



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



In the matter of:)
)
) ISCR Case No. 14-06093
)
Applicant for Security Clearance)

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

09/14/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guidelines F (financial considerations) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On January 28, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national

interest to continue Applicant's security clearance. On February 12, 2015, Applicant answered the SOR and requested a hearing. On March 30, 2015, the case was assigned to me. On April 27, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for May 13, 2015. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 7, while Applicant testified and offered Applicant Exhibit (AE) A. Applicant's objections to GE 3-7 were overruled. The record of the proceeding was left open until May 27, 2015, to provide Applicant the opportunity to present additional matters. He submitted documents that were marked as AE B through N. Department Counsel's prehearing letter sent to Applicant was marked as Hearing Exhibit (HE) 1; her email to the Applicant on May 4, 2015, was marked as HE 2; her list of exhibits as HE 3; and her email forwarding Applicant's post-hearing submission as HE 4. The transcript (Tr.) of the hearing was received on May 20, 2015.

Findings of Fact

Background information

a. Applicant is a 53-year-old employee of a defense contractor. He has been working for his current employer since January 2000. He graduated from high school in 1980 and has completed some college courses. He served on active duty in the U.S. Marine Corps from July 1981 to July 1984, served in the Marine Corps Reserve from April 1986 to July 1988, and received honorable discharges for his military service. He has been married and divorced three times.¹

b. Under Guideline F, the SOR alleged that Applicant did not file his federal income tax returns for 2009, 2010, 2011, 2012, and 2013 (SOR ¶ 1.a). Under Guideline E, the SOR cross-alleged the Guideline F allegation in SOR ¶ 2.a and further alleged that Applicant had been charged or cited for five criminal offenses and two traffic citations (SOR ¶¶ 2.b–2.h). In his Answer to the SOR, Applicant denied the allegation in SOR ¶ 2.a and admitted the remaining allegations with comments. His admissions are incorporated as findings as fact.²

SOR ¶¶ 1.a and 2.a – failing to file federal income tax returns

a. In his security clearance application (SCA) dated March 4, 2014, Applicant disclosed that he failed to file his federal income tax returns since 2009, but indicated that he paid his taxes each year. He attributed his tax-filing problems to not having

¹ Tr. 7-8; GE 1; AE H, J.

² Applicant's Answer to the SOR.

access to records after he and his ex-wife separated. He stated that he was working with an accounting firm to file the income tax returns.³

b. At the hearing, Applicant testified that he filed his federal income tax returns for 2011, 2012, 2013, and 2014, but failed to produce any documentation confirming those tax returns were filed. He stated that he hired a tax service in February or March to assist him in filing the tax returns and filed them in early April 2015. He stated that he did not file his federal income tax returns for 2009 and 2010 because his tax preparer told him he “couldn’t go back that far and that the IRS would send [him] a letter if there was anything that [he] needed to address for those years.”⁴

c. In addressing why he failed to file the tax returns in a timely manner, Applicant testified that, after he and his ex-wife separated in 2009, he did not have access to receipts and other paperwork needed for filing his federal income tax return for that year. He stated he was never able to obtain all the paperwork needed to claim certain deductions, but obtained some of the documents after his divorce in 2011. He also lost records when his storage unit had a leak in 2010 or 2012. He further indicated that, although he was paying child support, state authorities thought he was behind on those payments and threatened to seize his federal income tax refund, which prompted him to delay filing those tax returns.⁵

d. In his post-hearing submission, Applicant provided copies of the first two pages of his federal income tax returns for 2012, 2013, and 2014. In that submission, he indicated that he was providing a copy of his 2011 federal tax return, but failed to do so. Instead of submitting the 2011 tax return, he appears to have mistakenly submitted two copies of his 2014 income tax return. The copies of the tax returns that he provided were neither signed by him nor dated. The 2012 and 2014 tax returns reflected that they were prepared by a tax service on March 10, 2015. According to the tax returns, he owed the IRS past-due taxes in the amount of \$5,511 for 2012 and \$1,891 for 2013, but was due a refund of \$1,000 for 2014. No documents were provided to confirm that the IRS received the income tax returns or that he paid the past-due taxes that were owed.⁶

SOR ¶ 2.b – 1991 criminal charge. In September 1991, Applicant was charged with fraud – insufficient fund check, a misdemeanor. In October 1991, he pled nolo contendere to that charge and adjudication was withheld. He provided proof to the court that the check was paid.⁷

³ GE 1, 2.

⁴ Tr. 43-45; GE 1.

⁵ Tr. 31-34, 41-56; GE 2.

⁶ AE K-N; HE 4.

⁷ Tr. 38-39, 57; GE 3, 4.

SOR ¶ 2.c – 1995 criminal charge. In May 1995, Applicant was charged with operating a vehicle off an established road, a misdemeanor. In September 1995, he was found guilty of that charge. He testified that he drove on a dirt road to a swimming hole that he had driven on for many years. Only after he was ticketed for this offense did he notice a sign that was not clearly visible on a tree indicating the road was closed. He stated this charge was ridiculous.⁸

SOR ¶ 2.d – 1999 criminal charge. In December 1999, Applicant was charged with aggravated battery and cruelty towards a child, both felonies. He testified that his then wife had mental health problems and assaulted him. He defended himself by holding her wrists and sitting on her on a chair until she calmed down. She later called the police and he was arrested. The cruelty towards a child involved him spanking his son with a belt. He claimed that he did not know spanking a child with a belt was illegal. The police report indicated that photos of his son's legs revealed severe bruises. In March 2000, he pled nolo contendere to battery, a misdemeanor; adjudication was withheld; and he was placed on 12 months of probation. In August 2000, he pled nolo contendere to child abuse, a felony; adjudication was withheld; and he was placed on two years probation. He also was ordered to attend parenting classes.⁹

SOR ¶ 2.e – 2000 traffic citation. In February 2000, Applicant was issued a traffic citation for failure to obey a traffic control device after he was involved in an accident. Applicant claimed he had a green light when he went through an intersection. Apparently, the other driver in the accident and a witness claimed the other driver had a green light. When the police officer did not appear in court, this citation was dismissed.¹⁰

SOR ¶ 2.f – 2001 criminal charge. In January 2001, Applicant was charged with battery and resisting arrest without violence. While visiting neighbors near his sister's house, he indicated that the neighbors started getting drunk and aggressive. According to Applicant, he left that location to return to his sister's house. The neighbors followed him and assaulted him. He claimed he called the police who believed the neighbor's version of the events. The police report indicated that Applicant made a sexual pass to a woman, that an argument ensued, and that Applicant threw a coffee table at an individual. The police officer reported that Applicant appeared intoxicated and stated he had consumed five beers and three shots of whiskey. Upon being advised that he was under arrest, Applicant attempted to run from the police officer and attempted to pull away as handcuffs were being placed on him. The police had to wrestle him to the ground to restrain him. The charges were dropped when Applicant wrote a letter of apology to the neighbors. He also completed 30 hours of community service.¹¹

⁸ Tr. 57-58; GE 4.

⁹ Tr. 35-37, 39, 58-60; GE 2, 3, 4, 7.

¹⁰ Tr. 60-61; GE 4.

¹¹ Tr. 34-35, 61-62; GE 2, 4, 6.

SOR ¶ 2.g – 2009 criminal charge. In March 2009, Applicant was charged with assault with an intended threat to do violence (domestic), a misdemeanor. He reportedly threatened his wife and threw coffee on her during this incident. In July 2009, he pled nolo contendere to the charge. Adjudication was withheld and he was placed on six months of probation, ordered to undergo a domestic violence evaluation, undergo random drug and alcohol tests, and maintain full-time employment.¹²

SOR ¶ 2.h – 2012 traffic citation. In April 2012, Applicant was issued a traffic citation for careless driving after he was involved in an accident. He testified that he accidentally bumped the truck in front of him in bumper-to-bumper traffic. Adjudication was withheld in this case after he opted to attend a defensive driving school and pay a fine and court costs.¹³

Character Evidence

a. Applicant presented letters of reference from a supervisor, coworkers, and friends that attest to his reliability, honesty, dedication, integrity, and good character. His supervisor stated that Applicant is an asset to the company. Letters from his ex-wife, children, and a stepchild indicated that he is a devoted father.¹⁴

b. In the Marine Corps, Applicant received two meritorious masts for outstanding performance of duty. He was also awarded the Good Conduct Medal. He testified that he has worked in his current job for 30 years, but apparently for different defense contractors. He submitted a work performance evaluation from August 1985 to May 2015 that reflected his performance has been satisfactory (the highest category).¹⁵

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *Safeguarding Classified Information Within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no

¹² Tr. 37-38, 62-63; GE 2, 4. 5

¹³ Tr. 39-40, 63; GE 4.

¹⁴ AE A-C.

¹⁵ AE D-J.

one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the applicant has or 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 and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The security concern for this guideline is set out in AG ¶ 18 as follows:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's admissions and the record evidence established the following disqualifying condition under AG ¶ 19:

(g) failure to file annual Federal, state, or local income tax returns as required

Three mitigating conditions under AG ¶ 20 are potentially applicable:

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

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances; and

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.

Applicant failed to file his 2009-2013 federal income tax returns as required. At the hearing, he testified that he filed his 2011-2013 tax returns. Although he provided unsigned and undated copies of the 2012-2014 tax returns in his post-hearing submission, I find that he most likely filed those tax returns. In general, however, he failed to show that he acted responsibly in the filing of his tax returns. His explanation for his failure to file his tax returns in a timely manner was not persuasive. His tax returns for 2009 and 2010 have not yet been filed. The other tax returns were filed only after his receipt of the SOR.

From the evidence presented, I am unable to conclude that his failure to file his tax returns in a timely manner happened so long ago, was so infrequent, or happened under circumstances that make such failures unlikely to recur. His tax-filing problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's admissions and the record evidence established the following disqualifying conditions under 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 person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior. . .; and

* * *

(3) a pattern of dishonesty or rule violations.

AG ¶ 17 lists four personal conduct mitigating conditions that are potentially applicable:

(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;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

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

In 2000, Applicant pled nolo contendere to felony child abuse, a serious offense. The 2001 incident involving his sister's neighbors is also troubling. The remaining criminal charges and traffic citations when viewed in isolation do not appear serious, but when considered as a whole with the other allegations, particularly his tax-filing problems, show a pattern of unreliable behavior. His conduct involving questionable judgment is recent. From the evidence presented, I am unable to find that such unreliable behavior is unlikely to recur or does not cast doubt on his suitability for a security clearance. None of the mitigating conditions fully apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

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. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant served honorably on active duty in the Marine Corps for three years, in the Marine Corps Reserve for two years, and for a defense contractor for 30 years. He is a valued employee. Nonetheless, his pattern of unreliable behavior raises questions about his reliability, trustworthiness, and good judgment.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant failed to mitigate the financial considerations and personal conduct security concerns.

Formal Findings

Formal findings on the allegations set forth in the SOR are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.h:	Against Applicant

Decision

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

James F. Duffy
Administrative Judge