



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



In the matter of:)
)
) ISCR Case No. 17-01540
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: Tokay T. Hackett, Esq.

11/13/2018

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), F (Financial Considerations), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on November 5, 2014. On June 24, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, F, and E. The DOD CAF acted under Executive Order (Exec. Or.) 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 (AG) implemented by the DOD on September 1, 2006.¹

¹ Security Executive Agent Directive 4 (SEAD 4), was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017.

Applicant answered the SOR on August 25, 2017, and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2018. On June 29, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 20, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. At Applicant's request, I kept the record open until September 27, 2018, for additional submissions. Applicant submitted (AX) E in a timely manner. The exhibit was entered into the record without objection. DOHA received the transcript (Tr.) on September 28, 2018.

Findings of Fact²

Applicant is a 44-year-old materials handler employed by a defense contractor since March 2014. He has worked for defense contractors for about 18 years. Applicant graduated from high school in 1992. He is single with two adult children. Applicant is currently working two jobs. He has held a security clearance for 18 years. Applicant completed his most recent security clearance application in November 2014.

Criminal Conduct

The SOR alleges eight incidents of criminal conduct (SOR ¶¶ 1.a-h) under Guideline J and cross-alleges the same conduct under Guideline E, but adds two new allegations for driving without a required license in 2014 and driving without a required license in 2012. He denied four of the allegations and provided explanations. He admitted SOR ¶¶ 1.b, 1.c, 1.d, and 1. g.

Applicant has a history of criminal activity beginning in 1993 to 2014. The early criminal arrests and charges included possession with intent to distribute cocaine,; armed unregistered firearm; charge and arrest of possession with intent to distribute cocaine while armed; and simple possession of cocaine. The last charge in 1993 resulted in one-year probation. (GX 2; GX 3) In 1996 and 2007, Applicant was arrested and charged with violation of the Uniform Control Substance Act and possession with intent to distribute cannabis, and charged with possession with intent to distribute amphetamines. (SOR ¶ 1.e-1.h) These arrests and charges in 1993, 1996, and 2007, resulted in one conviction. (GX 2)

In 2009 and 2010, Applicant was arrested and charged with reckless driving, driving under the influence -1st offense, and fleeing law enforcement. For the first DUI, Applicant pleaded guilty to the DUI and was sentenced to one-year of probation and completion of a drug treatment program and assessment. For the 2010 arrest and charge of DUI -2nd offense and operating a vehicle while impaired, Applicant pleaded guilty and was

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

sentenced to confinement, one-year of probation and completion of various traffic and alcohol programs. (GX 2) (SOR ¶¶ 1.c-d)

In 2011, Applicant was arrested and charged with operating after suspension and contempt. He pleaded guilty to operating after suspension and was sentenced to a 30-day confinement and one-year of probation. (SOR ¶ 1.b) Applicant admitted that he did drive on a suspended license. He stated that he needed to get home from an Alcoholics Anonymous (AA) meeting. (Tr. 42)

In 2013, Applicant was arrested and charged with disorderly conduct; trespass-posted property; and trespass-private property. (SOR ¶ 1.a) This incident occurred when Applicant was arguing with a neighbor. It was evening and he was checking on his mom at her house. He is on the lease with his mother. He was not prosecuted, but he was ordered to do 24 hours of community service, which he completed. (Tr. 41; GX 2) The misdemeanor was put on a stet docket. (GX 2; GX 4)

Applicant's explanations for the early (1993) criminal involvement revolve around his geographic location when he was young. He stated he was in the wrong place at the wrong time. Applicant stated that he was 19 and allowed his friends to influence him. He denied the fact that he possessed cocaine or a firearm. He claimed that he was riding in a car with friends and the drug was found in the car. He was arrested, but the charges were dropped. He stated that since 2007, he no longer associates with those persons. He emphasized that he is now a grandfather and not the person he was in 1993 or 1996. Again, in 1996, he was 22 years old and he was in a group that participated in drug activities. He explained that he was arrested with a group. Again, he noted the charges were dropped. (Tr. 53)

However, in 2007, he was associating with people who were "engaged in bad activities." He denied that he sold or possessed amphetamines. He was again riding with friends and was arrested with them. He stated that the charges were dropped against him. He believes he was punished for the activity of others. He terminated those friendships in 2007.

As to the incidents involving alcohol in 2009 and 2010, he states that his actions were reprehensible but he was going through a separation and he was very stressed. He drank instead of facing the situation. He admits the second alcohol incident was one year later and he regrets driving after drinking. He again used alcohol to cope with the stress in his life. (Tr.45) He completed probation and various alcohol programs. (AX A, Enclosure) After the alcohol convictions, his driver's license was suspended, but he drove his car in 2011. He admits it was wrong and he believes he has matured. He stated that he was driving home from an AA meeting. He states that it would not occur again. He believes his drinking is under control. (Tr.42) He does not attend AA any more. (Tr. 46) He believes the last time was in 2015.

Financial

The SOR alleges in ¶¶ 2.a-2.m, 11 collection accounts totaling about \$5,988, and delinquent taxes to the Federal Government in the amount of \$4,382 for tax year 2012 and delinquent taxes to the Federal Government in the amount of \$8,159 for tax year 2011.

Applicant has been in a payment plan with the IRS since February 2017. He initiated the plan and pays \$175 monthly. In 2015, he worked with a company to negotiate a plan. He paid the company \$1,650 for advice. They advised him to stop paying the IRS. However, they did not negotiate on Applicant's behalf and he called the IRS to start a payment plan. He is compliant and current with the installment plan. The money is debited from his checking account. The delinquent taxes for the two years have been combined for 2011 and 2012 under the Federal payment plan. (AX A) Originally he was is paying the IRS for about 17 months for the delinquent taxes for tax year 2011 and 2012. He was audited in 2015 and that is how he learned about the delinquent taxes. He always used a tax preparer for completion of his taxes. (AX D; Tr. 61-64) Thus, SOR ¶¶ 2.a and 2.b are found in Applicant's favor.

Applicant denied all the financial SOR allegations, except for SOR ¶ 2.g. The reasons that he gave for the denials of the various collection accounts were that he was not aware of the accounts. (Tr. 65) He also stated that he believes he has no delinquent bills and that the accounts are no longer on his credit report. Applicant does not recall disputing any of the accounts. Applicant stated that the medical bills should have been taken care of by his insurance. He also noted that one account belonged to his father. Applicant had no receipts for any bills that he believed he paid. (SOR ¶¶ 2.d and 2.e) The debt in 2.f is duplicative of 2.e. Applicant had no documentation that he paid any of the debts, except for 2.d. (AX A, Enclosure 5) Applicant could not find any other receipts for debts he believed he had paid. One other receipt is for the debt in SOR ¶ 2.k.

As to SOR ¶ 2.g, Applicant admits the debts, but stated he got behind in his payments and the bill was not paid. He believes he has better money management skills now. He also stated that he had not looked at his credit report and was not aware of the various accounts.

Applicant has received financial counseling and he has created a budget. (AX A) He earns about \$60,000 combined from his two jobs. He pays his bills in a timely manner. Applicant has no current creditors. He has a 401(k) and other savings. (Tr. 85; AX) Applicant has filed his 2017 tax return. (AX E)

Personal Conduct

The personal conduct allegations in the SOR ¶¶ (3.a-3.d) cross allege the information under criminal conduct and financial considerations. It also adds two allegations as mentioned under criminal conduct of a 2014 charge of driving/attempting to drive a motor vehicle on a highway without a required license and authorization (SOR

3.c) and a 2012 charge of driving a motor vehicle on a highway or public use property on a revoked license and privilege.(SOR 3.d) The driving incidents without a proper license were both nolle prosequi. (GX 5)

Applicant admitted both allegations of driving on a revoked license, based on his DUI's, but he explained that he was responding to an emergency in one situation and in the other, he was returning from work. He did not have anyone to transport him to work. He regrets the actions, but his license was reinstated in July 2014. Applicant stated that this will never happen again.

Character References

Applicant presented a witness who has known him since 2014. The witness worked with Applicant and was his team lead for a few years. The witness characterized Applicant's duty performance as excellent. He noted that he was reliable and always handled the job. The witness knew about the issues in the SOR and discussed them with Applicant several years ago. He believes that Applicant is trustworthy and recommends him for a security clearance. (Tr.) The witness stated that Applicant has learned lessons from his past mistakes.

Applicant has earned many awards and certificates during his long career as a contractor. (AX A, Enclosure 15) He has been awarded "Great Performer" from his employer on several occasions. He earned training certificates with high scores in areas such as web-based training in environmental management, individual risk management, storm water information, and several others. (AX A, Enclosure 16)

Applicant submitted four letters of recommendation from colleagues and friends. Each letter attests to Applicant's professionalism and trustworthiness. (AX A, Enclosure 16) A former project manager wrote that Applicant worked for him for one year and he was adept at following the company's rules and regulations. The writer also stated that Applicant has been exposed to classified information and has been very protective of the information.

Applicant volunteers with the Mayor's Office on Returning Citizens Affairs (MORCA). He helps with community events to help high risk teens. He also assists in administrative and special projects to provide assistance to recently incarcerated men and women. (AX E) Applicant is active in church activities.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants

eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.” Applicant's admissions, testimony at the hearing, and the documentary evidence submitted by the parties establish the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) is not established as Applicant has a history of involvement with the law since 1993. The early events from 1993 to 1996 involved possession of cocaine and intent to distribute while armed. Despite the fact that only one conviction resulted from those charges, and they occurred a long time ago, they are not mitigated due to subsequent criminal involvement. The criminal conduct spans a period of about 20 years. In 2007, there is another charge with possession and intent to distribute amphetamines. Applicant has two DUI's in 2009 and 2010. In 2011, 2012, and 2014 there are other criminal incidents. Applicant has held a security clearance since 2000. These criminal conduct situations cast doubt on Applicant's good judgement.

AG ¶ 32(d) is partially established for the conduct alleged in the SOR concerning alcohol incidents because Applicant has completed his treatment and has not had any DUI's since 2010. However, he drove on a suspended license several times and admitted that there were other times that he did as well. Applicant has had some charges dismissed or nolle prosequied, but his involvement with the law spans a long time. Applicant has good recommendations, completed probation, is involved with the community, but he has held a security clearance since 2000 and his latest criminal citation was in 2014. His rehabilitation did not prevent further involvement with the law. This mitigating condition is not fully established.

Guideline F (Financial Considerations)

The concern under this guideline 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 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

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his credit reports, and failure to pay Federal taxes that became delinquent, establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and 19(f) ("failure to file . . . or pay annual Federal, state, or local . . income tax returns as required."

The security concerns raised in the SOR may be mitigated by any of the following potentially applicable factors:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

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

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.

Applicant reported no prior unemployment. He is working two jobs. He stated that as to the Federal taxes that were delinquent, he was audited and found out about the issue. He explained that he was not aware of many of the items that were on the SOR for financial concerns because he had not looked at a credit report, or because he thought the health insurance company should have paid. Applicant stated that he had paid some accounts and disputed others. He disputed one debt, but as to the ones that he stated he paid or were closed, he provided no documentation. He acknowledged that he started to pay some accounts after the SOR was issued. Applicant also believed one or two accounts may have belonged to his father.

Applicant provided his information concerning his installment payments to the IRS and all his documentation supports his assertion that he has addressed the delinquent Federal taxes and is current. (AX D) Thus, AG ¶ 20(g) applies to SOR ¶¶ 2.a and 2.b.

As to documentation for any delinquent accounts that he has paid, Applicant only provided a few receipts. He had evidence to support that the phone collection account in SOR ¶ 2.d was paid. (AX A Enclosure 5) Applicant produced receipts for SOR 2.e. and 2.k. Applicant referred to the fact that the other accounts are closed and not his responsibility. He states that there are no delinquent accounts on his credit report.

Applicant has received financial counseling and has a budget. AG ¶ 20(c) partially applies. He has presented insufficient information to show that he has the problems under control. However the other mitigating conditions do not apply in this case and Applicant has not mitigated the financial considerations security concern.

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. . . .” Applicant's criminal history establishes the following disqualifying conditions under this guideline:

AG ¶ (c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

AG ¶ 16(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 or sensitive information. This includes, but is not limited to, consideration of . . . (2) any disruptive, violent, or other inappropriate behavior; [and] (3) a pattern of dishonesty or rule violations; and

AG ¶ 16(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

The following mitigating conditions are potentially relevant:

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;

AG ¶ 17(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

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The personal conduct allegations are cross alleged with Guideline J and F. These have been fully discussed above. The additional two allegations in SOR 3.d and 3.e involve the driving on a suspended or revoked license in 2012 and 2014. Applicant's misconduct has continued from 1993 until 2014. Although he has completed his alcohol classes and has not had any other alcohol incidents, he has not shown the ability to follow rules, laws, and regulations. Therefore, none of the mitigating conditions apply. He has not mitigated the personal conduct concerns.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis and applied the factors in AG ¶ 2(d). Applicant was candid, sincere, remorseful, and credible at the hearing. He is working two jobs and has held a security clearance since 2000. He has letters of recommendation. He has been entrusted with classified information. He completed alcohol rehabilitation and has not had a DUI since 2011. He is involved in the Church and community activities.

However, Applicant has a long history of involvement with the law. He has had some early cases dismissed, but taken together with the conduct from 2007 until 2014, and the lack of proactivity with his financial affairs, although he has made strides in that area, and sought counseling, insufficient time and action has passed to mitigate. After weighing the disqualifying and mitigating conditions under Guidelines J, F, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct, financial concerns, and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST APPLICANT

 Subparagraphs 1.a-1.h: Against Applicant

Paragraph 2, Guideline F (Financial Considerations): AGAINST APPLICANT

 Subparagraphs 2.a-2.b: For Applicant

 Subparagraphs 2.c-2.m: Against Applicant

 Subparagraphs 2.d-2.k: For Applicant

 Subparagraph 2.f: Duplicate

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

 Subparagrphs 3.a-3d: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Noreen A. Lynch
Administrative Judge