



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-00561
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: *Pro se*

08/06/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his financial situation and deliberate falsification of his security clearance application (SCA). Clearance is denied.

Statement of the Case

On July 4, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations and personal conduct guidelines. Applicant answered the SOR and requested a hearing.

On April 26, 2018, a date mutually agreed to by the parties, the hearing was held. Applicant testified and called his former neighbor as a character witness. Government Exhibits (Gx.) 1 – 7 and Applicant's Exhibits (Ax.) 1 – 10, 12 – 24, and 26 – 41 were admitted into the administrative record.¹ The transcript of the hearing was received on May 7, 2018, and the record closed on May 11, 2018.²

¹ Applicant's objection to Gx. 4 was overruled, but was considered in assessing the weight to give the exhibit. Applicant identified before the hearing certain documents that he would be offering as Ax. 11 and 25, but neither exhibit was offered. See Transcript (Tr.) 14-23; Appellate Exhibit IV.

² Department Counsel's and Applicant's written closing statements were marked and attached to the record as Appellate Exhibits V and VI, respectively. The other appellate exhibits are identified in the transcript and are also attached to the record.

Procedural Issue

At hearing, Department Counsel moved to amend the SOR by withdrawing allegation 2.c. The Government also moved to correct a typographical error with allegation 1.j, specifically, to reflect that the tax year in question that Applicant failed to timely file was 2014, not 2012. Without objection, the amendments were granted.³

Findings of Fact

Applicant, 53, served in the U.S. military, on active duty and in the reserve forces, from approximately 1986 to 1999. He was first granted a security clearance while in the military, and worked for a number of years in the personnel security field. He has been gainfully employed as a federal contractor since January 2013, earning a six-figure salary through this employment. His current annual salary is approximately \$135,000.

Applicant is divorced and has two children. He states that he sends his ex-wife \$2,700 a month in alimony and provides an additional \$600 to his children in financial support. His SOR reflects seven delinquent debts totaling over \$300,000. He claims to have worked out payment plans to resolve some of the SOR debts, but provided no documentation to corroborate his testimony. He submitted an April 2018 financial analysis from a debt counseling firm that reflects Applicant's monthly expenses and debt payments exceed his monthly income by over \$1,350. He plans to file a Chapter 7 bankruptcy petition to resolve his debts.⁴

Applicant states that his financial problems date back to about 2008, when he accepted his former employer's offer of a voluntary separation in return for a one-time bonus of \$20,000. He accepted the offer in large part to join his wife and their children who had moved out of state. His wife was in the military at the time and had received military orders for a change of duty station. Applicant was then involved in a motorcycle accident that left him unable to work for several months. Applicant testified how he was racing or chasing his wife, who was in her car with their children, when the high-speed accident occurred. At about the same time, Applicant fell behind on the mortgage on his out-of-state home. He was unable to sell the home or rent it due to the recession and maintenance issues. The home was foreclosed.⁵

In 2010 and 2011, Applicant filed Chapter 13 bankruptcy petitions to resolve his debts.⁶ The 2010 bankruptcy case was dismissed by the court after the bankruptcy trustee objected to Applicant's proposed repayment plan.⁷ Applicant's 2011 bankruptcy petition reflects assets totaling less than \$40,000 against liabilities adding up to over \$350,000. It also reflects that Applicant earned over \$300,000 from 2008 to 2010, his

³ Tr. 11 – 13.

⁴ Tr. 45-60; Gx. 1; Gx. 2; Ax. 16 – 18; Ax. 22; Ax. 23; Ax. 40.

⁵ Tr. 33-35, 41-45, 62; Gx. 1 at 50-51; Gx. 2; Ax. 19.

⁶ Tr. 36-38; Gx. 6; Gx. 7.

⁷ Gx. 6.

personal property included two luxury vehicles, he owed \$5,300 in past-due federal taxes for 2008 and 2009, and owed back taxes to two different states. He reported a checking account balance of just \$120.⁸ The 2011 bankruptcy case was dismissed by the court, because the bankruptcy judge found that Applicant was misstating his ability to repay his creditors.⁹ Applicant blames his current financial situation, in part, on the bankruptcy judge not allowing him to fully explain his financial situation before dismissing his case.¹⁰

The April 2018 independent financial analysis that Applicant submitted at hearing was completed by a debt counseling service that Applicant engaged as part of his new bankruptcy case.¹¹ As noted, the financial analysis indicates that Applicant's monthly net remainder is a negative (-) \$1,350. This analysis is based on Applicant reporting a monthly income of \$1,918.¹² Applicant also submitted at his hearing a personal financial statement, wherein he reported a net monthly income of over \$6,500.¹³

In 2013, Applicant was hired to work overseas as a U.S. Government contractor. He did not file his 2013 and 2014 tax returns when they were due because he claims he was told he was exempt. He subsequently filed both returns and owes no past-due balance.¹⁴ Applicant's tax returns for these two years reflect a six-figure income. Applicant went on vacation to Europe and Thailand during these two years. He explained at hearing the he went to Thailand for medical care. His pay was garnished to pay some past debts, but Applicant took no voluntary action to address any of the SOR debts.¹⁵

In June 2015, Applicant submitted a security clearance application (SCA). In response to questions about his employment history, Applicant stated he left his position as a federal employee with DoD in 2011, because "poly delayed, did not obtain within year requirement." He further stated that he had not been fired or left under unfavorable circumstances. He signed the SCA, certifying that his responses were true, complete, and accurate to the best of his knowledge and belief.¹⁶

⁸ Gx. 7.

⁹ Tr. 36-38 ("I think you're trying to tell me that the Chapter 13 was dismissed because the judge found that you had more income to pay off these debts than you were indicating? Her statement at the time was . . . well, if you can afford a BMW, certainly, you don't need to be in this courtroom. And is that the reason -- is that basically the reason the Chapter 13 was dismissed, in your mind? Correct. . . . I just want to make sure. Your Chapter 13 was dismissed because the judge determined that you had the financial means to pay more back to your creditors? With the car, correct. Yes, sir.")

¹⁰ Tr. 37 ("And so I wanted to explain to the judge. . . . because I wanted her to understand that, hey, it wasn't an overspending thing.")

¹¹ Ax. 21; Ax. 40; Ax. 41.

¹² Ax. 40.

¹³ Ax. 1.

¹⁴ Answer; Gx. 2.

¹⁵ Tr. 65-68; Gx. 1 at 35-43; Gx. 2.

¹⁶ Gx. 1 at 16-17.

At hearing, Applicant acknowledged he received the November 2011 notice of termination, which informed that he was terminated from federal employment for failing to complete a counterintelligence polygraph examination. The notice goes on to state that Applicant was scheduled on three separate occasions to take the exam and either failed to show or did not pass the exam.¹⁷ Of note, Applicant claimed that he was unable to attend a scheduled polygraph examination on October 4, 2011, because he had to attend a hearing for his Chapter 13 bankruptcy case.¹⁸ A review of public court records regarding the 2011 Chapter 13 bankruptcy case notes that the issue under consideration was disposed of *without a hearing*.¹⁹

Applicant filed a civil lawsuit in November 2011 against the DoD, claiming he was unlawfully fired. The suit was dismissed by a federal court in April 2012.²⁰ Applicant failed to report this lawsuit on his 2015 SCA, in response to relevant questions asking if in the past 10 years he had been a party to any civil court action.²¹ Applicant claimed at hearing that his failure to report this information was a “just an oversight” caused by him rushing to complete the application.²²

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

¹⁷ Tr. 39-41; Gx. 2.

¹⁸ Gx. 5, Defendant's Compliant, at page 4 of 8, and *Defendant's Memorandum in Support of Motion to Dismiss*, at page 3 of 12.

¹⁹ Gx. 7 at page 4 of 10.

²⁰ Gx. 5.

²¹ Gx. 1 at 55.

²² Tr. 64-65.

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

DOHA administrative judges “are creatures of the Directive,”²³ who derive their authority from the Directive. The Directive also sets forth an administrative judge’s responsibilities and obligations, including the requirement that a judge remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1. See *also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).²⁴

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.²⁵

²³ ISCR Case No. 17-01213, n. 2 (App. Bd. June 29, 2018).

²⁴ However, a judge’s mere disbelief of an applicant’s testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct or issue. ISCR Case No. 17-02952 (App. Bd. Aug. 3, 2018); ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct or issue raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

²⁵ See *generally* ISCR Case No. 11-13626 (App. Bd. November 7, 2013) (discussing predictive nature of security clearance adjudications). See *also* *Palmieri v. United States*, 2018 U.S. App. LEXIS 20477, * 8 (D.C. Cir. July 24, 2018) (“*Egan* holds that ‘the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.’ . . . The idea is that ‘an outside non-expert body,’ including a court, is institutionally ill

Analysis

Guideline F, Financial Considerations

The financial considerations security concern is generally explained at 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.

The security concern here is not limited to a consideration of whether persons with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt cast doubt upon a person's judgment, self-control, and other qualities essential to protecting classified information. See *generally* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

In assessing Applicant's case, I considered the applicable disqualifying and mitigating conditions, including:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(d): deceptive or illegal financial practices such as . . . filing deceptive loan statements and other intentional financial breaches of trust;

AG ¶ 19(e): consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns . . . as required;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

suited to second-guess the agency's '[p]redictive judgment' about the security risk posed by a specific person.") (citing to and quoting from *Egan*, 484 U.S. 527, 529).

AG ¶ 20(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.

The record evidence clearly establishes each of the disqualifying conditions noted above. Applicant has earned a six-figure salary through his employment as a federal contractor since at least 2013. In those five years, Applicant has taken no responsible, voluntary action to resolve the SOR debts. Instead, he took vacations to Europe and Thailand. A federal court dismissed his 2011 bankruptcy case because the judge found that Applicant was less than candid with the court about his financial ability to repay his creditors. Although his wife's military moves and the recession were matters beyond his control that likely impacted his finances and he filed his overdue federal tax returns before the SOR was issued, this favorable evidence is insufficient to mitigate the serious security concerns raised by Applicant's long history of financial irresponsibility.

Further lessening the mitigating value of the favorable evidence in this case is Applicant's continued failure to take responsibility for his financial situation and his submission of misleading documents. Namely, Applicant submitted a financial analysis from a debt counseling service that depicts a poor financial situation, which it appears Applicant intends to submit to a federal bankruptcy court in order to obtain a discharge of his debts through Chapter 7. Applicant also submitted a personal financial statement that portrays a far rosier financial picture in order to advance his position to retain the security clearance he needs to keep his job as a federal contractor. In short, the record evidence leads me to seriously question Applicant's judgment, reliability, and trustworthiness.

Guideline E, Personal Conduct

The security clearance process relies on the honesty and candor of all applicants. Dishonesty during the security clearance process raises a serious security concern, which is explained at 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.²⁶

In assessing Applicant's case, I considered the applicable disqualifying and mitigating conditions, including the following:

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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

²⁶ See *also* SEAD-4, Appendix A, ¶ 2(i) ("the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigating and adjudicating their national security eligibility. Any incident of intentional material falsification . . . raises questions about an individual's judgment, reliability, and trustworthiness.")

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the . . . falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant deliberately failed to report on the SCA his termination from federal employment in 2011 and the lawsuit he then filed regarding the termination. He provided misleading information about the reason he left federal employment. He acknowledged at hearing that he received the termination notice. His explanations for failing to list the termination and the lawsuit lacked credibility. Applicant has shown, through his words and his actions, that he is untrustworthy and not a suitable candidate for a security clearance or a position of trust. AG ¶ 16(a) applies. None of the mitigating conditions apply.

Whole-Person Concept

In addition to the specific adjudicative guidelines, a judge must also take into account factors that are applicable to all cases. These factors are grouped together under the all-encompassing umbrella of the whole-person concept.²⁷ I hereby incorporate my above analysis and highlight some additional whole-person matters.

Specifically, I considered Applicant's honorable military service and his years of holding a security clearance without an incident or violation, as well as the favorable opinion of his witness. However, this and the other favorable record evidence are insufficient to mitigate the serious security concerns at issue. Overall, the record evidence leaves me with *serious* doubts about Applicant's eligibility for continued access to classified information.²⁸

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 (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a – 1.k:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraph 2.c:	Withdrawn

²⁷ See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

²⁸ I also considered the exceptions listed in SEAD 4, Appendix C, but none are warranted in this case.

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge