



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 20-01805
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

07/30/2021

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate financial concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On October 23, 2020, the Department of Defense (DoD) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DoD Directive 5220.6 *Defense Industrial Personnel Security Clearance Review Program*, (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR (undated), and requested a hearing. The case was assigned to me on April 7, 2021. A hearing was scheduled for May 27, 2021, and heard on the date as scheduled. At the hearing, the Government's case consisted of six exhibits. Applicant relied on one witness (himself) and one exhibit. The transcript (Tr.) was received on June 8, 2021.

Procedural Issues

Before the close of the hearing, Applicant asked to leave the record open to afford him the opportunity to supplement the record with the documenting of his satisfaction of his home equity loan (covered by SOR ¶ 1.a), and whether the loan that was foreclosed is covered by any state anti-deficiency statute.

For good cause shown, Applicant was granted 14 days to supplement the record. Department Counsel was afforded seven days to respond. Applicant did not supplement the record.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated two delinquent debts: one for an unsatisfied \$75,552 equity deficiency on his foreclosed home equity loan and another for a delinquent medical debt of \$271. Allegedly, these debts remain unsatisfied and outstanding.

In his response to the SOR, Applicant disputed the existence of a deficiency balance following the foreclosure of his home equity loan but admitted the allegation pertaining to a delinquent medical debt with explanations. He claimed this debt represents a dental debt arising out of his son's dentistry visit and is the result of a miscommunication between himself and son as to whether the dental bill was paid.

Findings of Fact

Applicant is a 51 year-old system administrator data for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in April 1999, separated in August 2017, and divorced in April 2021. (GEs 1 and 4; Tr. 25-26, 29) He has no children from this marriage. He earned an Associate's degree in October 1991 and reported no military service. (GE 1)

Since May 2015, Applicant has been employed by his current employer as a system administrator. (GEs 1 and 3) Previously, he worked for other employers as a security system specialist working at various levels of responsibility. He has held a security clearance since 2009, and he has never had his security clearance revoked or suspended. (GE 1)

Applicant's finances

Applicant and his ex-wife bought their residence in August 2007 for \$601,000 and placed a first mortgage on the property for approximately \$531,720. (GE 4; Tr. 29, 31) Also, in August 2007, they financed their home purchase with a \$75,552 home equity loan, secured by a second mortgage on the property. (GE 4; Tr. 30, 45-47) The loan proceeds from this loan were used to make their down payment (\$60,000) and closing costs. (Tr. 33, 45-47) At the time, Applicant was earning approximately \$80,000 annually. (Tr. 29)

In 2012. Applicant's spouse was diagnosed with a physical ailment that resulted in her missing a lot of work between 2013 and 2015 and becoming bedridden for several months in 2015, and an inability to work. (GE 2; Tr. 27-28, 37-38) After exhausting her sick leave benefits, she was denied disability benefits. Unable to make their monthly mortgage payments on Applicant's salary alone, he and his ex-spouse defaulted on both mortgages In 2013, they downsized to another residence, and voluntarily relinquished their home to their first mortgage lender in July 2015. (AE 3-4; Tr. 37-40).

Sometime in 2016, the first mortgagee initiated foreclosure proceedings. (Tr. 39) At the time of the foreclosure, Applicant and his ex-spouse owed approximately \$450,000 on their first mortgage account and \$75,082 on their second mortgage securing their home equity loan according to their most recent credit reports. (GEs 3-5)

Unclear is the sale price of Applicant's foreclosed residence. Applicant was never contacted by the first mortgagee after the sale to confirm the sale price and available excess proceeds (if any) for allocation to the second mortgage's outstanding loan. Afforded the opportunity to supplement the record with updated sale information on his foreclosed residence, he did not do so. (Tr. 41-42, 50)

For lack of information from either the first mortgage lender or Applicant, no independent assessments can be made as to whether Applicant's home equity lender was ever credited with excess proceeds from the foreclosure sale. The only available documentation of any liability of Applicant to the second mortgage holder on his home equity loan (SOR ¶ 1.a) is the detailed delinquent amount in the 2019-2020 credit reports placed in evidence by the Government that confirm Applicant's existing liability to the lender in the amount of \$78,082 (GEs 4-5; Tr. 41, 45-50), and the more recent 2021 credit report documented by Applicant that reveals no amounts owing to creditor SOR ¶ 1.a. (AE A) Without the sale and loan documentation in evidence to cross-check and assess any credit adjustments in the SOR 1.a debt, fully accurate and reliable assessments of the current status of the cannot be made. (Tr. 50-52)

Besides his delinquent home equity loan, Applicant accrued a delinquent consumer debt of \$271. (GEs 3-5) This debt represents a medical account that became delinquent in 2016 in the reported amount of \$271. Applicant's most recent May 2021 credit report credited Applicant with paying off the account in full, and Applicant confirmed his payoff of this debt. (AE A; Tr. 26)

Applicant reported a current net monthly income of \$4,124.16. (GE 3) His monthly expenses total \$3,400, which leaves him with a monthly remainder of \$728.16. He claimed bank savings of \$4,000 and a car worth \$19,000. (GE 3)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 adjudicative guidelines. These guidelines 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 overarching 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.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Financial Considerations

The Concern: 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 or regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burdens of Proof

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 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 "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), § 3.1.

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. 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

Security concerns are raised over Applicant’s accrual of a delinquent home equity loan exceeding \$78,000 that he has not resolved since the senior lender holding the first mortgage foreclosed its mortgage on the property in 2016. Uncertain is the sale price of the underlying property at the scheduled public sale and whether the sale produced enough excess proceeds to cover the second mortgagee’s (SOR 1.a) security interest in Applicant’s home equity loan. Resolved by payment is the \$271 debt covered by SOR ¶ 1.b.

Applicant’s incurring of a delinquent home equity loan secured by the creditor’s second mortgage interest in the property warrants the application of two of the disqualifying conditions (DC) of the financial consideration guidelines: DC ¶¶ 19(a), “inability to satisfy debts,” and 19(c), “a history of not meeting financial obligations.” Each of these DCs apply to Applicant’s situation.

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder’s demonstrated difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the timing of addressing and resolving debt delinquencies are critical to an assessment of an applicant’s trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Applicant’s history of financial difficulties associated with his mortgage delinquencies, limit his taking advantage of any of the potentially available extenuating and mitigating benefits covered by the financial considerations guideline.

While some states have anti-deficiency laws in place that preclude a foreclosing lender and second mortgagee holding a purchase money mortgage from obtaining a personal judgment for a deficiency on the sale proceeds of a non-judicial foreclosure of the debtor’s mortgage-secured loan to cover the second mortgagee’s subordinate interest in the foreclosed property, Applicant’s state of residence is not one of those states with an anti-deficiency law on its books. Without an anti-deficiency statute to

shield Applicant from potential deficiency, were the sale proceeds produced by the 2016 sale of Applicant's foreclosed first mortgage insufficient to cover all or part of the subordinate second mortgagee's interest in the property, the lender would be left with no recourse to any of the property's sale proceeds. In such circumstances, the creditor's (SOR ¶ 1.a) only enforcement option as a sold-out junior lien holder would be its obtaining a personal judgment against Applicant for the deficiency following the first mortgagee's foreclosure of its first mortgage and application of the ensuing sale proceeds to satisfy its first mortgage only.

Conceivably, the sale of Applicant's foreclosed residence produced enough excess sale proceeds after satisfying the first mortgagee's loan interest to cover all or a part of the SOR creditor 1.a's subordinate interest in the property. Without any more definitive post-hearing information from Applicant on the sale and availability (if any) of excess sale proceeds to cover all or a part of SOR creditor 1.a's interest in the property, the Government is entitled to rely on information contained in credit reports addressing Applicant's mortgages to assess the current debt status of Applicant's home equity loan (SOR ¶ 1.a) (GE.s 4-5). Although, the information contained in Applicant's credit reports is open to challenge for accuracy by evidence of rebuttal, mitigation, or explanation. See, e.g., ISCR Case No. 07-08925 at 3 (App. Bd. Sep. 15, 2008).

Because of Applicant's failure to provide more clarifying information on the current status of his home equity loan covered by SOR ¶ 1.a, neither MC ¶ 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," is entitled to only partial application attributable to his wife's health issues covering the years 2012-2016.

Similarly, MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is entitled to no more than nominal application to Applicant's situation. To date, Applicant is able to cite to only other non-SOR debts reported to be in good standing in his credit reports and his payoff of the \$271 medical debt covered by SOR ¶ 1.b as examples of good-faith payment initiatives.

To be sure, Applicant's produced credit reports are conflicting on the issue of Applicant's liability exposure to SOR creditor ¶ 1.a. While the earlier 2019-2020 creditor reports produced by the Government confirm the existing liability of Applicant to SOR creditor 1.a, the mortgage debt was no longer reported in Applicant's more recent 2021 credit report. Deletion of the debt could indicate satisfaction of the debt, or it could signify simply that the debt has been removed from coverage because the debt is no longer enforceable. For written contracts (inclusive of mortgage instruments), the controlling statute of limitations bar in Applicant's state of residence is three years. See § 5-101 of M stats. Because the foreclosure sale was completed in 2016, application of the state's three-year statute of limitations bar might well explain the deletion of the SOR § 1.a debt from Applicant's 2021 credit report. Whether all or part of the debt is

enforceable under any circumstances (not just in the consideration of security clearance eligibility) required more historical payment information from Applicant than he has heretofore provided.

More importantly, statute of limitation credit (whatever its application may be to a debt barred from enforcement in other commercial contexts) is not available as a defense to a defaulted debt in a security clearance proceeding. Debts reduced involuntarily by the passage of time have never been equated by the Appeal Board with good-faith efforts to repay overdue creditors. See, e.g., ISCR Case No. 03-04779 (App. Bd. July 2005); ISCR Case No. 02-3030 at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 2001)

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a “meaningful track record” that includes evidence of actual debt reduction through the voluntary payment of accrued debts (and implicitly the timely filing of tax returns, as required). See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). In Applicant’s case, his failures to provide more information on the status of his delinquent home equity loan and steps he has taken to address and resolve the debt detailed in his credit reports, preclude him from taking full advantage of potentially available mitigating conditions.

Whole-person assessment

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether his overall management of his finances are compatible with minimum standards for holding a security clearance. While Applicant is entitled to credit for both his civilian contributions and his payment satisfaction of his SOR ¶ 1.b medical debt, neither his civilian contributions nor his modest efforts in addressing his listed SOR debts are enough to mitigate raised financial concerns.

Applicant’s past and present failures to address and resolve his debt delinquencies reflect adversely on his ability to maintain his finances in a sufficiently stable manner to meet the minimum requirements for holding a security clearance. At this time, it is too soon to make safe predictions of his stabilizing his finances within the foreseeable future.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Guideline F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Subparagraph 1.b:

For Applicant

Conclusion

In light of all of 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. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge