



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 12-06228
)	
Applicant for Security Clearance)	

Appearances

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

03/11/2014

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated personal conduct security concerns, but failed to mitigate financial considerations security concerns. Clearance is denied.

Statement of the Case

On June 13, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 10, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 6, 2013, and DOD CAF received his answer on May 14, 2013. Department Counsel was prepared to proceed on October 21, 2013. The case was assigned to me on October 24, 2013. DOHA issued a notice of

hearing on October 31, 2013, scheduling the hearing for December 4, 2013. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 10, which were admitted into evidence without objection. Applicant did not call any witnesses, but did testify on his own behalf. He did not offer any exhibits. DOHA received the hearing transcript (Tr.) on December 11, 2013.

Procedural and Preliminary Matters

Department Counsel moved to withdraw SOR ¶¶ 2.a and 2.c. Without objection from the Applicant, I granted Department Counsel's motion. (Tr. 10-11.)

Findings of Fact

Although Applicant did not "deny" or "admit" the SOR allegations, he did provide explanations that I am construing as constructive denials to all SOR allegations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 46-year-old senior systems engineer, who had been employed by a defense contractor since April 2012. He is required to obtain a security clearance as a condition of his continued employment. (GE 1, Tr. 20-22, 35.)

Applicant was awarded his GED in October 1983. He did not pursue higher education. (GE 1, GE 7, Tr. 22-23.) Applicant was married from 1997 to 1998, and that marriage ended by divorce. He remarried in 2004. Applicant's wife is a retired state employee and currently is a part-time employee at a grocery store. Applicant has no children. He did not serve in the armed forces. (Tr. 23-14, 36.)

Financial Considerations

The SOR consists of seven separate allegations, a credit card collection account for \$1,005; a telephone company collection account for \$249; a bank collection account for \$411; a past-due mortgage account for \$44,855; a cable television collection account for \$57; a collection account for \$462; and an August 2008 bankruptcy court judgment for \$102,933 entered against him for fraudulent pre-petition money transfers made prior to filing Chapter 7 Bankruptcy. (SOR ¶¶ 1.a – 1.g.)

After a successful career in computer-related jobs, Applicant opened a flooring business in September 2003. Initially, his new flooring business thrived to the point that he was able to expand. However, as a result of the downturn in the economy in approximately 2006, Applicant was forced to close his business in May 2007 and file for bankruptcy in August 2007. (Tr. 36-46.)

During cross-examination, it became clear that Applicant has taken no action to contact his creditors, attempt to settle or dispute his debts, or otherwise resolve his debts. Applicant's debts were brought to his attention as early as August 2012 when he was interviewed by an Office of Personnel Management (OPM) investigator. Applicant advised the investigator that he got behind on his bills as a result of being unemployed. Additionally, Applicant received notice of his debts when he received his April 2013 SOR and also when he received a copy of his July 2012 credit report forwarded to him by Department Counsel before his hearing. (Tr. 62-81, GE 7, GE 9.) As noted, Applicant did not submit any exhibits. He has not sought financial counseling.

Applicant was quite candid when discussing his debts. When queried by Department Counsel about the connection credit problems could have on his security clearance eligibility, he responded, "...when I look at my life and I look at these debts that I may or may not owe and I think of just my peers and what debts I know they owe, I kind of feel this is – I hate to use the word insignificant, but lack of a better word, to me I just don't see this as being a liability." (Tr. 64-65.)

Applicant testified that he paid his attorney \$1,500 to represent him at his August 4, 2008 pre-petition hearing for fraudulent pre-petition money transfers. Applicant's attorney advised him there was "no evidence" to support the trustee's claim and assured him that the matter would either be set aside or dismissed. His attorney failed to appear at a scheduled hearing and a \$102,933 default judgment was entered against Applicant. Applicant was unaware of the default judgement and was under the impression that the matter was resolved. He pressed his attorney for documentation; however, his attorney advised him "[d]on't worry about it." His attorney, a sole practitioner, committed suicide at some point after that and Applicant has not been able to retrieve any of his documents. Applicant did not see a copy of the default judgment until Department Counsel forwarded him a copy in discovery documents. Having seen the documentation, Applicant agrees that a default judgment was entered against him. (Tr. 28, 59-62, 82, GE 3.)

Currently, Applicant is not drawing a pay check and is "on the bench" and stated he will have work "as soon as [his] clearance is granted." He estimates that his family monthly income is approximately \$3,000. (Tr. 83.)

Personal Conduct

The SOR alleges that Applicant deliberately failed to disclose the \$102,933 judgment, discussed *supra*, on his June 2012 e-QIP. Applicant credibly testified regarding what he believed to be the status of his judgment at the time he completed his e-QIP. I accept his explanation that he believed he answered his e-QIP truthfully. Having had the occasion to observe Applicant's demeanor during his testimony and taking into account all of the circumstances that led up to and following this judgment, I find that Applicant did not deliberately falsify his e-QIP when answering the e-QIP question about past judgments.

Character Evidence

Applicant previously served as a volunteer fire fighter for 15 years. (Tr. 24.) He did not submit reference letters or work-related performance evaluations.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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 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 Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 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 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

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, e-QIP, OPM interview, and SOR response.

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.

None of the mitigating conditions are established. Applicant's delinquent debts are numerous, recent, and not the result of circumstances making them unlikely to recur. His business failing is a circumstance beyond his control, but he has not acted reasonably. As noted, Applicant has made no effort to address his debts even after they were brought to his attention.¹

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false answer on his security clearance application:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

The SOR alleges that Applicant deliberately provided false information or omitted required information on his June 2012 security clearance application. Applicant's alleged falsification of his e-QIP is not substantiated. AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f) fully applies to SOR ¶¶ 2.b. Although he admitted preparing his e-QIP, and now recognizes that his answer was incorrect, he honestly and reasonably believed that the judgment was "taken care of" by his attorney. While Applicant could have been expected to exercise greater care in completing his e-QIP, his lapses in judgment do not constitute knowing and willful conduct.²

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 the 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.

²The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's record of community service as a volunteer fire fighter weighs in his favor. He is a law-abiding citizen, desires to contribute to the national defense, and lives within his means. Apart from his SOR debts, there is no evidence to suggest that he is not current on his day-to-day expenses.

A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. June 21, 2010.) An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

However, Applicant's failure to address his debts in any meaningful manner since the closure of his business in 2007 precludes a favorable decision. His failure to recognize the importance of regaining an acceptable level of financial responsibility does not weigh in his favor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated personal conduct security concerns, but has not mitigated financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

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:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.g:	Against Applicant
Paragraphs 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Withdrawn

Conclusion

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

Robert J. Tuidor
Administrative Judge