



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



In the matter of:)
)
) ISCR Case No. 12-04650
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

07/31/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On March 21, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. Applicant answered the SOR on April

10, 2014, and requested a hearing on May 14, 2014. This case was assigned to me on May 19, 2014. On June 4, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for June 23, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6, while Applicant testified and offered Applicant Exhibits (AE) A through F. The record of the proceeding was left open until July 7, 2014, to provide Applicant an opportunity to present additional matters. He submitted documents that were marked as AE G through R. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on July 1, 2014.

Procedural Matter

At the hearing, Department Counsel made motions to withdraw the allegations in SOR ¶¶ 1.c and 1.g. Applicant had no objections to those motions. The motions were granted, and the noted allegations were withdrawn.¹

Findings of Fact

Applicant is a 50-year-old senior software analyst who works for a defense contractor. He has been working for his current employer since August 2002. He was born overseas, entered the United States in June 1980, and became a U.S. citizen in May 1999. He earned a bachelor's degree in mechanical engineering in 1989. He married in March 1997. He and his wife are separated and divorce proceedings are ongoing. They have two children, a son 11 years old and a daughter 16 years old. Applicant has held a security clearance without incident since about 2002.²

Excluding the withdrawn allegations, the SOR alleged that Applicant had five delinquent debts totaling \$214,281 (SOR ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.f). In his Answer to the SOR, Applicant admitted the debts in SOR ¶ 1.b, 1.d, and 1.e and denied the debts in SOR ¶¶ 1.a and 1.f. His admissions are incorporated as findings of fact. Each of the alleged debts is reflected in a credit report that was admitted into evidence.³

Applicant attributed his financial problems to a combination of setbacks. These included the collapse of the housing market, his divorce proceeding, and his child's medical problems.

In 2003, Applicant entered into a real estate development partnership with another individual. This was a secondary job for both of them. In 2004, they purchased

¹ Tr. 10, 68-69. The debt in SOR ¶ 1.c was a duplicate of the debt in SOR ¶ 1.f.

² Tr. 5-6, 32-38; GE 1, 3.

³ GE 5, 6; AE F. Applicant's Answer to the SOR.

property to develop. In 2005, they broke ground to construct four housing units on that property. Applicant stated that the project was not managed properly and contractors were not readily available, which generated delays. The project was originally planned to be completed in 9-12 months, but ended up being delayed by 2 years. He borrowed money from a personal line of equity, from personal credit cards, and from his mother to keep the project afloat. By the time construction was completed and a certificate of occupancy was issued in 2008, the housing market had collapsed, and he was unable to find buyers or renters for the units. He hired attorneys to assist him and ended up relinquishing the units to a bank. Applicant estimated that he lost about \$230,000 on this project.⁴

In 2010, Applicant and his wife separated, and she filed for divorce. At that time, she was employed selling time shares. In May 2011, a court issued a temporary order requiring Applicant to pay \$2,500 per month in spousal and child support. In addition, he was providing support to his wife in the form of car and insurance payments and paying their son's medical expenses (discussed below). On his own, Applicant decided to reduce the spousal/child support payments to account for the other forms of financial support he was providing. As a result of that decision, he was cited for contempt of court and placed in jail for two days. He testified that he was released upon payment of \$9,000 in attorneys' fees and \$3,000 in spousal support. He had to borrow money to make those payments. Applicant estimated that he has paid about \$65,000 so far for legal expenses related to the divorce proceeding. At the time of this hearing, he and his wife were going through mediation to address the amount of spousal and child support and the division of marital assets. He anticipates the mediation may cost about \$3,600. His legal fees may increase if mediation fails and litigation is required.⁵

As early as 2011, Applicant's son was diagnosed with a mental health disorder. He attended special schools and received special monitoring because of his mental health condition. At one point, he attended a school that cost about \$3,000 for a three-month period. His son now attends public school.⁶

SOR ¶ 1.a – mortgage loan in foreclosure that was past due \$79,796, with a balance of \$192,195. Applicant purchased this house for \$198,000 in January 1998. He put a down payment of about \$50,000 and initially had a mortgage loan of \$130,000. He

⁴ Tr. 26-29, 38-43; GE 2, 3; AE A-C.

⁵ Tr. 27-28, 34-35, 46-53, 62-63; GE 1, 2, 3; AE D, E. The temporary court order stated in part:

a. The parties combined expenditures from their respective financial affidavits exceed \$12,000 monthly while their combined income is \$8,000 creating a monthly deficit of \$4,000.

b. The parties are going to have to adjust their lifestyles to accommodate their current financial situation. They cannot continue to spend as they have been.

⁶ Tr. 28-29, 48-53, 69-71; AE E.

refinanced that loan several times and withdrew equity from the house. He defaulted on the mortgage loan in about June 2008. After his marital separation, his wife remained in the house until about August 2013. Applicant acknowledged that no payments were made on the mortgage loan for about five years while the house was occupied. The house has been foreclosed. Applicant did not know if the house had been resold or whether he owed a deficiency on the mortgage loan. In his Answer to the SOR, he denied this debt because the account was closed.⁷

SOR ¶ 1.b. – charged-off account for \$123,500. This was a home equity line of credit obtained from a credit union. Money from this loan was used to fund his real estate development project. The date of last activity on this debt was July 2009. This debt remains unresolved.⁸

SOR ¶ 1.d – collection account for \$2,388. This was a credit card debt that had a date of last activity of May 2009. Applicant used this credit card for his real estate development business. This debt remains unresolved.⁹

SOR ¶ 1.e – charged-off account for \$1,955. This was a bank account that had a date of last activity of July 2009. In his Answer to the SOR, Applicant indicated that he was disputing this debt because he requested the bank to terminate certain automatic withdrawals from the account, but the bank continued to authorize those withdrawals totaling about \$1,900. No documentation was presented to establish that Applicant had a legitimate basis for disputing this debt.¹⁰

SOR ¶ 1.f – collection account for \$6,644. This was a personal credit card account that Applicant used for his real estate development business. It had a date of last activity of June 2009. He testified that this debt remains unresolved.¹¹

Applicant's annual salary is \$151,000. In his post-hearing submission, Applicant submitted a Personal Financial Statement (PFS) dated July 1, 2014, that reflected his total net monthly income was \$8,408, his total monthly expenses were \$7,482, and his total monthly debt payments were \$630, which left him a net monthly remainder of \$296. The total monthly debt payments did not include payments toward the alleged debts. His PFS indicated that he had assets totaling \$247,000, including \$230,000 in a

⁷ Tr. 43-46, 63-65; GE 1, 2, 3, 4, 6; AE F.

⁸ Tr. 41, 43, 65-66; GE 2, 3, 6; AE F.

⁹ Tr. 66; GE 2, 3, 5, 6; AE F.

¹⁰ Tr. 66-68; GE 2, 3, 6; AE F. Applicant's credit reports do not reflect that this debt has been disputed. See AE F at 17.

¹¹ Tr. 55-56, 68; GE 2, 3, 5, 6; AE F. As noted above, this debt was a duplicate of SOR ¶ 1.c.

401(k) account. In his testimony, he noted that he was working with attorneys to resolve his financial problems.¹²

Applicant's credit report of July 2003 indicated that he had no delinquent accounts. He testified that he resolved delinquent debts that were not alleged in the SOR. One was a \$28,000 debt that he resolved for \$13,000 in 2013 by using a tax refund. His most recent credit report indicated that he had settled debts for less than the full balance.¹³

Between 2008 and 2012, Applicant took three vacations out of the country. These included trips to Mexico in July 2008, the Bahamas in March 2011, and Mexico in September 2012.¹⁴

Applicant has consistently received monetary awards at work. Over the years, his performance evaluations have rated him as a "successful contributor," "high contributor," or "exceptional contributor." His supervisor has stated that he exhibited candor, honesty, and integrity.¹⁵

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

¹² Tr. 38, 60-63, 69; AE R.

¹³ Tr. 53-58; GE 1, 2, 3; AE F, G. Delinquent debts not alleged in the SOR will not be considered in applying the disqualifying conditions. They, however, may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of the whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

¹⁴ Tr. 58-60; GE 1, 2; AE I.

¹⁵ AE G, H, J-Q.

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 unfavourable, to reach his 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* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the applicant has or 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 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 financial considerations 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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated delinquent debts that he was unable or unwilling to satisfy for an extended period. This evidence is sufficient to raise the above disqualifying conditions.

Five 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's financial problems were the result of conditions beyond his control. These conditions included the collapse of the housing market that resulted in the failure of his real estate development business, his pending divorce, and his child's medical problems. He failed, however, in establishing that he has acted responsibly under the circumstances. His financial problems are ongoing and significant. While he has

resolved some delinquent debts that were not alleged in the SOR, he failed to show that he is taking meaningful steps to resolve the alleged debts. He has neither established repayment plans for any of the alleged debts nor presented a realistic plan for resolving them.

From the evidence presented, I cannot find that Applicant's financial problems are under control or are being resolved. His delinquent debts continue to cast doubt on his current reliability, trustworthiness, and good judgment. He has not presented documentation to show that he has a legitimate basis for disputing the debt in SOR ¶ 1.e. None of the mitigating conditions apply.

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 process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. 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 has worked for his company for almost 12 years and is a valued employee. He has held a security clearance without incident during that time. However, he failed to provide sufficient evidence to mitigate the financial concerns raised in the SOR. He has paid debts not alleged in the SOR, but failed to show he has taken any meaningful action to resolve the alleged debts. His financial problems remain a security concern.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude that Applicant has failed to mitigate the financial considerations security concerns.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	Withdrawn
Subparagraphs 1.d – 1.f:	Against Applicant
Subparagraph 1.g:	Withdrawn

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge