



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-02304
)	
Applicant for Security Clearance)	

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

05/02/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 19, 2018. On October 29, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on November 19, 2018, and requested a hearing before an administrative judge. On January 3, 2019, Department Counsel amended the

SOR by adding one additional allegation under Guideline F. Department Counsel was ready to proceed on January 10, 2019, and the case was assigned to me on February 26, 2019. On March 4, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 28, 2019. On March 12, 2019, the hearing date was changed to March 27, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or any documentary evidence. I kept the record open until April 19, 2019, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. DOHA received the transcript (Tr.) on April 11, 2019.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.k and 1.n. He admitted the allegation in SOR ¶ 2.a with an explanation. He denied the allegations in SOR ¶¶ 1.m, 1.n, and 1.o. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a financial analyst employed by a defense contractor since June 2018. (Tr. 29.) He served on active duty in the U.S. Navy from April 1990 to April 1994 and was honorably discharged. He enlisted in the U.S. Navy Reserve (USNR) in 1996. He worked for a utility company from December 1999 until he was called to active duty in the USNR in February 2009. He remained on active duty in various locations until June 2015. In August 2015, he retired from the USNR as a petty officer first class (pay grade E-6).

Applicant worked for a short time as a deputy sheriff after he was released from active duty. He worked for a defense contractor from December 2015 to October 2016. He was a civilian employee of the U.S. Navy from October 2016 until he was terminated in September 2017. He was then employed by a defense contractor from February to June 2018, when he began his current job. He received a security clearance at the beginning of his active duty in 1990.

Applicant married in August 2005, separated in January 2016, and is now divorced. No children were born during the marriage. While married, he had four stepchildren, ages 28, 27, 21, and 20.

The SOR alleges a Chapter 13 bankruptcy petition, a Chapter 7 bankruptcy petition, and 12 delinquent debts reflected in credit reports from January 2018 (GX 3) and September 2018 (GX 2.) The evidence reflecting the bankruptcies and delinquent debts is summarized below.

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

SOR ¶¶ 1.a and 1.b: Bankruptcies. Applicant and his wife filed a joint Chapter 13 bankruptcy petition in February 2014, and it was dismissed in October 2014 for failure to make payments. They intentionally stopped making payments when they decided that a Chapter 7 bankruptcy better suited their financial needs. They filed a joint Chapter 7 bankruptcy petition in November 2014, and they received a discharge in March 2015. Their petition listed assets of \$96,862 and liabilities of \$419,060. The debts included first and second mortgages on a home, multiple vehicle repossessions, medical and dental bills, debts related to care and maintenance of horses and other animals, utility bills, and various consumer debts.

Applicant attributed the bankruptcies to delinquent debts his wife brought into the marriage and her surreptitious and excessive spending after they were married. (Tr. 36.) The Chapter 7 bankruptcy petition reflects student loans incurred by his ex-wife from 2003-2007 totaling \$57,413. All other debts attributed to his ex-wife (a student loan for \$17,766; an overpayment by the Department of Veterans Affairs; and multiple credit-card accounts and collection accounts) were incurred after their marriage. (GX 5.)

SOR ¶¶ 1.c-1.j: Eight delinquent student loans totaling about \$28,565. The September 2018 credit report reflects that Applicant has disputed these debts. (GX 2.) The record does not reflect the basis for the disputes. Applicant testified that he began incurring student loans in 1998 or 1999 and that his last student loan was incurred in 2005. (Tr. 48.) He earned an associate's degree in June 2010 and took some additional courses after receiving his degree. Payments on the loans were deferred until about 2012. (Tr. 50.) He did not contact the lenders or collection agencies until he began gathering information for his Chapter 7 bankruptcy petition in 2015. (Tr. 51.) He contacted the collection agencies again after he received his Chapter 7 discharge. In August 2018, he entered into a rehabilitation program providing for ten consecutive monthly \$36 payments. He had made four payments by automatic debit as of the date of the hearing. (AX D; Tr. 52-55.)

SOR ¶ 1.k: Car loan charged off for \$147. In his answer to the SOR, Applicant stated that this was a car loan he co-signed for his ex-wife. The creditor for this debt is the same as the creditor alleged in SOR ¶ 1.o. This debt was for a vehicle that was returned to the dealer as a "lemon." (GX 1 at 43.) It appears to have been included in the judgment alleged in SOR ¶ 1.o.

SOR ¶ 1.l: Government debt of \$91 referred for collection. In his answer to the SOR, Applicant stated that this debt was for his wife's uniforms when she was employed at a military hospital. (Tr. 58.) He has taken no action to dispute it or otherwise resolve it.

SOR ¶ 1.m: Government debt for \$85. This debt is listed in the credit report from January 2018 as a "government miscellaneous debt." (GX 3 at 6.) Applicant testified that he contacted the collection agency listed in the credit report and was informed that this debt was incurred by his ex-wife when she was employed at a military hospital. (Tr. 59.) He has taken no action to dispute or otherwise resolve it.

SOR ¶ 1.n: Medical bill referred for collection of \$118. The January 2018 credit report reflects that this debt was “open” as of November 2014 and was included in a bankruptcy petition. (GX 3 at 10.) Applicant’s Chapter 7 bankruptcy petition did not specifically list this debt, but it would have been discharged in March 2015. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even if they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat’l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010). The debt is not reflected in the September 2018 credit report. (GX 2.)

SOR ¶ 1.o: Judgment for \$18,998 for a delinquent car loan. This judgment was entered against Applicant and his wife in January 2016. (GX 4.) In his answer to the SOR, Applicant stated that this debt was for his wife’s vehicle but that he co-signed the loan. Their separation agreement makes no provision for disposition of motor vehicles or assignment of responsibility for joint debts. (AX E.) The court records reflect that a default judgment was entered, but Applicant testified that he appeared in court but his wife did not. He also testified that, after his court appearance, he discussed the debt with the creditor’s representative and was informed that he would be contacted after the vehicle was sold, but that he had no further communication with the creditor. (Tr. 63.) He did not contact the creditor again until he received the amended SOR. (Tr. 95.) In a post-hearing submission, Applicant stated he contacted the creditor and learned that the car was auctioned for \$9,800. The creditor is willing to make a payment agreement, but Applicant will not be able to afford any payments until mid-June 2019. (AX A.) The debt is not resolved.

Applicant’s net pay is about \$3,150 per month. He receives \$1,384 per month for a service-connected disability. He has a pension account from a previous employer that totals about \$21,000, but he will not use it to pay his delinquent bills because of the adverse consequences of an early withdrawal. (Tr. 64-65.)

Applicant did not file his federal income tax returns for 2015, 2016, and 2017 on time. He testified that his ex-wife was uncooperative in providing the documentation for the years they were married, and he finally decided to file separately. (Tr. 66-68.), The IRS filed a substitute tax return for him in January 2018, and he filed his 2015 return in August 2018. (AX I.) He filed his 2016 return in November 2018 and his 2017 return in June 2018. (AX G; AX H.) He filed his 2018 return on time, and he does not owe any federal income taxes. He owed about \$330 for tax year 2015, but it was satisfied by application of refunds for subsequent tax years. (AX F.)

Applicant admitted that he answered “No” to a question in his SCA asking whether he had failed to file returns or pay federal, state, or other taxes. He attributed his answer to a mistake and admitted that he should have answered “Yes.” He answered “Yes” to a question whether he was currently delinquent on any debt, because he knew he owed taxes of about \$330 for 2015. (Tr. 70-71.)

When Applicant was hired as a civilian employee of the Navy in October 2016, he was a probationary employee. In August 2017, he was terminated for unsatisfactory performance and disorderly and unprofessional conduct on two occasions. The termination notice recites that he leapt from his chair during a meeting, shouted at his supervisor, and pointed his finger in her face. (GX 6.) At the hearing, Applicant testified that his supervisor berated him at length in the presence of co-workers, cursed at him, and used the “f” word. At that point, he stood up, told her that he “had enough of her language,” and walked out of her office. (Tr. 23.)

Applicant has filed a complaint with the Equal Employment Opportunity Commission (EEOC). His complaint is pending decision by an EEOC administrative judge. In the complaint, Applicant contends that he was the victim of trumped-up charges in retaliation for accusing his supervisor of subjecting him to discrimination, harassment, and a hostile work environment based on his race (Caucasian), age (47) and sex (male). His supervisor was a 49-year-old African-American female. He accused his supervisor of using abusive and foul language, *i.e.*, repeated use of the “f” word, berating him in the presence of co-workers, falsely accusing him of mishandling a travel-document situation that occurred on a ship that was not under his authority, falsely accusing him of recording his sick leave incorrectly, refusing to approve leave, and harassing him about taking leave. (AX C.) The record reflects that his supervisor was reprimanded in July 2014 for similar conduct. (AX C, Enclosure 2.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, 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.” 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a

person's self-control, judgment, and other qualities essential to protecting classified information. A person 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).

The debt alleged in SOR ¶ 1.k appears to have been included in the judgment alleged in SOR ¶ 1.o. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I have resolved SOR ¶ 1.k in Applicant's favor.

Applicant's admissions and the documentary evidence in the record establish the remaining allegations under this guideline and are sufficient to raise the following disqualifying conditions:²

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

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;
and

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

The following mitigating conditions 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit

² The disqualifying condition in AG ¶ 19(f) ("failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required") may not be an independent basis for revoking Applicant's security clearance, because it was not alleged in the SOR. However, it 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 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 his failure to timely file his federal and state income tax returns and his federal tax debt for these limited purposes.

credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d): the individual initiated and is adhering to 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 established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is not fully established. Applicant's marital breakup and his ex-wife's excessive spending were conditions largely beyond his control. The bankruptcies were the product of financial mismanagement and preceded his marital breakup and his disputed termination of employment. His loss of employment in September 2017 may have been a condition beyond his control, but the basis for his termination is disputed and has not yet been resolved by the EEOC. In any event, he has not acted responsibly. He received a fresh financial start with his Chapter 7 discharge, but he did not initiate the rehabilitation plan for his student loans until August 2018. He has taken no action to dispute or otherwise resolve the debts alleged in SOR ¶¶ 1.l and 1.m. He contacted the creditor for the debt alleged in SOR ¶ 1.o shortly after the judgment against him was filed in January 2016, but he took no further action to resolve the debt until he received the SOR. Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. Applicants who begin to address their security-significant conduct only when their personal interests are at stake may be lacking in judgment and reliability. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

AG ¶ 20(c) is not established. Applicant received financial counseling in connection with his two bankruptcies, but his financial situation is not under control.

AG ¶ 20(d) is not fully established. Applicant's bankruptcies were a lawful course of action, but bankruptcy does not qualify as a "good-faith effort" to resolve debts. ISCR Case No. 11-08274 (App. Bd. May 2, 2013). He has made no payments on the debts alleged in SOR ¶¶ 1.l, 1.m, and 1.o. He has made only four of the ten payments required for his student loan rehabilitation program. Based on his financial track record, I am not convinced that he will adhere to any payment schedule that is eventually negotiated for his delinquent student loans, even if he completes the rehabilitation program.

AG ¶ 20(e) is not established. Applicant denied liability for the debts alleged in SOR ¶¶ 1.l, 1.m, and 1.o, but he submitted no documentary evidence showing a

legitimate basis for disputing them and no documentary evidence showing that he filed disputes with the creditors, collection agencies, or credit bureaus.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .” The following disqualifying conditions under this guideline are potentially applicable:³

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . : any disruptive, violent, or other inappropriate behavior . . . :

The SOR alleges, “[Y]ou were terminated from your employment as a government employee with [a military command] during your probationary period.” On its face, this allegation does not allege any circumstances that would raise security concerns. It alleges only the fact of termination and not the basis for it. A termination because of ineptitude, lack of required skills, or similar reasons would not raise security concerns. However, Applicant was not misled by this defective pleading, because the letter notifying him of his termination set out the factual basis for it.

Applicant contends that he was terminated in retaliation for reporting misconduct by his supervisor. Adjudication of the propriety of his termination is beyond the jurisdiction of DOHA, and the record is inadequate to determine whether Applicant committed the insubordinate acts asserted in the termination letter. Based on the limited

³ Applicant's false answer to the question in his SCA about failure to timely file or pay taxes was not alleged in the SOR and may not be an independent basis for revoking his security clearance, although a false answer could be considered for the purposes set out in footnote 2 above. However, I am satisfied that Applicant did not intentionally falsify his SCA.

record, I am not convinced that Applicant engaged in conduct that would raise security concerns. I conclude that no disqualifying conditions under this guideline are established.

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 and applying the adjudicative factors in AG ¶ 2(d).⁴

I have incorporated my comments under Guidelines F and E in my whole-person analysis, and I have applied the adjudicative factors in AG ¶ 20(d). After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation about his personal conduct, but he has not mitigated the security concerns raised by delinquent debts.

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.j: **Against Applicant**

Subparagraph 1.k: **For Applicant**

Subparagraphs 1.l-1.o: **Against Applicant**

Paragraph 2, Guideline E (Personal Conduct): **FOR APPLICANT**

Subparagraph 2.a: **For Applicant**

⁴ The factors are: (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.

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge