



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-00841
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: Dave Zobel, Esq.

05/12/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on April 10, 2014. On August 20, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF 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 answered the SOR on September 22, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 21, 2015, and the case was assigned to me on January 12, 2016. On January 15, 2016, the Defense Office of Hearings and Appeals (DOHA) notified

Applicant that the hearing was scheduled for February 5, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through I and 1 through 29, which were admitted without objection.¹ I kept the record open until March 7, 2016, to enable him to submit additional documentary evidence. He timely submitted AX J through P, which were admitted without objection. DOHA received the transcript (Tr.) on February 16, 2016.

Findings of Fact

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

Applicant is a 53-year-old network security operations manager employed by federal contractors since 1997. He joined the U.S. Army Reserve (USAR) in 1983. After graduating from college in 1987 with a degree in computer science, he served on active duty from 1987 to 1996. After he was released from active duty, he remained in the USAR, attaining the rank of colonel, until he retired on January 1, 2016. (Tr. 35.) He was mobilized and deployed to Kuwait and Iraq from August 2006 to August 2007. He was mobilized again from February 2008 to January 2011 and assigned to duty stations in the United States. He was mobilized in August 2012, served in Afghanistan until June 2013, and served in the United States until October 2013. (AX 1; AX 2.) He has held a security clearance for almost 30 years.

Applicant consistently received strong officer evaluation reports as a USAR officer. (AX 19-24.) He deferred completion of the non-resident Army War College course to deploy to Afghanistan as the deputy commander of a signal unit. He applied for reinstatement in the course upon his return and was supported by the commanding general of his deployed unit and another general officer. (AX 26 and 27.)

Applicant married in May 1990, separated in February 2008, and divorced in June 2014. He and his ex-wife have two adult children, ages 26 and 22. (GX 1 at 23.) His ex-wife has a 34-year-old son from a previous relationship. Applicant delayed filing his petition for divorce to enable him and his wife to complete 20 years of marriage and thereby make his wife eligible for military benefits when he retired from the USAR. (Tr. 46.)

The SOR alleges nine delinquent debts. The evidence concerning these debts is summarized below.

¹ AX 1 through 29 contain Applicant's biographical data and character references. AX A through I address the merits of SOR ¶¶ 1.a through 1.i, with each exhibit keyed to an SOR subparagraph. AX J through P update the information submitted at the hearing.

SOR ¶ 1.a: medical bill for \$120. This debt became delinquent in January 2011. It was placed for collection in February 2013, while Applicant was deployed to Afghanistan. (GX 7 at 1.) Applicant paid the debt in full on February 2, 2016. (AX A.)

SOR ¶¶ 1.b and 1.e: second mortgage on marital home, past due for \$15,954; and home-mortgage loan in foreclosure with a balance of about \$440,910. Applicant and his wife purchased the marital home in October 2004 for \$530,000. They financed the purchase with two loans. One loan was for \$468,800, secured by a first mortgage, and the other was for \$58,602, secured by a second mortgage. (GX 3 at 6.) The loan secured by the first mortgage was for a fixed interest rate for the first five years and then became a variable-rate loan. After the initial five years, the interest rate increased significantly. (Tr. 148.) The loan payments were automatically deducted from a joint account. (Tr. 40-42; GX 2 at 5.)

Before Applicant was recalled to active duty in 2008, he was earning about \$55,000 per year from his civilian employer and about \$22,000 as a member of the USAR. His wife earned about \$25,000-\$30,000 per year. (Tr. 46-47.)

When Applicant and his ex-wife separated, she remained in the marital home, and Applicant established a separate household. They kept their joint bank account, but each also opened a separate bank account. Applicant deposited sufficient funds in the joint account to cover the loan payment and his wife's household expenses. In 2011, Applicant was notified that he had missed three payments on the home loan. He suspected that his then wife diverted the funds he had deposited in the joint account, but she denied it. (Tr. 148-51.) He could not afford to make up the three payments. He invoked the Servicemembers Civil Relief Act to preclude foreclosure, since he was on active duty. He applied for refinancing the loan under the Home Affordable Mortgage Program (HAMP) and some other federal government programs. At this point, the housing market had collapsed and he owed more than the house was worth.

Processing the application for a HAMP refinancing was complicated by Applicant's deployment to a combat zone. Their divorce had become contentious, and his wife was uncooperative. They missed the first deadline for a HAMP refinancing, and their second attempt was pending when Applicant returned from Afghanistan in July 2013. The second HAMP application was denied because Applicant's income was too high. (Tr. 152.) Applicant's civilian employer transferred him to another location farther away from the marital home, where he established a separate residence.

The home was flooded by a broken water pipe in March 2015 and required repairs costing about \$22,676. (AX 7.) In June 2015, Applicant's insurance company issued a check for about \$73,000 to cover the repairs as well as other damage attributed to broken water pipe. The check was payable to Applicant, his ex-wife, and the mortgage lender. The mortgage lender was unwilling to endorse the check to enable Applicant to pay the contractor who repaired the damage. At one point, the lender lost the check, forcing Applicant to arrange for another check to be issued. (AX 9 at 2.) It

took Applicant and his attorney until January 2016 to obtain the endorsement of the mortgagor's authorized agent on the check.

Applicant was hoping for a short sale of the home after it was repaired. However, this option was preempted when the mortgage lender foreclosed on the home in May 2015. (AX 9 at 1.) The balance due after the foreclosure sale was \$189,992. (AX 9.) On January 25, 2016, the mortgage lender paid the contractor \$22,676 for the repairs and applied \$51,073 to the deficiency balance due after the foreclosure sale. (AX 9-17.) On February 10, 2016 (five days after the hearing), the lender offered a settlement for \$138,958. (AX J; AX K.)

The second mortgage loan became delinquent in June 2012, with a balance due of \$40,027. (GX 7 at 4.) As of February 11, 2016, the amount past due was \$20,616, and the outstanding principal was \$40,027. (AX L.) As of March 4, 2016, the lender computed the current payoff balance to be \$50,385. At the time of the hearing, Applicant and his attorney are gathering documentation (W-2 forms, several months of checking account statements, two years of tax returns, and other financial statements) to support an offer to resolve the outstanding loan for a lesser amount. (AX J.)

SOR ¶ 1.c: credit-card account charged off for about \$1,036. This joint account was opened by Applicant and his ex-wife in August 2000. It first became delinquent in June 2012, while Applicant was in Afghanistan. (GX 7 at 4.) Applicant paid this account in full in June 2015. (AX 5 at 9; AX C.)

SOR ¶ 1.d: charged-off account, no account number, description of the debt, date, or amount alleged.² After extensive research, Applicant discovered this account was a membership in an officer's club where he had been stationed while on active duty. The club manager informed him that he never had an account with the club. Normal military procedures would have required Applicant to resolve any account he had with the officers' club before he would have been permitted to depart from the installation. (Tr. 110-11.) This debt is reflected in Applicant's CBRs as disputed with a high balance of \$169, closed by credit grantor, and paid after being charged off. (GX 7 at 6; AX 5 at 6.)

SOR ¶ 1.f: charged-off debt for \$448, no account number, description of account, or date alleged. This account is a credit-card account. It was not listed in Applicant's July 2015 CBR, but it was listed in his December 2014 CBR. It was opened in September 2007, and the last activity on the account was in June 2010, while

² The allegations in SOR ¶¶ 1.d, 1.f, and 1.g do not comply with the specificity requirement of Directive ¶ E3.1.3, which requires that the SOR "shall be as detailed as the national security permits." Applicant denied SOR ¶ 1.g in his answer to the SOR, stating that he was unable to find any information about this debt. With the assistance of his attorney and extensive research, he was able to identify the specific debts involved in SOR ¶¶ 1.d, 1.f, and 1.g. Therefore, I conclude that he was not prejudiced by the defective SOR. It is unlikely that the typical *pro se* applicant could have adequately identified these debts.

Applicant was on active duty (GX 6 at 2; AX 1.) Applicant paid the debt in full in May 2015. (AX F.)

SOR ¶ 1.g: collection account for \$269, no account number, date, or description of the debt alleged. This debt is a telephone bill referred for collection in January 2014. (GX 6 at 2; AX 6 at 11.) Applicant paid the debt in full on February 1, 2016. (AX G.) He testified that he was not sure it was his debt, but he paid it to remove it from his credit record. (Tr. 116.)

SOR ¶ 1.h: medical bill referred for collection for \$234. This debt was referred for collection in March 2012. (GX 6 at 2.) Applicant paid this debt in May 2015. (AX H.) It is not reflected in his July 2015 CBR (GX 7.)

SOR ¶ 1.i: charged-off telephone bill for \$143. This debt was referred for collection in January 2012. (GX 6 at 2.) Applicant paid it in full on February 2, 2016, even though he was not sure it was his debt. (AX I; Tr. 123.)

In a personal subject interview in July 2014, Applicant disclosed that he did not file his federal and state income tax returns for tax years 2012 and 2013. He attributed his failure to preoccupation with the divorce. (GX 2 at 5.) He filed the returns in July 2014, after his divorce was completed. He did not owe any federal or state taxes for 2012 and 2013. He was entitled to a federal tax refund of \$3,704 for 2013, which was applied to a federal tax debt for 2009. He was unaware of the tax debt for 2009 until December 28, 2015, when he was notified that his refund was applied to a tax debt of \$15,162. (AX M.) He does not know how why he owed federal taxes for 2009, because his wife filed the 2009 returns while he was deployed. He is trying to obtain more information with the IRS, with a view toward resolving the debt. (Tr. 157-58; AX J at 2.) His failure to timely file his federal and state returns and his federal tax debt for 2009 were not alleged in the SOR.

When Applicant and his wife were finally divorced in June 2014, Applicant had spent about \$17,000 in legal fees, including \$10,000 paid to his ex-wife's attorney. He was paying \$4,000 per month for spousal and child support pending the divorce. The divorce decree required him to pay \$3,000 per month in spousal support for five years. His daughter now lives with him, and he no longer pays child support.

Applicant's current gross monthly pay is about \$9,469. His deductions from gross pay, including \$3,000 per month for spousal support, are about \$5,192. His net monthly expenses are about \$3,990, including his car payments, which are current. His net monthly income is about \$1,202. His spousal support obligation will terminate in June

2019. (AX 18; Tr. 126.) His ex-wife will receive one-half of his military retired pay when he begins to collect it at age 56.³ (Divorce decree, attached to answer to SOR.)

Applicant owns a 9-year-old truck and a 16-year-old compact SUV. He bought the SUV for his daughter when she graduated from high school. (Tr. 138-29.) He has about \$17,806 in a credit union certificate of deposit; \$5,094 in his savings account; \$4,136 in his checking account, and \$1,760 in an investment account. His current outstanding debts are a car loan with a balance of \$11,816; the deficiency after foreclosure of the first mortgage of \$138,959; the balance due on the second mortgage loan of \$50,385; and a federal tax debt of \$15,162. (AX P.) He completed a credit-counseling course in January 2016. (AX 25.)

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.

³ Retired members of the USAR generally are not eligible to receive retired pay until they reach age 60. However, a member of the USAR who was recalled to active duty after January 2008 has the age requirement reduced by three months for each cumulative of 90-day period of active duty. (<http://militarypay.defense.gov/Pay/Retirement/Reserve.aspx>.)

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 and the documentary evidence submitted at the hearing 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 disqualifying condition in AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required . . .") may not be an independent basis for denying a clearance, because it was not alleged in the SOR. However, the unalleged conduct may be considered to assess Applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether he 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 it for these limited purposes.

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.

AG ¶ 20(a) is not fully established, because Applicant's delinquent debts were numerous and recent. However, Applicant's delinquent debts were incurred when he was deployed to a combat zone and in the middle of a contentious divorce. He is now retired from the USAR and divorced, making further financial problems unlikely to recur.

AG ¶ 20(b) is established. Applicant encountered several conditions largely beyond his control: the downturn in the housing market, his multiple mobilizations and deployment to a combat zone, the water damage to his home, his marital separation, and the failure of his now ex-wife to make the payments on the mortgage loans and household bills as agreed. After he was able to identify the debts alleged in SOR ¶¶ 1.c,

1.d, and 1.f-1.i, he resolved them. He maintained contact with the creditors in SOR ¶¶ 1.b and 1.e, attempted to obtain a loan modification, and was contemplating a short sale when the creditor foreclosed on the property. His efforts were hampered by the dilatory conduct of the creditor in SOR ¶ 1.b regarding the insurance settlement of the water damage to his home. He remains committed to resolving the debts in SOR ¶¶ 1.b and 1.e, and he likely would have made more progress if the insurance settlement had not dragged on until 11 days before the hearing. He and his lawyer have maintained contact with the creditors in SOR ¶¶ 1.b and 1.e. His extraordinary efforts to track down his creditors in spite of the vague allegations in the SOR and his track record of diligence in resolving most of the debts in the SOR indicate that he will continue in his efforts to resolve the his remaining debts.⁴

AG ¶ 20(c) is partially established. Applicant has received extensive advice from his lawyer and he enrolled in a credit-counseling course in January 2016. However, he has not had sufficient time to establish “clear evidence” that the debts in SOR ¶¶ 1.b and 1.e are being resolved. His financial situation will improve substantially when he begins receiving military retired pay and his spousal support obligation ends.

AG ¶ 20(d) is established for all the debts alleged in the SOR except SOR ¶¶ 1.b and 1.e. Applicant has not had sufficient time to negotiate a payment plan or other resolution of these two debts.

AG ¶ 20(e) is not established. Applicant expressed doubt that the debts alleged in SOR ¶¶ 1.d, 1.g, and 1.i, but he submitted no documentary evidence supporting his debt, and he ultimately paid the debts.

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

⁴ Administrative judges do not have authority to grant conditional clearances. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar.1, 2000). See *also* ISCR Case No. 01-24328, 2003 WL 21979745 at *2 (App. Bd. May 23, 2003). However, If Applicant fails to continue his efforts to resolve his remaining delinquent debts, “[t]he Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012).

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 completed more than 20 years in the USAR. He was mobilized and deployed to combat zones three times. He has held a security clearance for almost 30 years, apparently without incident. He was candid, sincere, and credible at the hearing. He and his attorney spent an extraordinary amount of time and effort to track down the vague allegations in the SOR and resolve them. He voluntarily disclosed his failures to timely file his tax returns. He was unaware of the federal tax debt until shortly before the hearing, and he is addressing it, even though it was not alleged in the SOR.

Like many deployed servicemembers, Applicant was required to entrust many financial responsibilities to family members. He was diligent in his efforts to provide his ex-wife with the benefits of being a military spouse, but his ex-wife betrayed his trust by failing to pay the mortgage loans and household expenses with the funds he deposited in their joint account.

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.) Applicant's long service to the national defense and his responsible efforts to resolve his financial problems demonstrate his sound judgment, reliability, and trustworthiness.

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 mitigated the security concerns raised by his delinquent debts. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant continue his 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): FOR APPLICANT

Subparagraphs 1.a-1.i:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge