



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 14-05270
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Richard L. Morris, Esq., and Mercedes Culpepper, Esq.

06/19/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on May 5, 2014. On November 6, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J and F. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant received the SOR on November 10, 2014; answered it on December 17, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015, and the case was assigned to me on January 23, 2014. It was reassigned to another administrative judge on February 3,

2015, to consolidate the docket, and reassigned back to me on March 4, 2015, due to the assigned administrative judge's unavailability. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 4, 2015, scheduling the hearing for March 24, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through P, which were admitted without objection. I kept the record open until April 15, 2015, to enable Applicant to submit additional documentary evidence. He timely submitted AX Q through V. DOHA received the transcript (Tr.) on April 2, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.e, 1.g-1.i, and 2.c-2.f. He admitted SOR ¶¶ 1.f and 1.j in part. He denied SOR ¶¶ 2.a and 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old shipboard electrician employed by a federal contractor at a naval shipyard since September 2013. He received a security clearance in April 2009. His clearance was revoked in October 2012. (GX 1 at 45-46.)

Applicant attended high school from January 1983 to June 1986 but did not receive a diploma. He received his general educational development certificate in April 1995. He attended a technical school from November 2005 to August 2008 and received an associate's degree in computer networking in September 2008. He worked in the private sector from December 1999 to February 2008. He worked for a federal contractor from February 2008 until November 2012, when he was fired as a result of being incarcerated. He was unemployed from November 2012 to April 2013. He worked in the private sector from April 2013 until he began his current job.

Applicant was charged with grand theft of an auto in October 1987 and convicted of unauthorized use of an auto in December 1987. He was placed on probation for two years. He testified that his parents had promised to buy him a car when he graduated from high school, but they did not buy the car (probably because he did not graduate). He went to the dealership, found the car with the key in it, and drove around in it for four days. (Tr. 94-95.)

In September 1993, Applicant was charged with driving on a suspended license. He was convicted and sentenced to 30 days in jail. (GX 3 at 5.)

In March 1997, Applicant was charged with possession of marijuana. He was convicted and his driver's license was suspended. (GX 2 at 3; GX 3 at 7.)

In February 1998, Applicant was charged with driving on a suspended license. His license had been suspended because of the marijuana conviction. (GX 3 at 4.) He was convicted, fined, and his license was suspended for 30 days. (Tr. 93.)

In December 1998, Applicant was charged with making a false statement in connection with a firearm purchase, a felony. (GX 3 at 3.) He testified that the charge arose when he attempted to purchase a firearm, not knowing that his 1987 felony arrest for grand theft barred him from possessing a firearm. After he explained the situation to the judge, the charge was dismissed. (Tr. 90-92.)

In February 1999, Applicant was charged with assault and battery of his live-in girlfriend. He was convicted in March 1999. (GX 2 at 3.) There is no evidence reflecting the sentence imposed. The charges arose when Applicant and his girlfriend pushed each other during an argument, and she called the police. At the hearing, Applicant denied that there was physical contact during this incident. (Tr. 132.)

In August 2000, Applicant was charged with assault and battery of the same girlfriend, violating a protective order, and destruction of property. (GX 2 at 3.) These charges arose from an argument between Applicant and his girlfriend, during which he punched a door and broke a few items in the house. (Tr. 86.) He testified that during this incident his girlfriend hit him with a phone and he destroyed the phone. (Tr. 132.) He was convicted and required to complete a 16-week anger-management class. A one-year protective order was imposed.

In April 2006, he was charged with improper control of an automobile resulting in an accident, a misdemeanor, after he swerved to avoid another vehicle that had cut him off, lost control of his vehicle, and hit a retaining wall. He was with the girlfriend that he subsequently married in 2010. (Tr. 84-85.) He was convicted and sentenced to six months in jail, suspended. He was placed on probation for 12 months and his driver's license was suspended for 30 days. (GX 3 at 1.)

Applicant and his ex-wife began living together in 2005, and they married in January 2010. They have an eight-year-old daughter. Applicant also has two daughters, ages 25 and 23, from previous relationships.

In July 2012, Applicant was arrested for assault and battery of his wife. In his answer to the SOR, he stated that his arrest arose from an argument about his wife's infidelity. He denied having any physical contact with her during the argument.

In September 2012, Applicant was arrested for assault and battery of his wife after another argument about her infidelity. In his answer to the SOR, Applicant stated that his wife punched and scratched him and he grabbed her wrists to stop her. He and his wife separated after this incident, and they divorced in February 2013. At the hearing, he testified that their altercation consisted of pushing and shoving, but no slapping or punching. He admitted that he knocked his wife to the ground during the altercation. (Tr. 135.) A warrant for his arrest was issued. He turned himself in on advice of counsel and was incarcerated for seven days. (Tr. 77-78.)

In December 2012, Applicant appeared in court for both the July and September 2012 incidents, and he pleaded guilty. He was required to complete an 18-week

intensive group-therapy course for domestic violence. He completed the course in October 2013. (AX I.) He was placed on probation for two years, which ended in February 2015. (GX 1 at 33; Tr. 77-79.)

Applicant testified that the court-ordered counseling taught him to relax, decide what is really important, and decide whether an issue requires a negative or angry response. As a result, he has not lost his temper for two years. (Tr. 114-15.)

Applicant's credit bureau report (CBR) for June 2014 reflected three medical debts: a \$130 debt referred for collection in June 2011 (SOR ¶ 2.a), a \$56 debt referred for collection in June 2011 (SOR ¶ 2.b), and a \$285 debt referred for collection in January 2013 (SOR ¶ 2.c). (GX 5 at 6.) Applicant's CBRs for January and February 2015 reflected that the debts alleged in SOR ¶¶ 2.a and 2.b were paid, but the debt in SOR 2.c was unsatisfied. (GX 6 at 1; AX A at 9-11.) On March 25, 2015, he received a receipt from the collection agency for payment of \$400.71 on "multiple accounts," reflecting a zero balance due. (AX Q.) The three medical debts are resolved.

Applicant's June 2014 CBR also reflected three student loans placed for collection for \$8,332 (SOR ¶ 2.c), \$1,063 (SOR ¶ 2.e), and \$8,863 (SOR ¶ 2.f). (GX 5 at 7.) All three student loans were referred for collection in March 2012. Applicant's January 2015 CBR reflected that the three student loans had been transferred or sold. (GX 6 at 3.) His February 2015 CBR reflected three student loans, now held by another creditor, charged off for \$8,643; \$1,124; and \$9,398. (AX A at 2-3.) In November 2014, Applicant's request for forbearance on paying his student loans was approved. (AX U.) In March 2015, Applicant received an offer to settle all three student loans for \$19,267. (AX V.) On March 31, 2015, he made an initial payment on each loan pursuant to a repayment agreement, in the amounts of \$113.93; \$12.76; and \$107.11. (AX R, S, and T.)

Applicant and his wife filed a joint federal income tax return in 2011, reporting gross income of \$72,685 (AX D.) They filed a joint return for 2012, reflecting gross income of \$67,077, of which \$31,531 was Applicant's income. (AX C.) When Applicant filed his separate federal income tax return for 2013, he reported gross income of \$21,926. (AX B.) At the hearing, he submitted a personal financial statement (PFS) reflecting monthly net income of \$1,674, expenses of \$1,655, and a net monthly remainder of \$19. His PFS does not include payments on the student loans. He testified that he calculated his income on the PFS based on working 60 hours every two weeks. When his request for forbearance on the student loans was approved in November 2014, he was working 120 hours every two weeks. (Tr. 105.)

Applicant's ex-wife, who was involved in the domestic incidents in 2012, submitted a statement describing him as a devoted father, hardworking, loyal, dutiful, and trustworthy. (AX K.) Applicant's younger brother, who is also employed by a defense contractor, considers him hardworking, honest, and a devoted father. (AX P.) A Navy chief warrant officer, who has known Applicant for seven years as a neighbor and friend, describes him as a caring and generous person, a great father, and a person of

integrity. He believes Applicant took his conviction for domestic violence seriously, complied with the court's orders, "and is a better man for doing so." (AX N.) A martial arts instructor, who has known Applicant for about eight years and shares Applicant's interest in martial arts, considers him a person of integrity, honesty, and compassion. (AX O.)

The co-owner and vice-president of a former employer describes Applicant as dependable, honest, trustworthy, and devoted to his family. (AX L.) A Navy lieutenant junior grade, who became acquainted with Applicant when the ship underwent extensive repairs and upgrades, described Applicant as hardworking, reliable, and calm under pressure. (AX M.) A co-worker, who has known Applicant for 35 years, describes him as "one of the best single fathers I have ever met." Applicant lived with this co-worker after he was charged with domestic violence. When the co-worker was away from home, he trusted Applicant with his child and his house. (Enclosure to Answer to SOR.)

Another co-worker, who has worked with Applicant for about eight years, testified that he considers him "one of the most reliable people that I've ever known." He would trust Applicant with his children. He has found Applicant blunt but very honest. Applicant does not drink alcohol and does not party while on temporary duty assignments. Applicant is energetic but very peaceful. He is very frugal, but good-hearted and generous. (Tr. 23-30.) He testified that Applicant was very remorseful about the domestic violence incidents. (Tr. 34.) While Applicant was unemployed, he found short-term temporary jobs, gave his wife whatever money he could earn, and was very concerned about his daughters. (Tr. 32.) At the time of the hearing, Applicant was living with one of his adult daughters. (Tr. 38.)

Applicant's facility security officer testified that he has been honest and forthright about his finances and criminal history. He testified that Applicant frequently talks about his youngest daughter and his hopes for her future. He described Applicant's demeanor as "hyper but peaceful," always trying to keep busy. (Tr. 43-48.)

Applicant's brother-in-law, a paralegal in a Navy Judge Advocate General's Corps Office, has known Applicant for 28 years. He is aware of Applicant's incidents involving domestic violence but not his earlier criminal history. He testified that Applicant was devastated by the incidents with his wife, because he did not experience domestic violence in his home while he was growing up. He believes that Applicant matured more slowly than most other men of the same age. He testified that Applicant is a much calmer person from what he was when they first met. Applicant is very involved with his youngest daughter's education and religious upbringing. He testified that Applicant does not consume alcohol, is not a "flashy" person, and is very careful with his money. (Tr. 56-68.)

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, *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 AG. 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.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges two domestic violence incidents in 2012 involving Applicant’s ex-wife (SOR ¶¶ 1.a and 1.b), a traffic accident in 2006 resulting from Applicant losing control of his vehicle (SOR ¶ 1.c), two domestic violence incidents in 1999 and 2000 involving Applicant’s then live-in girlfriend (SOR ¶¶ 1.d and 1.e), a false statement in connection with a firearm purchase in 1998 (SOR ¶ 1.f), driving on a suspended license in 1998 and 1993 (SOR ¶¶ 1.g and 1.i), possession of marijuana in 1997 (SOR ¶ 1.h), and grand theft of an automobile in 1989 (SOR ¶ 1.j). Applicant admitted all the allegations except SOR ¶¶ 1.f and 1.j.

The evidence reflects that Applicant attempted to purchase a firearm in 1998, not realizing that his arrest for a felony precluded the purchase, but there is no evidence that he made any false statement during his attempt. Thus, SOR ¶ 1.f is not established by substantial evidence.

The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.” Applicant’s admissions and the documentary evidence admitted in evidence at the hearing establish two disqualifying conditions under this guideline: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

The following mitigating conditions under this guideline 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; and

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

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Almost six years elapsed between the domestic violence incident in August 2000 and the traffic offense in 2006. Although Applicant described the traffic accident in terms of a mere loss of control, he admitted that he swerved after being cut off by another driver. This admission, coupled with the relatively severe sentence imposed (six months in jail, suspended, probation for 12 months, and suspension of a driver’s license for 30 days) indicates that more than mere negligence was involved. Although more than six years passed between the traffic accident and the two domestic violence incidents in 2012, the incidents in 2012 were a recurrence of the behavior in 1999 and 2000. At the hearing, Applicant claimed that no physical contact was involved in the June 2012 incident and only mutual shoving was involved in the September 2012 incident. However, he pleaded guilty to both incidents, and he admitted at the hearing that he shoved his wife with sufficient force to knock her to the ground. Based on all the evidence, I conclude that insufficient time has passed to establish AG ¶¶ 32(a).

Applicant has expressed remorse for the domestic violence incidents. He appears to have benefited from the court-ordered therapy. He is deeply involved with his youngest daughter and is respected by his co-workers. Nevertheless, he was on probation until February 2015, and I am not convinced that sufficient time has passed to warrant application of AG ¶ 32(b).

Guideline F, Financial Considerations

The SOR alleges three delinquent medical debts placed for collection (SOR ¶¶ 2.a-2.c) and three delinquent student loans placed for collection (SOR ¶¶ 2.d-2.f.). The concern under this guideline is set out in AG ¶ 18:

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.

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. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his CBRs, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

The following mitigating conditions under this guideline 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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; and

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

AG ¶ 20(a) is not established. The three medical debts were not resolved until March 2015, the student loans are not yet fully resolved, and the debts were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not established for the medical debts in SOR ¶¶ 2.a and 2.b, which were referred for collection before Applicant was fired in November 2012. However, the medical debt in SOR ¶ 2.c and the three student loans in SOR ¶¶ 2.d-2.f became delinquent after he was fired, which was a condition beyond his control. Although the domestic violence in 2012 was mutual and not a condition beyond Applicant's control, his marital breakup and the resulting reduction in family income were conditions beyond his control. He did not act responsibly regarding the medical debts, because he did not address them until shortly before the hearing, even though he has been employed since September 2013. He acted responsibly regarding the student loans by requesting and obtaining forbearance, negotiating a payment plan, and making the first payments under the payment plan.

AG ¶ 20(c) is not fully established. There is no evidence that Applicant sought or received counseling. However, his medical debts are resolved. It is too soon to determine whether his student loans are under control, because he has made only one

payment and has virtually no discretionary funds available after paying his living expenses.

AG ¶ 20(d) is established for the medical debts. It is not yet fully established for the student loans, because he has made only one payment under his payment agreement and is in a precarious financial situation that raises doubt about his ability to comply with his payment agreement.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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.

I have incorporated my comments under Guidelines J and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was sincere, remorseful, and credible at the hearing. He has matured, made progress in anger management, and is beginning to get his finances under control. However, it is too soon to conclude that he will continue to avoid angry, impulsive behavior, and he has not yet established a track record of financial responsibility.

After weighing the disqualifying and mitigating conditions under Guidelines J and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct and financial problems. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

