



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02601

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

01/31/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant has not mitigated the security concerns under Guideline F, financial considerations. Applicant mitigated the security concerns under Guideline H, drug involvement, substance misuse. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 16, 2016. On September 15, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline H, drug involvement, substance misuse. The DOD CAF acted under Executive Order (EO) 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 (AGs) implemented by DOD on June 8, 2017.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017. Accordingly, I have applied the June 8, 2017 AGs in this decision.¹

Applicant timely answered the SOR, denying all of the SOR allegations except for SOR ¶¶ 1.a, 1.e, and 2.a. In SOR ¶ 2.a, he admitted to smoking marijuana infrequently in the past. In his Answer, Applicant stated he had been in contact with state and federal revenue authorities, and his tax issues would be resolved in the next few weeks. Applicant also requested a hearing before an administrative judge. The case was assigned to me on October 30, 2017. On November 27, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 7, 2017. I convened the hearing as scheduled.

Government Exhibits (GE) 1, 3, and 4 were admitted into evidence without objection. At the hearing, Applicant testified and his counsel submitted several documents, which were marked as Applicant's Exhibits (AE) A through GG, and admitted without objection. DOHA received the transcript (Tr.) on August 17, 2017. I granted Applicant's request, through counsel, to leave the record open until January 2, 2018, so that he could provide substantiating documentation concerning his tax liens.² Applicant's counsel timely submitted supplemental documentation, which was marked as AE HH through NN and admitted without objection.

Findings of Fact³

Applicant is 50 years old. He graduated from high school in 1986, and received advanced technical training in the U.S. Army. Applicant has been employed as a technician for a cable communications company since July 2015. He is pending employment by a federal contractor as a satellite technician working overseas in support of the military. He was previously self-employed from 2003 to 2012 as the owner of a PC repair store in state A. He closed the store in 2012 and moved to state B to take care of his stricken mother. Applicant was unemployed from November 2012 to September 2013 when he took a job as a motorcycle parts salesman. He was terminated from that job in March 2014, and remained unemployed until July 2015. He was married in 1990 and divorced in 1993; married again in 1994 and divorced in 2000; and married a third time in 2007 and divorced in 2013. Applicant has three adult children.

¹ Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either version.

² Tr. at 77.

³ Unless stated otherwise, the source of the information in this section is Applicant's May 16, 2016 Security Clearance Application (SCA).

Applicant served on active duty (AD) in the U.S. Army from 1988 to 2000 and received a separation in lieu of trial, other than honorable discharge. In 1998, Applicant was assigned overseas and he discovered that his daughter was being physically abused by her stepfather. He received a transfer from Europe to state B so that he could be closer to his daughter. The abuse continued, and Applicant went through his chain of command to request an early release from the army. (Tr. 33) His request was denied and Applicant felt he had no choice but to leave on unauthorized absence (UA). He turned himself in eight months later at a different military installation and he was charged with UA in violation of the Uniform Code of Military Justice. Applicant was offered, and accepted, separation in lieu of trial. He had stellar performance evaluations, numerous awards, and two previous honorable discharges during his previous 10 years of active duty. (AE M)

Retired Sergeant Major (SGM) H. testified on Applicant's behalf and said he met Applicant in 1988 in Germany when they served together. The SGM had 24 years of impressive service on active duty in the Army. He testified that all service members, including Applicant, were subject to random urinalysis tests while on active duty. He has never known Applicant to use marijuana (MJ) and he corroborated Applicant's description of the physical abuse of his daughter. The SGM trusts Applicant completely and knows that he needs a clearance for a job opportunity overseas.

In section 23 of his SCA, Applicant indicated that he very rarely smoked MJ from 1980 to 2016, for pain relief. He also stated that he does not buy MJ and he doesn't keep it but he may use it again someday if someone offered it to him. Applicant clarified this statement in his testimony and regretted making this intemperate comment in his SCA. He testified credibly that he certainly never used MJ during his 12 years on AD, and he only previously used it in social settings on extremely rare occasions. He no longer associates with the same MJ using friends, and he stated that he does not intend to ever use MJ in the future, and signed a statement of intent to that effect. (AE D, Tr. 49-50) He has never been diagnosed or treated for drug abuse.

Applicant testified that his divorce from his third wife was acrimonious and caused him financial distress. (Tr. 31-32) She was an accountant and employed as assistant to the comptroller of state A. She handled all of their finances and was responsible for filing tax returns and paying bills. (Tr. 32) SOR ¶1.a alleges his failure to file, as required, federal taxes for tax years (TY) 2009, 2012 and 2015. Applicant testified that these would be filed in a few days as he has hired Tax Defense Network (TDN) in December 2017 to resolve his federal and state tax issues. (Tr.37, AE R) He provided TDN with a power of attorney to accomplish this. He submitted copies of an e-mail chain showing that TDN was working on these issues at the end of 2017. (AE W) He submitted a record of annual earnings showing that he had no declared income in some years, such as TY 2007 and TY 2012. (AE X) Thus, he was not required to file income tax returns for TY 2007 and TY 2012. He earned \$12,998 in 2015. (AE X)

SOR ¶1.b alleges Applicant is indebted to state A for a tax lien in the amount of \$27,418 entered against him in 2013. At the hearing, he testified that TDN was actively

working this matter. (AE Q, T, U, W, and X) Applicant's counsel submitted post-hearing documentation including an offer in compromise to the revenue authority of state A that was accepted in late December 2017, to resolve this lien. (AE II and JJ) He also submitted evidence of filing the 2009, 2012, and 2015 IRS forms 1040. (AE HH) These reflected adjusted gross income (AGI) of \$2,298 in TY 2009 from business income; no income earned in 2012; and \$12,748 in wages earned in 2015. These three IRS forms 1040 were all filed on December 13, 2017. SOR ¶¶1.a and 1.b are resolved.

SOR ¶1.c alleges another tax lien entered against Applicant in 2007 in the amount of \$332. Applicant denied this in his answer and submitted documents to show that his earnings for that TY were zero. (AE X) He submitted documents showing that he successfully disputed this lien with state A. (AE Q,T,U,W and X)

Applicant testified that he was a co-founder of the Tea Party in state A in 2008. He felt that he was targeted by the IRS for political reasons and audited in 2009. (Tr. 45-46) He submitted post-hearing documents confirming his position in the Tea Party and his involvement in state politics. (AE NN) He also submitted a fund-raising appeal to members of the Tea Party, which was laced with propaganda suggesting that there was a conspiracy by the IRS to persecute tea party members. Applicant testified that this accounts for the \$54,000 federal tax lien entered against him in 2009, and he claims that it was entered erroneously. (Tr. 46) TDN is actively working to establish this theory. (AE DD, S, BB, Z, and R) However, at this point, it is an undeveloped and unsubstantiated theory. I find that the federal tax lien resulted from delinquent sales taxes that Applicant owed in connection with his defunct PC repair business, together with penalties, interest and fees. He has been aware of it since 2009 and has not rebutted the presumption of regularity that this was dutifully entered by the IRS, after abundant notice to the tax payer about appropriate venues to appeal it or contest it – in tax court. There has been no evidence submitted to show that it has been appealed or successfully withdrawn yet. No evidence of a re-payment plan has been submitted.

Applicant submitted documents, through counsel, at the hearing to show that he has paid the \$167 debt alleged at SOR ¶1.e. (AE G, P and Y) He testified that he is disputing the \$580 debt alleged at SOR 1.f and offered documents to confirm this. He provided a letter from the creditor agreeing to remove this debt from his credit reports. (Tr. 48, AE H, AA) His credit reports no longer reflect this debt. Applicant had financial counseling and created a budget in November 2017. (AE FF)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG, Appendix A, ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

Analysis

Guideline F, Financial Considerations

The security concern relating to financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise

questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance abuse, 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 an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (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 taxes as required.

Applicant's delinquent debts alleged in the SOR are confirmed by his SCA, credit reports, and answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.⁴ Applicant has not met that burden. He exercised poor judgment in failing to address his 2009 federal tax lien sooner than November 2017. Applicant was aware that it was a problem, as well as his state tax issues.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

⁴ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

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

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

(g) the individual has made arrangements with appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant endured three divorces, and periods of unemployment or underemployment. To some extent, these conditions were beyond his control. To his great credit, he has resolved his state tax issues and the other alleged delinquencies. However, he has not produced relevant and responsive documentation, demonstrating that he acted responsibly under the circumstances in addressing the federal tax lien. He broached the delinquent tax debts in his SCA in May 2016. Yet, almost two years later, he has not resolved this issue, which is his largest delinquency. Applicant has not met his burden to provide sufficient evidence to show that his financial problems are under control, and that his debts were incurred under circumstances making them unlikely to recur. He has made substantial progress pursuant to offers in compromise with state A and he has filed the IRS forms 1040. However, these efforts were only commenced in late 2017 for taxes owed for TY's 2009 to 2015. In short, his response has been too little, too late. The federal tax lien alleged in the SOR has not been resolved. AG ¶¶ 20 (b) and 20(g) apply only partially. Otherwise, the mitigating conditions enumerated above do not apply.

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia.

Applicant used marijuana infrequently between 1980 and 2016. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant testified credibly that he used MJ only rarely in social settings, and never while he was on active duty subject to urinalysis exams. He used it for pain relief, and signed a statement of intent never to use MJ again. He no longer associates with the same friends and his use of MJ presents no security concerns. He has abstained from drug use since 2016. He has disassociated from friends who use illegal drugs, and intends to abstain in the future. His drug use has been mitigated by the passage of time and it no longer casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) and AG ¶ 26(b) are applicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's

conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG, Appendix A, ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG, Appendix A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and H in my whole-person analysis. Some of the factors in AG, Appendix A, ¶ 2(d) were addressed under that guideline. Applicant has employed TDN and attorneys to help mitigate his financial problems. He has made great progress in that regard. Most importantly, Applicant has not addressed the most glaring specific allegation in the SOR and taken affirmative measures to resolve it. He has not met his burden of production.

Applicant's finances remain a security concern. There is insufficient evidence to conclude that Applicant's financial problems are under control. The record evidence leaves me with questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns under Guideline H, but he has not mitigated the security concerns arising under Guideline F, financial considerations.

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:	AGAINST APPLICANT
Subparagraph 1.a – 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e – 1.f:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT

Subparagraphs 2.a – 2.b:

For Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge