obligations or repayment arrangements with his creditors.

Applicant's debts remain unpaid. Accumulating the delinquent obligations did not occur under unusual conditions. There is no showing that the failure to timely pay those obligations was an unusual condition unlikely to recur. From February 2015 through July 2015, he was unemployed. He failed to present documentation showing the effect of this period of unemployment, more than two years previous, on his current finances. He provided no information as to the impact on his current finances caused by the unemployment. He provided insufficient evidence to conclude that his financial problems are unlikely to recur. His delinquencies continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant has been employed full-time since October 2015. He provided no evidence of what responsible steps, if any, he took to pay or resolve his debts. The second prong of AG ¶ 20(b) does not apply. There is no evidence of financial counseling or clear indications that Applicant's financial problems are being resolved or are under control. AG ¶ 20(c) does not apply. There is no showing of Applicant having made good-faith payments towards his delinquent obligations or evidence to establish that he is executing a reasonable ongoing plan to pay or resolve his debts. AG ¶ 20(d) does not apply.

Applicant indicated he has filed his tax returns. However, AG ¶ 20(e) does not apply because he has not provided documented proof to substantiate the filing of his delinquent tax returns or that any delinquent taxes have been paid.

Guideline E, Personal Conduct

The concerns about personal conduct are articulated 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 information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigations or adjudicative processes . . .

When Applicant completed his November 2015 e-QIP he failed to disclose he had not filed his Federal and state tax returns for tax years 2011 through, in response to

Section 26 – Financial Record Taxes. He listed he owed approximately \$20,000 in child support, but failed to disclose his other delinquent obligations in response to Section 26 – Financial Record. AG ¶ 16(a), ¶ 16(d) and ¶ 16(e) are implicated to a greater or less extent. They provide:

(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;

(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 person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standings.

Applicant's failure to disclose his failure to timely file tax returns and pay his delinquent financial obligations demonstrates a lack of candor required of persons entrusted with a security clearance. The government has an interest in examining all relevant and material adverse information about an Applicant before making a security clearance determination. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent violations or other concerns in the future, something the government relies on to perform damage assessments and limit the compromise of sensitive information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate government interests.

Additional personal conduct concerns involved two DUI convictions that occurred more than eight years ago and a ten-year-old court-martial conviction. These events are not recent and are sufficiently remote as to have little impact on Applicant's current personal conduct security concerns. Applicant denied failing to list he failed to get a job with the FBI in 2008 due to illegal drug use. He denied using illegal drugs on his February 2017 response to interrogatories. The FBI document is so cryptic as to fail to prove he used illegal drugs. Even if true, the use of illegal drugs and failing to obtain a job ten years ago offers little insight as to his current personal conduct security concerns. I find for Applicant as to SOR 2.c, 2.d, 2.e, and 2.f. However, the personal conduct security

concerns raised by his failure to list his unfiled Federal and state tax returns and failing to list his delinquent obligations on his e-QIP are not mitigated and remain a 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 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have considered Applicant's honorable active duty service in the U.S. Navy. His DUI convictions, his court-martial conviction, and failure to get a job with the FBI due to alleged illegal drug use are sufficiently remote in time as to be of little security concern. However, his failure to reveal his unfiled and unpaid Federal and state tax returns and his delinquent financial obligations on his November 2015 e-QIP remain a concern.

Applicant has been aware of the Government's security concern about his delinquent debts since his August 2016 personal subject interview, the June 2017 SOR, and the August 2017 FORM put him on notice of the Government's concern about his delinquent accounts. There is no evidence he has contacted his creditors. He provided no documentation regarding his past efforts to address his delinquent debts and has failed to show documentation he has established repayment agreements to address the delinquent debts.

In requesting a decision without a hearing, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt and tax issues. By failing to provide such information, and in relying on only the very limited response in his SOR Answer, financial considerations security concerns remain. Failing to explain his false e-QIP answers remains a personal conduct security concern. He did not provide information to explain or mitigate his

falsifications on his November 2015 e-QIP and they remain a security concern under personal conduct.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). At the same time, security clearance decisions are not intended as punishment for past wrongdoing, but rather involve an assessment of future risk that one may not properly handle or safeguard classified information.

The issue is not simply whether all the delinquent obligations have been paid—it is whether an applicant's financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(e)) Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial considerations and personal conduct.

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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a - n: Against Applicant

Paragraph 2, Personal Conduct: AGAINST APPLICANT

Subparagraphs 2.a - b: Against Applicant

Subparagraphs 2.c- f: For 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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge