



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



In the matter of:)
)
) ISCR Case No. 15-00006
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

05/23/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines F (financial considerations) and E (personal conduct). Clearance is denied.

Statement of the Case

On April 15, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On June 26, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant, pursuant to 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* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied.

On July 16, 2015, Applicant responded to the SOR. On September 1, 2015, Department Counsel was ready to proceed. On September 14, 2015, DOHA assigned Applicant's case to me. On September 22, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for October 6, 2015. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 12, which were received into evidence without objection. Applicant testified and did not offer any exhibits. On October 15, 2015, DOHA received the hearing transcript (Tr.) I held the record open until October 23, 2015 to afford the Applicant an opportunity to submit additional evidence, and he did not submit any evidence.

Findings of Fact

Applicant admitted SOR ¶¶ 1.c – 1.g, 2.a – 2.f; and denied SOR ¶¶ 1.a, 1.b, 1.h – 1.p, and 2.g – 2.i. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is 42 years old, unemployed, and has a pending application to work as a customer service representative for a defense contractor. He seeks a security clearance as a condition of employment. Applicant was most recently employed as an "order filler" at a large box store chain and was unable to work after he had a knee replacement in December 2015. (Tr. 21-23; GE 1)

Applicant graduated from high school in June 1991. He was awarded a certificate in medical billing and coding from a career college in December 2013. (Tr. 23-24; GE 1) Applicant served in the U.S. Navy from June 1991 to September 2009, and was discharged with an other than honorable (OTH) discharge as an aviation ordinance airman (pay grade E-3) (Tr. 24-26, 31; GE 1)

Applicant married in August 2010 and divorced in January 2013. He has a nine-year-old son, who lives with his mother -- an active duty Navy Chief Logistics Specialist (pay grade E-7), currently stationed overseas. Applicant does not pay child support to his son's mother. (Tr. 27-34; GE 1)

Financial Considerations

Security concerns were identified under this Guideline following applicant's submission of his April 2014 SF-86. Specifically, Applicant's SOR alleges 16 separate debts totaling \$38,661. These debts range from an \$86 cell phone collection account to a \$13,768 charged-off account for a repossessed automobile. (SOR ¶¶ 1.a – 1.p; GE 10 – GE 12)

During cross-examination, Department Counsel discussed each debt with Applicant. Applicant provided a variety of responses regarding debt status to include

that he did not recognize the debt, that the debt was not valid, that the debts were incurred by an unauthorized person or persons, or that he did not have enough money to pay the debt. Currently, Applicant's sole source of income is a monthly Veteran's Administration disability of \$1,856. Applicant did not submit any documentation during his hearing or post-hearing that he had made any payments, settlements, attempts to contact creditors, attempts to dispute debts, or otherwise resolve any debts alleged. (GE 10- GE 12; Tr. 64-80)

During Applicant's July 2014 Office of Personnel Management Personal Subject Interview (OPM PSI), Applicant discussed his indebtedness with the OPM agent. During that interview, Applicant claimed that he "did not know any information" about the majority of these debts. However, he stated that he planned "to follow up with these accounts and pay them if needed." (GE 2; Tr. 66)

Personal Conduct

Security concerns were identified under this Guideline following applicant's submission of his April 2014 SF-86. The conduct alleged included six separate criminal acts or allegations of criminal acts and three separate falsifications of his April 2014 SF-86.

The criminal acts or allegations of criminal acts consist of:

(1) In July 1997, Applicant was charged with assault and battery on a family member. The charges were later dismissed. (SOR ¶ 2.a; GE 4, GE 7); (2) In May 2000, Applicant was charged with rape, a felony, and referred to an Article 32 Investigation. The rape charge was "dropped." Following the Article 32 Investigation, Applicant was ultimately awarded non-judicial punishment and found guilty of false official statement and adultery. (SOR ¶ 2.b; GE 4, GE 5, GE 7);

(3) In August 2002, Applicant was charged with assault and battery on a family member. The charge was *nolle prosequi*. (SOR ¶ 2.c; GE 4); (4) In March 2007, Applicant was charged with assault on a family member. He was convicted of this offense. (SOR ¶ 2.d; GE 4, GE 8); (5) In January 2008, Applicant was charged with simple assault. He was given a deferred finding disposition. (SOR ¶ 2.e; GE 4, GE 9); and

(6) In June 2009, at a court-martial, Applicant was convicted of disrespect toward a superior commissioned officer, committing assault, communicating a threat, and provoking speech and gestures. Applicant testified that these charges stem from a verbal altercation with a woman he encountered when he dropped off his son at the child development center. The woman, Applicant claimed, was in civilian clothes and unknown to him, and started "raising her voice" at him and he "went in protective mode, because of [his] son." He was sentenced to 89 days confinement and to be reduced from pay grade E-6 to E-3. After Applicant served his sentence, he was referred to an administrative board for misconduct and was separated from the naval service with an other than honorable discharge. (SOR ¶ 2.f; Tr. 31-32, 34-52; GE 6)

The three falsification allegations stemming from Applicant's April 2014 SF-86 are:

(1) when Applicant was asked whether he had ever been charged with a felony, he answered "no." Applicant claimed that he was told by a Naval Criminal Investigative Service agent that his 2000 rape charge, later dismissed, was a "class 6 misdemeanor," and that he believed he answered the question truthfully. (SOR ¶ 2.g; Tr. 53-54; GE 1);

(2) when Applicant was asked whether he had ever had a security clearance denied, he answered "no." In May 2004, the Department of the Navy Central Adjudication Facility (DON CAF) issued Applicant a final denial of security clearance letter, which Applicant acknowledged. The security concerns forming the basis for denying Applicant his security clearance at that time was sexual behavior, personal conduct, financial considerations, and criminal conduct. He claimed that he answered the question correctly on his SF-86 and is not sure what happened, but opined that his answer may have defaulted back to a "no" answer. (SOR ¶ 2.h; Tr. 54-56; GE 1, GE 7);

(3) when Applicant was asked in the past seven years whether he had defaulted on any type of loan, 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 whether he had ever been 120 delinquent on any debt not previously entered, he answered "no" failing to disclose the debts listed in SOR ¶¶ 1.a – 1.p. Applicant claimed that he was familiar with the security clearance application process, and he would not have knowingly denied having a debt that he did have. He opined that the on-line program "does have errors" and that his answer may have defaulted back to a "no" answer. (SOR ¶ 2.i; Tr. 56-64; GE 1)

Applicant signed the certification section of his SF-86 stating that his statements were true, complete, and correct. (GE 1) It is also noted that among the reasons DON CAF denied Applicant's security clearance in May 2004 was for falsifying his security clearance application by failing to list any unpaid judgments or any 180 or 90 days delinquent accounts, and for failing to list his rape charge. (GE 7)

Character Evidence

Applicant did not submit any character evidence during the hearing or post-hearing.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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

applicant's 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.

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, these guidelines are applied 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, 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 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 "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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It 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. 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 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations."

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). The evidence establishes the validity of the allegations and the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;

(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;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant receives partial credit because he has been unable to work since knee replacement in December 2015. However, Applicant is precluded from receiving full credit under this mitigating condition because many of these debts originated before his knee replacement and the apparent lack of progress in resolving or attempting to resolve his remaining unmitigated debts, discussed *supra*.¹

AG ¶ 20(c) is not applicable because there is no record evidence that Applicant sought financial counseling. Despite having been provided with an opportunity to do so, Applicant did not provide documentation that any of his debts are under control. AG ¶ 20(d) is not applicable because there Applicant submitted no documentation that any of his debts were resolved or were in the process of getting resolved.² AG ¶ 20(e) is not applicable.

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

²The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

With that said, a security clearance case is not aimed at collecting debts.³ Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.⁴

Applicant failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address identified delinquent debt. Considering the record evidence as a whole,⁵ financial considerations security concerns remain.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

³ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

⁴ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotation marks omitted).

⁵ See ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

AG ¶ 16 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

(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.

The evidence establishes the disqualifying conditions in AG ¶¶ 16(a), 16(c), and 16(d), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Applicant's 12-year span of criminal behavior raises a significant security concern about his judgment and willingness to follow rules and regulations. Also of concern is his failure to list required information pertaining to his finances, past criminal behavior, and security clearance history. His explanations for failing to list such information are not credible especially in light of his previously having been denied a security clearance in May 2004 for similar behavior. Applicant was a mature adult and experienced with the security clearance process at the time he completed his security clearance application. His past behavior and failure to list required information on his security clearance application brings into question his ability to exercise good judgment so much so that he cannot be trusted to make sound decisions, and thus should not be trusted to safeguard classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of the Executive Order 10865 specifically provides that industrial security 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." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this decision should be considered to suggest that I have based this decision, in whole or in part, on any express or implied decision as to an Applicant's loyalty or patriotism.

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 ¶ 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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines F and E are incorporated in this whole-person section. However, further comments are warranted.

Applicant's years of Navy service, except for that portion of his service that led to his OTH discharge, weigh in his favor. There is no evidence to suggest that he is not currently a law-abiding citizen. However, given the security concerns raised and Applicant's inability to provide sufficient mitigating evidence leaves me with doubts regarding his security worthiness. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated the financial considerations or personal conduct security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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
Subparagraphs 1.a – 1.p:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.i:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge