



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-01568
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: Timothy M. Richardson, Esq.

09/17/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 29, 2015. On June 26, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E, F, and J. 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on July 14, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 14, 2017, and the case was assigned to me on October 23, 2017. On November 16, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 5, 2017. Applicant hired an attorney, who requested a postponement. The hearing was tentatively scheduled for a date in May 2018, but was postponed again to allow Applicant's attorney to recover from surgery.

The hearing was rescheduled for June 14, 2018, and I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 21 were admitted without objection.¹ Applicant testified, presented the testimony of six witnesses, and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. I kept the record open to enable Applicant to submit additional documentary evidence and to enable both parties to submit written closing arguments. He timely submitted AX L through R, which were admitted without objection. Written arguments of the parties are attached to the record as hearing exhibits. DOHA received the transcript (Tr.) on June 27, 2018. The record closed on July 17, 2018.

Findings of Fact²

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.c, 1.e, 1.f, 1.g, 1.i, 1.j, 1.k, and 3.a. He did not admit or deny the debt alleged in SOR ¶ 2.a. He offered explanations for the debts alleged in SOR 2.b-2.g. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 40-year-old self-employed federal contractor. He has never held a security clearance. His company has numerous employees with security clearances, but he needs a security clearance so that his company can be granted a facility clearance.

Applicant's father was an active-duty noncommissioned officer in the U.S. military. He served in Vietnam, and after he returned from Vietnam, he met and married Applicant's mother, a foreign national. He completed warrant officer candidate school and retired as a warrant officer after 23 years of service.

When Applicant was in his last year of high school, his mother was diagnosed with cancer, and he deferred his college plans to help support his family and care for his

¹ On June 12, 2018, two days before the hearing, Applicant filed motions in limine to exclude all or parts of GX 4, 6, 7, 8, and 10. (Hearing Exhibits (HX) I, II, and IV.) Department Counsel requested that the hearing be postponed until she could arrange for the testimony of authenticating witnesses. (HX III) I informed the parties that I would defer ruling on the motion until both sides had presented as much evidence as possible, at which time I would decide whether there were sufficient unresolved issues to justify a second session at a future date. (Tr. 10.) Eventually, Applicant's attorney withdrew all his motions in limine, and all government exhibits were admitted. (Tr. 131-32.) Department Counsel completed her presentation on June 14, 2018, as scheduled, making her motion for a continuance moot.

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

mother, with whom he was very close. His mother passed away in February 2002. After his mother's death, Applicant and his father learned that his mother had been previously married and had left a husband and four children to marry him, without obtaining a divorce. Six months later, his father disappeared, and Applicant has never had any further contact with him. Applicant testified that he "lived the fast life" for a while after his father disappeared. (Tr. 217-27.) He has never married and has no children.

Applicant worked as an account executive from August 1995 to November 2007, and as a personal trainer in a fitness center from November 1997 to June 2009. In June 2009, he was hired as an account executive by a defense contractor providing technical training, testing, and certification services for the military. The president of the company (Company A) was a medically-retired service member. (GX 1 at 15.) Applicant was a good salesman, and he became vice-president for business development. He held 49% of the shares in the company and the president held 51%. (Tr. 41.) He did not teach classes, and he held no technical certifications. (Tr. 95.) In May 2011, he was fired for defrauding the U.S. government, conspiring to falsify certifications for deployable personnel, inappropriate behavior with co-workers, theft, and deceit. (GX 9.) At the hearing, Applicant maintained that he was not fired, but that he resigned. (Tr. 315.) He testified that he and the company president decided that he would receive a letter stating that he was fired so that he could apply for unemployment. (Tr. 320-21.)

Applicant and the president of Company A gave different testimony about the circumstances of Applicant's termination. The president testified that Applicant took tests for two service members, forged signatures on test rosters, borrowed money from him and paid it back by writing a check for company funds, used company funds for entertainment and personal expenses, and mistreated a new employee by trapping her in a closed office and screaming at her after she had discovered his misuse of company funds. (Tr. 42-46.) The president testified that there was no evidence that Applicant received money from the service members for taking the tests. However, the company's customers were more likely to hire a testing company that produced a high pass rate, and expanded business would increase the value of Applicant's shares in the company. (Tr. 41.)

Applicant testified that when he was first hired, he noticed that the company was reporting a 100% pass rate for all the students. He also noticed that the company president was the instructor and also the test administrator. When a student failed an examination, the company president would retest the student repeatedly until the student passed. Applicant testified that he confronted the company president, who informed him that they would not get testing contracts if they did not produce a 100% pass rate. At some point, an active-duty service member who had hired Company A to teach, test, and certify a large number of students mentioned that one of his subordinates had failed his certification test three times. The same service member mentioned that he also needed to pass a certification examination. Applicant suspected that the service member was asking if they could help him and one of his subordinates pass their tests. After discussing his suspicion with the company president, they agreed that they would tell the service member that they would figure out a way to help him.

Applicant testified that someone took the examinations for the two service members, but he did not know who did it. However, he admitted telling the more senior service member that he had taken the exam for him and had failed it. (Tr. 316-17.) Applicant admitted that he realized in the summer of 2010 that something was wrong but that he did not report it. He testified that the company president repeatedly invoked the slogan, "If you ain't cheating you ain't trying." (Tr. 230-38, 318.)

In late October 2011, the president of Company A contacted military officials for whom testing had been done, and provided them with the email traffic between Applicant and the service member for whom Applicant had taken a test. The company president informed military contracting officials that Applicant had been terminated for unethical behavior but did not specifically mention testing fraud. In late November 2011, the company president contacted the military acquisition integrity office and provided them with evidence that Applicant had fraudulently taken certification tests for two service members. (Tr. 70-74; GX 9 at 42.)

The packet of evidence submitted to the acquisition integrity office included a statement from an account representative, stating that almost all his mentoring and exposure to the business of certification training came from Applicant, who demonstrated how to take a certification test by using answers recorded on his laptop, and, about three or four weeks later, gave him a test with questions and answers and asked him to complete test. The declarant asserted that Applicant provided misleading statements about the size and performance record of the company, and that the majority of the declarant's training was based on lies and embellished information from Applicant. (GX 9 at 5.) However, at the hearing, Applicant submitted an affidavit from the same declarant in which the declarant denied making accusations against Applicant, stated that he had no recollection of writing or signing the statement in GX 9, that he had no memory of Applicant lying to a client, and that he believed that the company was posturing itself to make Applicant the "fall guy" for its problems. (AX J.)

Applicant admitted at the hearing that he was not completely forthcoming during the investigation of the company's testing practices. His intention was to tell the investigators that he did not personally take tests for students, but he intentionally did not divulge any of the company's other questionable practices. He believed at the time that the investigators could "find that out for themselves." (Tr. 245-46, 324.)

In July 2012, Applicant was debarred from contracting with the U.S. government for one year, based on findings that he participated in examination fraud by taking examinations for two service members and using payment vouchers for individuals other than the individuals for whom they were intended. (GX 3; GX 4.) There was no evidence that Applicant received money from the service members for whom he took the examinations. (Tr. 62-63.) No other members of the company were debarred. (Tr. 47.)

After Applicant was fired, he and the president of Company A sued each other in a dispute about the amount Applicant would be paid for his shares in the company.

Applicant and Company A had a buy-out agreement, in which Applicant would be paid \$20,000 for his shares. The president of Company A sought to offset a personal loan that Applicant had not repaid and filed a warrant in debt for \$10,000. The lawsuit was settled when the president of Company A agreed to pay him \$11,000 for his shares. (Tr. 90.)

Applicant was employed by another defense contractor (Company B) as an account manager in July 2011. The president of Company A notified the president of Company B that Applicant was soliciting government business even though he was debarred. (Tr. 64-65, 91.) Applicant was fired by Company B in November 2013. An "executive assistan[t]" from Company B submitted a document stating that Applicant was fired because of "extensive court appearances for an assault and missed work due to incarceration, extensive collection calls and certified collection notices from creditors received at work, and poor performance in meeting sales goals." The document also stated that Applicant would not be considered for rehire. (GX 6.) In his SCA, Applicant stated that he left this job to accept another higher-paying job and for professional growth. (GX 1 at 14.)

At the hearing, Applicant testified he started looking for another job because he saw that funding for classes was running out and Company B was booking fewer classes. He also testified that he wanted to leave the training industry because it is a "slippery slope," and when he was recruited by another subcontractor he accepted the offer. (Tr. 250-51.) He testified that he met with his supervisor to tell her that he thought he should move on, and at the same time she told him that it would be best if the company released him. Applicant did not consider himself fired, and he believed that he left by mutual agreement. (Tr. 253.) He testified that he believed that Company B told security investigators that he had been fired because the company thought he quit his job to work for a competitor. (Tr. 328.)

Applicant was hired by another subcontractor (Company C) in November 2013. He and Company C had disagreements about his compensation, and in November 2015, he quit. (Tr. 256-58; GX 1 at 13.)

Applicant started his current company in November 2015. He is the sole owner, president, and chief executive officer (CEO) of the company. Shortly after starting his own company, he signed a consulting agreement with Company D and attended a conference funded by the Company D. However, he signed the attendance roster listing his own company but not Company D. (GX 7.) His misrepresentation is alleged in SOR ¶ 1.b. Company D refused to pay him the consulting fee. He hired an attorney, who sued Company D and negotiated a settlement for the fee. (Answer to SOR; Tr. 106.) The attorney who successfully recovered his consulting fee also testified as a character witness, and his testimony regarding Applicant's character is summarized below.

Applicant's company consists of about 150 employees working in five countries. His company works as a subcontractor and provides staff augmentation to primary defense contractors in various types of telecommunications. (Tr. 201-14.) He testified

that he formed his company after working for four federal contractors and seeing how they do business and how they treated their employees. He decided that he would put his employees first, on the theory that treating employees fairly and with respect would make them provide better service for the customer. (Tr. 216-17.)

At the hearing, Applicant submitted a detailed brochure, describing his company's mission, capabilities, and personnel. (AX B.) A business journal has recognized him individually for his accomplishments, and has recognized his company for entrepreneurial excellence. (AX D.) A state governor has recognized his company's efforts to recruit, hire, train, and retain veterans and serving members of the National Guard and Reserve. (AX E.) A professional communications and electronics association has recognized Applicant for his outstanding performance and lasting contributions to the association. (AX I.)

Applicant is actively involved in the community. Motivated by the loss of his mother, he has been involved with a charitable organization dedicated to research and treatment of cancer. He also is involved in local and national chapters of an organization dedicated to diagnosis and treatment of autism. (Tr. 264-65.)

The SOR alleges six arrests for criminal conduct under Guideline E and cross-alleges them under Guideline J. The evidence concerning these allegations is summarized below in chronological order.

SOR ¶ 1.k. On June 4, 2007, Applicant was arrested for failure to appear in court to answer a misdemeanor charge. He had been cited for not having his driver's license in his possession. He missed his court date because he was traveling on business. After being arrested for failure to appear, he was released on his own recognizance, and on June 16, 2007, he was convicted and fined \$100. (GX 20; GX 21.)

SOR ¶ 1.j. On July 16, 2008, Applicant was charged with failure to appear in court to answer a misdemeanor charge because he did not return to court after the July 2007 conviction and show the judge that he had a valid driver's license. (Tr. 309.) He was found not guilty. (GX 11; GX 19.)

SOR ¶ 1.i. On December 16, 2009, Applicant was charged with driving under the influence (DUI), first offense, a misdemeanor. His arrest is alleged in SOR ¶ 1.i. On March 5, 2010, he pleaded guilty, was convicted, placed on unsupervised probation, fined \$350, and sentenced to 12 months and 5 days in jail, with 12 months and 3 days suspended. He was placed on probation for three years and required to complete an alcohol safety action program (ASAP). His driver's license was restricted for one year. (GX 10 at 2; GX 14.)

SOR ¶¶ 1.f, 1.d, and 1.e. On June 18, 2013, Applicant was arrested for felony malicious assault in which the victim was severely injured. The charges arose when Applicant intervened during a drunken altercation at a house party. One of the combatants punched Applicant, who returned the punch in self-defense. The combatant

whom Applicant punched claimed that he was seriously injured. (Tr. 307.) Applicant testified that he spent 15 days in jail, awaiting trial. While in jail, his cellmate convinced him that he needed to change his lifestyle. In December 2014, Applicant was found not guilty. (GX 10 at 3; AX F.) He dropped all his old friends, began a vigorous physical-fitness program, stopped drinking, and began being involved in community activities. (Tr. 263-65.) As of the date of the hearing, Applicant had resumed his consumption of alcohol, but he does not drive after drinking. (Tr. 314.) Based on the same incident, he also was charged with assault and battery and malicious wounding, a felony, both of which were resolved by *nolle prosequi*. (GX 12; GX 13; Tr. 262.)

A credit report from January 2016 (GX 2) reflected a federal tax lien and six delinquent consumer debts, which are alleged in SOR ¶¶ 2.b-2.g. When Applicant submitted his SCA in December 2015, he answered “No” to the questions asking whether, in the past seven years, he had failed to file or pay Federal, state, or other taxes when required by law or ordinance; had a judgment entered against him; had any lien placed against his property for failing to pay taxes or other debts; had any possessions or property voluntarily or involuntarily repossessed or foreclosed; had bills or debts turned over to a collection agency; had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; or been more than 120 days delinquent on any debt. He also answered “No” to a question whether he was currently over 120 days delinquent on any debt. He did not disclose any of the debts alleged in SOR ¶ 2.b-2.g, a failure to file his federal income tax return for tax year 2007, or a judgment entered against him in November 2012 (which was not alleged in the SOR but which is discussed below).

Applicant testified that he did not disclose any of the debts alleged in the SOR because he was unaware of them. He testified that he moved several times and did not receive any bills or late notices. (Tr. 287.) His SCA reflects that he has lived in the same city since April 2005, but at six different addresses. He has lived at his current address since October 2014. (GX 1 at 7-10.) He testified that he did not notify the postal service each time he moved. (Tr. 288.)

The evidence concerning the debts alleged in the SOR is summarized below.

SOR ¶ 2.a: federal tax lien for \$5,489, filed in April 2007. Applicant testified that he was unaware of a federal tax debt when he submitted his SCA. (Tr. 27-28.) The notice of tax liens was filed in April 2007 and sent to the address where Applicant lived from April 2005 to August 2008. (GX 1 at 10.) After being interviewed by a security investigator in 2016, he contacted the IRS and learned that his federal tax refunds for three or four years had been diverted to pay the tax debt. (Tr. 280-81.) After receiving the SOR, he hired a tax attorney to resolve this lien. It expired in June 2016, and it is not reflected on a credit report from June 2018.³ (Tr. 267; AX B; AX R at 1.) Tax transcripts for tax years 2004 and 2005 reflect a zero balance. (AX R at 2-3.)

³ A levy must be made or a court proceeding begun to collect a federal tax lien within 10 years after a tax assessment is made. 26 U.S.C. § 6502; *United States v. Galletti*, 541 U.S. 114, 119 (2004).

SOR ¶ 2.b: installment contract charged off for \$3,028 in March 2015. Applicant testified that he was unaware of this debt when he submitted his SCA. (Tr. 268.) He testified that the debt arose when he and a roommate bought furniture with the understanding that the roommate would make the payments on the furniture in return for two months of free rent. The roommate failed to make the payments. (Tr. 282-83.) Court records reflect that a warrant in debt was filed by this creditor in January 2017, after he submitted his SCA, and a default judgment was entered against him for \$2,927 plus interest in February 2017. The judgment was satisfied in July 2017, after Applicant received the SOR. (GX 15; AX L.)

SOR ¶ 2.c: credit-card account charged off for \$452 in November 2013. Applicant testified that he was unaware of this debt when he submitted his SCA. (Tr. 269.) The debt was settled for \$330 in July 2017. (AX M.)

SOR ¶ 2.d: telecommunications account referred for collection of \$901 in October 2015. Applicant testified that he paid this debt in 2008. (Tr. 210.) This account was current as of July 2017. (Attachment to SOR answer; AX N.)

SOR ¶ 2.e: cellphone account referred for collection of \$678 in December 2014. Applicant testified that he was unaware of this debt when he submitted his SCA. (Tr. 270.) He incurred a termination fee when he switched carriers, and the new carrier promised to “buy out” his old contract. (Tr. 289.) The account was settled for \$484 in July 2017. (AX O.)

SOR ¶ 2.f: security-company bill referred for collection of \$577 in January 2012. Applicant testified that he was unaware of this debt when he submitted his SCA. (Tr. 271.) The debt was incurred when a roommate moved out but Applicant remained in the residence for six more months. He currently has home-security service with the same provider. (Tr. 290-91.) The debt was paid in June 2018. (AX P.)

SOR ¶ 2.g: telecommunications account referred for collection of \$301 in September 2015. Applicant testified that he was unaware of this debt when he submitted his SCA. (Tr. 272.) This account was settled for \$150 in July 2017. (AX Q.)

SOR ¶ 2.h: failure to file federal income tax return for tax year 2007. Applicant testified that he might have failed to pay his income taxes as an independent contractor in 2005. He testified that he was unaware of his obligation to pay quarterly taxes as an independent contractor. (Tr. 274-75.) His testimony is inconsistent with his employment history in his SCA, which reflects that he was employed by a commercial company as an account executive from August 1995 to November 2007. (GX 1 at 17.)

The president of Company A testified at the hearing and submitted a statement asserting that Applicant obtained car repairs on credit and failed to pay the bill. When the dealership threatened to file a warrant in debt against Applicant, the company paid the debt. (GX 9 at 4, 9.) Court records reflect that a warrant in debt was filed in October 2012 by the automobile dealer, a default judgment was entered against Applicant in

November 2012. The judgment was satisfied in January 2014. (GX 16.) This debt was not alleged in the SOR.

At the hearing, Applicant admitted that the delinquent debts alleged in the SOR occurred because they were incurred during a time in his life when he was not paying attention to his personal financial obligations. (Tr. 343.) He admitted that when he discovered the federal tax debt, he reacted passively by letting the IRS divert his tax refunds instead of requesting a payment plan or offering to pay the entire sum at once. He admitted that he did not contact the IRS until he received the SOR. (Tr. 346.)

Applicant currently draws a salary of \$85,000 per year. His company has a retirement plan, but he has not yet invested in it. He has no savings, and, as of the date of the hearing, he had about \$100 in his checking account. (Tr. 297-98.) He has a net monthly remainder, after paying all bills and expenses, of about \$1,500, which he reinvests in the company, and if he needs money he can withdraw it. (Tr. 301) He testified that, as the sole owner of the company, he is able to use the company credit card for personal expenses if necessary. (Tr. 340.)

The attorney who represented Applicant in recovering his consulting fee from Company D is now the attorney for Applicant's company and also his personal friend. He testified that he has found Applicant to be ethical, candid, truthful, financially stable, honest, and a person of good character. He has observed Applicant's personal growth since his period of criminal conduct and financial problems. (Tr. 107-09.) He believes that Applicant is a person who does not repeat his mistakes. (Tr. 113-14.)

The operations manager for Applicant's company has several years of enlisted and commissioned military service and holds a security clearance. He has known Applicant for about a year, but he was not aware of Applicant's criminal record and previous financial problems. He testified that, based on his daily contact, he believes that Applicant is honest, reliable, and candid. He believes Applicant's character and leadership are "unmatched." He has observed Applicant's high level of care and concern for his employees, resulting in a highly motivated work force. (Tr. 116-26.)

Applicant's director of strategic operations is a retired military officer with 26 years of service and holds a top secret clearance. He has known Applicant for about one year. When he testified, he was not familiar with the allegations in the SOR. He testified that he has found Applicant to be honest, candid, and reliable. He treats his employees with care and dignity. He regards Applicant as one of the best leaders he has worked with in almost 40 years of military and civilian service. (Tr. 134-48.)

Applicant's chief financial officer (CFO) and assistant facility security officer (FSO) has known Applicant for about nine years. He worked as a consultant for about two years and has held his current positions since June 2017. He holds as top secret clearance. He is familiar with Applicant's employment history. He considers Applicant a reliable, honest, candid, and "just a great guy." He treats his employees like family. (Tr. 148-174.) The CFO testified that Applicant's company has monthly income from

government contracts of almost one million dollars and he projects that the income will double within the next twelve months. The company currently has an interim top secret facility clearance. (Tr. 157.)

Applicant's FSO retired from the federal civil service after 36 years of service in jobs involving security clearances and investigations. He began working for Applicant in August 2017. When he testified, he was somewhat familiar with Applicant's employment background and financial issues, but was not aware of his criminal record. He considers Applicant to be honest, candid, reliable, hardworking, dependable, and a strong leader. (Tr. 181-206.)

The president of another company involved in defense contracting submitted a statement describing Applicant as a well-respected subject matter expert in cyber certification and training programs and a leader in hiring, guiding, and mentoring military veterans. He described Applicant as a trustworthy, dedicated professional who understands the requirements for having and maintaining a security clearance. (GX 8.)

A retired military service member who interacted with Applicant while on active duty, was a co-worker for a short time, and then was employed by another defense contractor submitted an affidavit on Applicant's behalf. He states that vendors of certification training were required to maintain an 80% pass rate for their students, and that training vendors' instructions would "teach to the test" by subscribing to one or more services that tracked the pool of examination questions and answers. He is aware of Applicant's debarment, but he never witnessed Applicant doing anything improper. His relationship with Applicant continued after retirement, and he now considers Applicant "a personal friend within a professional context." He believes that Applicant has learned from his debarment, and he supports granting him a security clearance. (AX K.)

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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by deliberately failing to disclose delinquent debts in his SCA (SOR ¶ 1.a); was terminated from employment for cause by three employers in December 2015, November 2013, and May 2011 (SOR ¶¶ 1.b, 1.d, and 1.h); was arrested for felonies in June 2014 and July 2013 (SOR ¶¶ 1.c and 1.e); was arrested for assault and battery in July 2013 (SOR ¶ 1.f); was debarred from contracting with the government in March 2012 (SOR ¶ 1.g); was arrested for DWI

in December 2009 (SOR ¶ 1.i), and was arrested for failure to appear in court on misdemeanor charges in July and May 2008 (SOR ¶¶ 1.j and 1.k).

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 relevant potentially disqualifying condition for Applicant's failure to disclose delinquent debts in his SCA is AG ¶16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" Applicant denied deliberate falsification of his SCA and claimed that he was unaware of the delinquent debts alleged in SOR ¶¶ 2.a-2.f when he submitted it. When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant was notified of the federal tax liens in April 2007, and the notice was sent to the address where he resided from April 2005 to August 2008. His excuse, *i.e.*, that he moved frequently and did not receive his mail, is not persuasive regarding this debt. He did not explain why he failed to notice that his tax refunds had been diverted. It is plausible and credible that he might not have remembered an eight-year-old notice that he received in 2007, while he was living an irresponsible "fast life." On the other hand, the basis for Applicant's termination by Company B in November 2013 included "extensive collection calls and certified collection notices received at work." I am not persuaded that he was unaware of his history of delinquent debts when he submitted his SCA in December 2015. I conclude that AG ¶ 16(a) is established.

Applicant insisted that he resigned from his employment with Company A (alleged in SOR ¶ 1.h) and Company B (alleged in SOR ¶ 1.d). However, the evidence as a whole indicates that he left both job under unfavorable circumstances. The circumstances of the termination of his consulting contract with Company C are ambiguous, and I am not satisfied that SOR ¶ 1.b is established by substantial evidence. The arrests alleged in SOR ¶¶ 1.c, 1.e, and 1.f are duplicative, because they appear to have arisen from one incident, and Applicant was acquitted of the charges alleged in SOR ¶ 1.c. He admitted his guilt of the failures to appear alleged in SOR ¶¶ 1.j and 1.k, even though he was found not guilty of the failure to appear alleged in SOR

¶ 1.j. The evidence supporting SOR ¶¶ 1.d, 1.h, 1.j, and 1.k is sufficient to raise the following potentially disqualifying conditions.

AG ¶ 16(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; and

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

The following mitigating conditions are potentially applicable:

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

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(f): the information was unsubstantiated or from a source of questionable reliability.

AG ¶¶ 17(a) and 17(c) are not established for Applicant's falsification of his SCA. He made no effort to correct his omissions and insisted throughout the security clearance process that he was unaware of the delinquent debts that he failed to disclose. His falsification was recent, did not happen under unique circumstances, and

was not “minor.” Falsification of a security clearance application is a felony under 18 U.S.C. § 1001 and “strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

AG ¶¶ 17(c) and 17(d) are established for the arrests alleged in SOR ¶¶ 1.c, 1.e, 1.f, 1.j, and 1.k. The arrests in SOR ¶¶ 1.j and 1.k were for minor offenses and are mitigated by passage of time. AG ¶ 17(d) applies to the DWI alleged in SOR ¶ 1.i. Applicant acknowledged the problem, completed the alcohol-abuse classes, and has modified his behavior. AG ¶ 17(f) is established for the charges arising from the drunken brawl and alleged in SOR ¶¶ 1.c, 1.e, and 1.f.

AG ¶¶ 17(c) and (d) are not established for Applicant’s terminations for cause alleged in SOR ¶¶ 1.d and 1.h and his debarment alleged in SOR ¶ 1.g. Although almost five years has elapsed since Applicant left Company B under adverse circumstances, and he is highly regarded for his recent accomplishments, his pattern of deceptive conduct has continued up to and including his intentional falsification of his SCA, which was submitted only two years after he left Company B.

Guideline F, Financial Considerations

The SOR alleges a federal tax lien for \$5,489 (SOR ¶ 2.a), six delinquent consumer debts (SOR ¶¶ 2.b-2.g), and failure to file a federal income tax return for tax year 2007 (SOR ¶ 2.h.) The security 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. . . . 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 and his credit report established the following potentially disqualifying conditions under this guideline.

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; 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.

The following mitigating conditions are potentially applicable:

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.

AG ¶ 20(a) is established for the tax debt alleged in SOR ¶ 2.a and telecommunications debt alleged in SOR ¶ 2.d, which are mitigated by the passage of time. It is not established for the debts alleged in SOR ¶¶ 2.b, 2.c, and 2.e-2.g, which were not resolved until recently. An Applicant's ongoing, unpaid debts reflect a continuing course of conduct and, therefore, can be viewed as "recent" for the purposes of the Guideline F mitigating conditions. ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017).

AG ¶ 20(b) is not established. The failure of Applicant's roommate to pay for the furniture in a shared apartment was a condition beyond Applicant's control. Applicant provided no evidence that the other debts in the SOR were caused by conditions beyond his control. He has not acted reasonably, because he took no significant actions to resolve the debts until he realized that they were an impediment to obtaining a security clearance.

AG ¶ 20(c) is established for the federal tax debt alleged in SOR ¶ 2.a. He consulted with a tax attorney and the tax debt appears to be resolved. Applicant submitted no evidence that he received the type of financial counseling contemplated by this mitigating condition for the other delinquent debts alleged in the SOR.

AG ¶ 20(d) is established for the telecommunications debt alleged in SOR ¶ 2.d, but not for the other delinquent debts alleged in the SOR. The federal tax lien alleged in SOR ¶ 2.a was satisfied by diversion of Applicant's tax refunds and not by any voluntary effort on his part. Applicant did not resolve his other delinquent debts until after he received the SOR. Payment of delinquent debts motivated by the pressure to qualify for a security clearance does not constitute "good faith" within the meaning of this mitigating condition. An applicant who waits until his application for a clearance is in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. See ISCR Case No. 16-01211 (App. Bd. May 30, 2018) *citing* ISCR Case No. 15-03208 at 5 (App. Bd. Mar. 7, 2017).

AG ¶ 20(g) is not established. Applicant took no affirmative action to resolve the tax lien. He submitted no evidence that he filed the past-due income tax return alleged in SOR ¶ 2.h.

Guideline J, Criminal Conduct

The SOR cross-alleges the conduct in SOR ¶¶ 1.c, 1.e, 1.f, 1.k, 1.j, and 1.k under this guideline. 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 record of arrests and convictions establish the following potentially disqualifying conditions under this guideline:

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 applicable:

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.

These mitigating conditions are established for the criminal conduct alleged in SOR ¶¶ 1.c, 1.e, 1.f, 1.k, 1.j, and 1.k, for the reasons set out in the above discussion of Guideline E.

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 and applying the adjudicative factors in AG ¶ 2(d).⁴

I have incorporated my comments under Guidelines E, F, and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines E, F, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his criminal conduct, but he has not mitigated the security concerns raised by his personal conduct and financial derelictions.

Conditional Clearance

At the hearing and in Applicant's written closing statement, Applicant's counsel suggested the possibility of granting Applicant a conditional clearance or a waiver in accordance with SEAD 4, Appendix C. I have considered those possibilities and determined that they would be inappropriate in this case.

A conditional clearance requires imposition of additional security measures. Applicant is the sole owner, president and CEO of his company, and his FSO and assistant FSO are dependent on him for employment and not in a position to demand compliance with security measures imposed to monitor his behavior. Furthermore,

⁴ The factors are: (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.

Applicant's lack of candor during the security clearance process, and his implausible and unpersuasive excuse for it, are not the type of conduct that can be effectively monitored.

A waiver may be granted "only when the benefit of initial or continued eligibility clearly outweighs any security concerns." While Applicant is clearly a talented entrepreneur, he has not demonstrated that he and his company can provide a benefit to the United States that outweighs the security concerns that have been established in this case.

Formal Findings

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

Paragraph 1, Guideline E (Personal Conduct): **AGAINST APPLICANT**

 Subparagraph 1.a: **Against Applicant**

 Subparagraphs 1.b-1.c: **For Applicant**

 Subparagraph 1.d: **Against Applicant**

 Subparagraphs 1.e-1.f: **For Applicant**

 Subparagraphs 1.g-1.h: **Against Applicant**

 Subparagraphs 1.i-1.k: **For Applicant**

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

 Subparagraphs 2.a-2.c: **Against Applicant**

 Subparagraph 2.d: **For Applicant**

 Subparagraphs 2.e-2.h: **Against Applicant**

Paragraph 3, Guideline J (Criminal Conduct): **FOR APPLICANT**

 Subparagraph 3.a: **For 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.

LeRoy F. Foreman
Administrative Judge