



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-06914

Appearances

For Government: Richard Stevens, Esq., Department Counsel

For Applicant: *Pro se*

02/09/2016

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On April 27, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOD CAF took that action under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

The SOR detailed reasons why DOD adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant a security clearance. On May 26, 2015, Applicant answered the SOR and requested a hearing. The case was assigned to me on August 26, 2015. The Defense

Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 3, 2015, and the hearing was convened as scheduled on September 23, 2015.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4. Department Counsel later withdrew GE 2 (an unauthenticated personal subject interview) from consideration, and it was not admitted into evidence. Applicant testified and submitted Applicant Exhibit (AE) A through E. The record of the proceeding was left open until October 23, 2015, to provide Applicant the opportunity to submit additional matters. Applicant timely submitted additional documents that were marked as AE F through J. Except for GE 2, all exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on October 1, 2015.

Preliminary Matters

Department Counsel made a motion to amend SOR ¶ 1.h to expand the period for which Applicant allegedly failed to file his federal income tax returns from one year (2009) to four years (2009 through 2012). Applicant had no objection to that motion. The motion was granted.¹

Findings of Fact

Applicant is a 45-year-old employee of a defense contractor. He has been working for that contractor since December 2013. He graduated from high school in 1988. He earned an associate's degree in 1994 and a bachelor's degree in 1997. He is married and has two children, ages 15 and 18. This is the first time that he is seeking a security clearance.²

As amended, the SOR alleged that Applicant had eight delinquent debts totaling \$17,279 and failed to file his federal income tax returns for 2009 through 2012 as required. He admitted each allegation with explanations. His admissions are incorporated as findings of fact. Credit reports (GE 3 and 4) established the alleged debts.³

Since 2006, Applicant was unemployed for about six to eight months. Specifically, he was unemployed from December 2008 to March 2009, from August to October 2006, and from February to March 2006. He also testified that he was unemployed for about nine months in 2001; he then worked for about eleven months

¹ Tr. 54-57. The record of the proceeding was initially left open for one week, but was later extended to a month to provide Applicant an additional time to address the amendment to the SOR.

² Tr. 5-6, 36, 45-46; GE 1.

³ Applicant's Answer to the SOR.

before becoming unemployed again for another nine months. Applicant also attributed his financial problems to raising a family on a single income.⁴

SOR ¶ 1.a – collection account for \$11,834

a. This is a student loan that had a date of last activity of January 2010. Applicant testified that he was participating in a rehabilitation program for this debt. The program was originally slated to last for nine months from August 2014 to June 2015. However, due to a paperwork error (details unknown), the program was extended to December 2015. He was initially paying \$5 per month under that program, but his monthly payments were later increased to \$15. A letter from the creditor dated May 2015 reflected the principle balance was \$9,965, interest charges were \$2,217, fees and costs were \$2,965, and the total balance was \$15,148. He expected that upon completion of the rehabilitation program the debt would be removed from collection status. He testified that he was making the rehabilitation payments.⁵

b. This loan was for education completed over 17 years ago. Applicant indicated his student loan debt was about \$25,000, and he paid about half that amount. His monthly student loan payments were about \$128. When he was unemployed, he was unable to make the payments. He believed the loan had an eight percent interest rate. He failed to provide proof of any payments toward this debt.⁶

SOR ¶¶ 1.b and 1.d – collection accounts for \$704 and \$788. These are credit card accounts that both had dates of last activity of April 2008. Both are being handled by the same collection agency. Applicant testified that both accounts no longer appear on his credit report. After contacting the collection agency, he expected the agency to combine both debts and send him further paperwork. In his post-hearing submission, he provided no documents concerning this debt.⁷

SOR ¶ 1.c – collection account for \$811. This is a television service account that was assigned for collection in April 2013. Applicant testified that he originally had a repayment agreement of \$137 per month for this debt. He claimed that he paid off another debt involving this creditor, but the creditor did not remove that debt from his credit report so he wanted to negotiate repayment of this debt to ensure it would be removed from his credit report once it was paid. At the time of the hearing, he was waiting for a letter from the creditor. In his post-hearing submission, Applicant provided

⁴ Tr. 46-48, 51-52; GE 1.

⁵ Tr. 24-26, 29-36, 50; AE D, E; Applicant's Answer to the SOR.

⁶ Tr. 29-36.

⁷ Tr. 26; Applicant's Answer to the SOR.

documentation that he made a payment of \$189 toward this debt before the hearing (June 2015), but submitted no other documents concerning this debt.⁸

SOR ¶ 1.e – collection account for \$227. This is a medical account that was assigned for collection in February 2010 and had an activity date of April 2008. Applicant testified that he paid this debt, but could not find paperwork confirming its payment. He intended to contact the creditor to obtain a document showing its payment. He provided no further documents about this debt in his post-hearing submission.⁹

SOR ¶ 1.f – collection account for \$161. This is a medical account that was assigned for collection in January 2012. Applicant testified that he entered into a repayment plan for this debt and testified it was paid. In his post-hearing submission, he provided documentation showing this debt was paid in two installments in May and July 2015.¹⁰

SOR ¶ 1.g – collection account for \$137. This was an insurance account with no listed assignment or activity dates. Applicant testified that he paid this debt. In his post-hearing submission, he provided documentation showing this debt was paid in two installments in May and June 2015.¹¹

SOR ¶ 1.h – failure to file federal income tax returns for 2009 through 2012

a. In his Electronic Questionnaire for Investigation Processing (e-QIP) dated January 28, 2014, Applicant indicated that he failed to pay his federal income taxes for 2009 and had lost documents for that year, but had since filed his federal income tax return for that year.¹²

b. At the hearing, Applicant testified that he did not file his federal income tax returns for 2010, 2011, and 2012 until 2014. He did not know why he did not disclose his failure to file those tax returns in his e-QIP, but thought he did not disclose that information because his tax preparer was working on those tax returns. He also indicated that his earlier statement that he filed his federal income tax return for 2009 was not accurate. He stated that, when he gave his tax preparer his tax paperwork for 2008 and 2010 through 2013 federal income tax returns, he thought he had included the 2009 paperwork, but had not done so. He indicated that he learned his 2009 federal income tax return was missing when he received the SOR.¹³

⁸ Tr. 26-27; AE D, J; Applicant's Answer to the SOR.

⁹ Tr. 27-28, 48-49; Applicant's Answer to the SOR.

¹⁰ Tr. 27-28, 49-50; AE D, J; Applicant's Answer to the SOR.

¹¹ Tr. 28; AE J; Applicant's Answer to the SOR.

¹² Tr. 28; GE 1; Applicant's Answer to the SOR.

¹³ Tr. 40-44.

c. Applicant further testified that, due to the large the amount of federal income taxes he owed for 2009 (discussed below), he decided to wait a year or two to file his tax returns so that his expected tax refunds for the subsequent years would offset the amount owed for 2009.¹⁴

d. In his post-hearing submission, Applicant provided portions of his 2009 federal income tax return. Those documents do not reflect when he filed that tax return. He also provided a copy of his 2014 IRS Form 1040 that reflected it was prepared in April 2015. He did not provide documentation establishing that he filed his 2010 through 2012 federal income tax returns.¹⁵

SOR ¶ 1.i – delinquent federal taxes in the amount of \$2,517

a. In his e-QIP, Applicant estimated that he owed \$12,500 for his 2009 federal income taxes. He further stated that he was working with the IRS to set up a payment plan for the balance, and the IRS was reviewing his 2010 to 2013 tax returns.¹⁶

b. At the hearing, Applicant stated that, when he was laid off in December 2008, he received a severance package of \$52,000. The payments were made in biweekly payments that continued into the following year. About three months after being laid off, he was hired in another job, but still continued to receive the severance payments from his previous job. He also indicated that he won \$2,700 in the lottery and cashed out his 401(k) account because he did not initially know how long he would be unemployed. These events made his taxes for 2009 higher than expected.¹⁷

c. At the hearing, Applicant provided an IRS “reminder” dated August 31, 2015, indicating that he then owed only \$29.96 for his 2009 taxes. He also provided a copy of a check showing he paid \$29.96 to the Federal Government on September 10, 2015. Additionally, he provided at the hearing (1) an IRS second reminder dated August 21, 2015, indicating he owed \$483 for his 2012 taxes and (2) a signed IRS Installment Agreement dated September 10, 2015. In that agreement, Applicant indicated he can pay \$50 per month toward the tax debt.¹⁸

At the hearing, Applicant testified that he earned about \$79,000 annually. He stated that his wife did not work outside the home until about a year ago. She initially worked on an inconsistent basis, but began working full-time about three months before

¹⁴ Tr. 44-45

¹⁵ AE F-H.

¹⁶ Tr. 28, 36-45; GE 1.

¹⁷ Tr. 38-46.

¹⁸ AE A-C.

the hearing. She earns about \$1,400 per month. He estimated that he had about \$700 to \$900 per month in discretionary income.¹⁹

Applicant's most recent credit reports reflect that he owed \$459 on a telecommunications account that was placed for collection. This account was not alleged in the SOR. In his post-hearing submission, he provided a document showing he authorized a debit of his bank account in the amount of \$76 for this debt.²⁰

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict

¹⁹ Tr. 51-53.

²⁰ AE D, E, I. This debt will not be considered in applying the disqualifying conditions.

guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

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

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, and local income tax returns as required or the fraudulent filing of the same.

The evidence established that Applicant accumulated delinquent debts that he was unable to pay for an extended period, and he failed to file his 2009 through 2012 federal income tax returns as required. AG ¶¶ 19(a), 19(c), and 19(e) apply in this case.

Five financial considerations 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 experienced periods of unemployment. However, his last period of unemployment ended over six years ago. Most of the alleged debts have dates of last activity or dates of assignment for collection that are subsequent to his last period of unemployment. He failed to present sufficient evidence to show he has acted responsibly in addressing his delinquent debts in the past six years. The actions he took to address his debts appear only to have occurred after the security clearance review process began. AG ¶ 20(b) partially applies.

Although Applicant paid the debts in SOR ¶¶ 1.f, 1.g, and 1.i, he failed to establish a consistent track record of payments toward the other debts. His financial problems are recent and ongoing. Insufficient evidence was presented to establish that his financial problems are under control, will be resolved within a reasonable period, and are unlikely to recur. His delinquent debts and his failure to file his income tax returns as required continues to cast doubt on his current reliability, trustworthiness, and good judgment. No documentation was presented to show he has a legitimate basis for disputing any of the debts. AG ¶¶ 20(a), 20(c), 20(d), and 20(e) are not applicable. Financial security concerns remain despite the presence of some mitigation.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative 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.

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 conducting the whole-person analysis, I have considered Applicant's work history and other information about him in the record. Nonetheless, the record evidence still leaves me with questions and doubts as to his eligibility and suitability for a security clearance. I find that Applicant failed to mitigate the security concerns under the financial considerations guideline.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

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|---------------------------|-------------------|
| Paragraph 1, Guideline F: | Against Applicant |
| Subparagraphs 1.a-1.e: | Against Applicant |
| Subparagraphs 1.f, 1.g: | For Applicant |
| Subparagraph 1.h: | Against Applicant |
| Subparagraph 1.i: | For Applicant |

Decision

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

James F. Duffy
Administrative Judge