



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



In the matter of:)
)
 [Redacted]¹) ISCR Case No. 14-03488
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/15/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 25, 2014. On August 25, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline 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 DOD on September 1, 2006.

Applicant received the SOR on September 2, 2014; answered it on September 10, 2014; and requested a hearing before an administrative judge. Department Counsel

¹ Applicant's name appears on several documents in the record, including the Statement of Reasons (SOR), without a middle initial and suffix. I have reflected Applicant's name on this decision as it appears on his answer to SOR, his email signature block, and the hearing notices.

was ready to proceed on January 16, 2015, and the case was assigned to me on January 29, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 6, 2015, scheduling the hearing for February 26, 2015. The hearing was cancelled because of a snowstorm and government shutdown.

On March 9, 2015, DOHA issued a second notice of hearing, scheduling the hearing for March 26, 2015. On March 19, 2015, DOHA issued an amended notice of hearing, moving the hearing from March 26 to March 24, 2015. Applicant waived the 15-day-notice requirement for the change in hearing date. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection.² DOHA received the transcript (Tr.) on April 2, 2014.

I kept the record open until April 15, 2015, to enable Applicant to submit additional documentary evidence. He timely submitted AX F and G. At his request, I extended the deadline to April 22, 2015, and he timely submitted AX H. AX F through H were admitted without objection. The record closed on April 22, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.d, and 1.f, and he denied SOR ¶¶ 1.b, 1.c, and 1.e. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 53-year-old interior communications electrician employed by a defense contractor since July 2007. He does not hold a security clearance.

Applicant served in the U.S. Navy from September 1982 to July 1993. He received a security clearance in September 1983. He was discharged under other than honorable conditions after testing positive on a drug test.

Applicant married in April 1989 and divorced in June 2008. He has a 22-year-old son, who lives with his mother. (Tr. 43.) He received an associate's degree from a community college in May 2000. He received a certificate in supervision and industrial management in May 2012 and a certificate in fundamental leadership in June 2013. He received a bachelor of arts degree in business administration and technology management in May 2014. He is currently enrolled in a graduate program and expects to receive a master's degree in business administration in May 2016.

At the hearing, Applicant stated that he previously worked for his current employer from 2003 to 2005, worked at a shipyard in another state from 2005 to 2007, and began his current job in 2007 (Tr. 21.) His statement is inconsistent with his SCA. According to his SCA, he worked as an electrician for a defense contractor from September 2005 to September 2006. He left this job for what he believed was a better

² AX E was marked but not admitted. There is no AX E, for the reasons set out in the discussion of SOR ¶ 1.c at page 3, *infra*.

job and worked in the private sector from September 2006 to November 2006, when he was fired. He was unemployed until January 2007. He worked as an electrician for a private yacht builder from January to April 2007, and for a temporary placement company from April 2007 until he began his current job. (GX 1 at 12-16.)

All the debts alleged in the SOR are reflected on Applicant's credit bureau reports (CBR) dated March 14, 2014, and January 15, 2015. (GX 2; GX 3.) The evidence regarding the delinquencies alleged in the SOR is summarized below.

SOR ¶¶ 1.a and 1.b (failure to file state tax return for tax year 2007, tax debt of \$5,000 for tax year 2007). When Applicant submitted his SCA, he disclosed that he failed to pay state income taxes of about \$5,000. He indicated that he had filed but not paid his taxes. He explained, "[I] thought my wife had taken care of the taxes." (GX 1 at 33.) However, in his response to the SOR, he admitted that he failed to file his 2007 return. His pay was garnished for \$80 per week, and the state tax debt was paid in full in December 2014. (AX A.) Regarding his reason for failure to file his return, he testified that he had worked in another state from 2005 to 2007 and did not know which state's return he was required to file, but he admitted that he did not file returns in either state. (Tr. 32, 37-38.)

SOR ¶ 1.c (federal tax lien filed in 2010 for \$18,888). In his answer to the SOR, Applicant denied this debt. He stated that he had a payment agreement with the IRS through which he is paying \$161 per month, and that his balance was \$2,120. At the hearing, he testified that he had withdrawn money from his 401(k) retirement account on several occasions to pay his basic living expenses, but he did not pay taxes on the withdrawals. He admitted that he intentionally did not report his 401(k) withdrawals for five or six tax years, believing that he would not be caught. (Tr. 33, 39-40.) He also admitted that he would not have paid the taxes if he had not been caught. (Tr. 66-67.) He testified he set up his payment plan in September 2014, but he admitted that he had not made consistent payments. Instead, he has depended on the seizure of his tax refunds to pay the debt. (Tr. 41-42.) He submitted an original copy of a letter from the IRS regarding the amount of his tax debt. I marked the document as AX E, and returned it to him with instructions to make a copy after the hearing and submit the copy so that he could retain the original for his personal records. (Tr. 26-27.) He did not resubmit AX E. However, he submitted subsequent correspondence from the IRS documenting a payment agreement for \$100 per month, beginning in May 2015. (AX G.)

SOR ¶ 1.d (deficiency after repossession of a vehicle, charged off for \$8,871.) In his answer to the SOR, Applicant admitted that he owed a deficiency after his vehicle was repossessed, but he disputed the amount. After the hearing, he submitted documentation of an agreement to settle the debt for \$4,000. The agreement requires a down payment of \$500 and 24 payments of \$145, beginning on April 17, 2015. (AX F.) Although I kept the record open until April 22, 2015, he did not submit evidence that he made the down payment or the April payment.

SOR ¶ 1.e (charged-off debt to credit union for \$9.) In his answer to the SOR, Applicant denied this debt and stated that the credit union had been paid in full. At the hearing, he presented documentary evidence of payment in full. (AX B.)

SOR ¶ 1.f (delinquent tuition debt placed for collection for \$4,253). Applicant testified that this debt was incurred because he registered for some classes but dropped them when his work schedule made it impossible to keep up with the course work. He testified that he called someone at the university, who assured him that his financial liability for dropping the course could be resolved. He admitted at the hearing that he did not follow up and that he forgot about the debt until he received the SOR. (Tr. 58-59.) After the hearing, he submitted a document from the collection attorney reflecting a \$177 payment on April 15, 2015, but the document does not reflect a payment agreement or other resolution of the debt. (AX H.)

Applicant's weekly take-home pay is about \$1,100. His monthly rent is \$629. He has no car payment, and his credit card accounts are current. He sends his parents \$100 per month. He spends about \$600 per month on his son's college expenses. His net monthly remainder is usually \$300-\$400. (Tr. 43-48.)

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 F, Financial Considerations

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 in his answer to the SOR, his CBRs, and his testimony at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(d): deceptive or illegal financial practices such as . . . income tax evasion;³ and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

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;

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

AG ¶ 20(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.

³ The SOR does not allege tax evasion or tax fraud. It merely alleges the debt. Thus, tax evasion or tax fraud may not be an independent basis for denying Applicant's application for a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the manner in which the federal tax debt was created for these limited purposes.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not established. Applicant's SCA reflects a period of unemployment, but it occurred after he was fired, which is not a condition beyond his control. The record contains no other evidence of conditions beyond his control.

AG ¶ 20(c) is not established. There is no evidence of financial counseling, and Applicant's financial situation is not yet under control.

AG ¶ 20(d) is not established for the state tax debt alleged in SOR ¶ 1.b, because it was satisfied by involuntary garnishment. Payment by involuntary garnishment, "is not the same as, or similar to, a good-faith initiation of repayment by the debtor." ISCR Case No. 09-05700 (App. Bd. Feb. 24, 2011), citing ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009). A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Thus, payment of the tax debt does not mitigate Applicant's failure to timely file his state tax return as alleged in SOR ¶ 1.a.

AG ¶ 20(d) is not established for the federal tax debt alleged in SOR ¶ 1.c. Applicant claimed that he negotiated a payment agreement in September 2014, but he admitted that he had not consistently made payments under the plan. Instead, he has relied on involuntary seizures of his tax refunds. He did not resubmit AX E, the document reflecting the current balance due on his federal tax debt. The first payment under the payment agreement in AX G is not due until May 2015. In light of his track record of erratic payments, I am not confident that he will comply with his most recent payment agreement.

AG ¶ 20(d) is not established for the repossession deficiency alleged in SOR ¶ 1.d, because Applicant submitted no evidence of compliance with the payment agreement. It is established for the \$9 debt to the credit union alleged in SOR ¶ 1.e. It is not established for the delinquent tuition debt alleged in SOR ¶ 1.e, because Applicant submitted evidence of only one \$177 payment and no evidence of a payment agreement.

AG ¶ 20(e) is established for the deficiency after repossession in SOR ¶ 1.d, because Applicant successfully challenged the amount of the debt and received a settlement offer for a substantially lesser amount. It is not established for the other debts alleged in the SOR.

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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant gave conflicting explanations for his failure to file his state tax return for 2007. He admitted filing fraudulent federal tax returns. The actions he has taken to resolve his debts have been motivated by his desire to obtain a security clearance, not by a sense of obligation to his creditors.

After weighing the disqualifying and mitigating conditions under Guideline 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 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.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.d: **Against Applicant**

Subparagraph 1.e: **For Applicant**

Subparagraph 1.f: **Against Applicant**

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge