



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 12-11590
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith Esq., Department Counsel
For Applicant: *Pro se*

12/24/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on May 24, 2012. On June 20, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD acted under Executive Order 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on July 16, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 17, 2015, and the case was assigned to me on September 17, 2015. On September 22, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 15, 2015. On September 28, 2015, DOHA notified

Applicant that the hearing was rescheduled for October 16, 2015. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through AA, which were admitted without objection. I kept the record open until November 6, 2015, to enable Applicant to submit additional documentary evidence. He timely submitted AX BB through EE, which were admitted without objection. DOHA received the transcript (Tr.) on October 26, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old telecommunications technician employed by a federal contractor since November 2010. He previously was employed by the same federal contractor from May 2002 to November 2007. He was self-employed from November 2007 to November 2010, when he was rehired by his previous employer. He was granted a security clearance in November 2005.

Applicant is a high school graduate. He married in October 2005, separated in December 2010, and divorced in October 2011. He and his wife have a nine-year-old son. He pays \$500 per month in child support for their son. (Tr. 42.)

Applicant's divorce was caused by the stress of operating a commercial cleaning service that failed in 2012. The divorce was acrimonious, making continued communication about the lingering business debts difficult. (Tr. 67.)

The SOR alleges 12 delinquent debts, including four unsatisfied tax liens filed by the Internal Revenue Service (IRS). The debts are reflected in Applicant's credit bureau reports from May 2012 and November 2014. (GX 3; GX 4.) All the debts except SOR ¶ 1.i arose because of the failed commercial cleaning business. The debt alleged in SOR ¶ 1.i arose because of Applicant's error in reporting gains from stock trading in his 2009 federal income tax return.

Applicant's wife started a commercial cleaning service in 2005. The business initially grew rapidly, and Applicant left his job, where he was earning about \$65,000 per year, to help her run the cleaning service. They started with two employees and grew to 60 employees. They were earning a combined income of about \$100,000 per year while the business was thriving. After two years, the business declined. They had fewer clients, some of their clients were not paying them on time, and their joint income dropped to about \$50,000 per year. In an effort to keep the business running, they stopped sending the IRS the payroll taxes they had withheld from their employees for tax years 2008, 2009, and 2010. (Tr. 43-45; GX 2 at 3.) The tax liens alleged in SOR ¶¶ 1.i, 1.j, and 1.k are for the taxes withheld from their employees but not paid over to the IRS. (Tr. 56.)

Applicant left the company in 2010 and transferred his interest in the company to his ex-wife when they separated, and his ex-wife operated the business until 2012, when it closed. He was able to return to his previous job with a defense contractor, where he now earns \$72,000 per year. He does not know what steps his ex-wife took to close the business or resolve any of the business-related debts. (Tr. 40-41.)

Applicant and his ex-wife submitted an offer in compromise to the IRS while the business was still operating. It acknowledged a tax debt of \$123,612.91, requested a waiver of civil penalties, and offered to pay \$2,060.22 per month for 60 months. (AX DD.) The IRS rejected the offer. (Tr. 62.)

Applicant testified that the amount due has been reduced to about \$61,000 by seizures of federal income tax refunds and payments made by the company between 2010 and 2012. (Tr. 39-40.) His IRS account transcripts list credits of \$400 from tax year 2008; \$3,295 from tax year 2009; and \$5,713 from tax year 2010, apparently reflecting the seizures of his tax refunds. The transcripts also reflect \$1,000 payments by a "related business entity" in March through June 2011, \$2,060 payments in October and December 2011, and \$1,000 payments from August through December 2012. (AX W; AX X; AX Z.)

The transcripts also reflect establishment of an installment agreement in March 2013; termination of an installment agreement in December 2013; and a pending installment agreement in April 2014. (AX Y; AX Z; AX AA.) Applicant testified that his tax liability for the business taxes and his personal income taxes were combined by the IRS and were the basis for the four tax liens. He testified that he made two \$500 payments to the IRS under a payment agreement, but the agreement was canceled by the IRS after two months. He later entered into another agreement for payments of \$350 per month but it was canceled before any payments were made. (Tr. 58-59.)

During a personal subject interview (PSI) in August 2012, Applicant told a security investigator that he began negotiating with the IRS in late 2010 or early 2011, and he provided the name of the IRS agent with whom he was negotiating. He also told the investigator that he believed the company was making monthly payments on the tax debt, and his belief is corroborated by the tax transcripts reflecting monthly payments through December 2012. (GX 2 at 3.)

Applicant testified that he consulted with a bankruptcy attorney and considered filing a bankruptcy petition, but he decided to not rely on bankruptcy because of the amount of the debt owed to the IRS and concerns about the negative impact of a bankruptcy on his pending application to continue his security clearance. (Tr. 48-49.)

Applicant enlisted the assistance of the IRS Taxpayer Advocate Service in July 2015. (AX T; AX U.) In September 2015 he hired a certified public accountant (CPA), who is certified to represent clients before the IRS and is currently assisting him. (AX V; AX EE.)

When Applicant filed his personal federal income tax return for 2009, he did not include about \$30,000 in capital gains from stock trades that were reported to the IRS, thereby incurring an additional tax liability of about \$17,000. During his August 2012 PSI, he told the investigator that he did not report the capital gains because he had a net loss for the year. (GX 2 at 4.) His personal tax liability is the basis for the lien alleged in SOR ¶ 1.I. (Tr. 55-56; AX V.)

Applicant also became delinquent on several consumer debts and credit cards when his tax debts made him unable to pay them. The evidence concerning these debts is summarized below.

SOR ¶ 1.a, home improvement loan to build a deck, referred for collection in August 2010 (\$15,409). The deck was built in 2009, and the house for which it was built was sold in a short sale after Applicant and his wife separated. The debt was not paid off by the short sale. It was settled for \$6,268, paid in three installments, with the final installment paid in September 2015. (AX A through E; AX CC.)

SOR ¶ 1.b, credit card account, charged off in March 2012 (\$9,657). This credit card was used in the failed business. The account was solely in Applicant's name, because his ex-wife had a poor credit record. (Tr. 50.) His wife was an authorized user of the credit card and continued to use it after they separated, accumulating the debt alleged in the SOR. (Tr. 50-51.) Applicant testified that he was not sure of the status of the business, because his ex-wife has not been communicative. He has maintained telephonic contact with the creditor but has not yet reached any agreement. (Tr. 37, 51-53, 66.)

SOR ¶ 1.c, collection account, referred for collection in September 2010 (\$4,533). Settled for \$1,478, to be paid in four monthly installments. (Answer to SOR; AX F.) He made the final payment in October 2015. (AX G through I; AX BB.)

SOR ¶ 1.d, furniture purchase, placed for collection in October 2010 (\$1,394). Settled for \$914, to be paid in three monthly installments. He made the final payment in September 2015. (AX K through M.)

SOR ¶ 1.e, credit card account, placed for collection in February 2011 (\$963). Settled for \$500 and paid in September 2015. (AX N; AX O.)

SOR ¶ 1.f, credit card account, charged off in February 2011 (\$895). Settled for \$198.98 and paid in September 2015. (AX P.)

SOR ¶ 1.g, delinquent medical bill (\$260). Paid in full in July 2015. (AX R.)

SOR ¶ 1.h, delinquent medical bill (\$40). Paid in July 2015. (AX S.)

Applicant's delinquent debts and tax liabilities, except the 2009 taxes due to the gains from stock trades, are all related to the failed business. He is living with his

parents to minimize expenses. After paying his monthly living expenses and installment payments, he usually has a net monthly remainder of about \$1,000. (Tr. 68.)

Applicant's manager, who has known him for 11 years, testified that he has been very honest about the financial problems caused by the failed business. She regards him as a good leader, trustworthy, candid, and reliable. When Applicant applied for his old job, they hired him immediately because of his strong character and technical skills. (Tr. 71-76.)

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, *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 AG. 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." See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges 12 delinquent debts, including four federal tax liens. The delinquent debts in SOR ¶¶ 1.a and 1.c-1.h are resolved. The debt in SOR ¶ 1.b and the tax liens in SOR ¶¶ 1.i-1.l are not resolved.

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

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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual 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).

Applicant’s admissions, corroborated by his CBRs, establish two disqualifying conditions under this guideline: AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) and AG ¶ 19(c) (“a history of not meeting financial obligations”).

The SOR does not allege that Applicant and his wife failed to file any federal tax returns. Thus, AG ¶ 19(g) (“failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same”) may not be an independent basis for revoking Applicant’s security clearance. However, conduct not alleged in the SOR 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 a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant’s failure to account for and pay the federal income taxes withheld from the company’s employees for these limited purposes.

Applicant admitted that he and his wife did not pay over to the IRS the federal income taxes withheld from their employees. Federal taxes withheld from employees’ wages are held in trust for the United States. Federal tax law obligates employers to collect, account for, and pay over federal income taxes withheld from their employees, and it imposes civil penalties equal to the amount of taxes not collected or not accounted for and paid over to the IRS. 26 U.S. Code § 6672.

The following mitigating conditions under this guideline 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated 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 established. Applicant’s delinquent debts were numerous and recent, but they were incurred under circumstances making them unlikely to recur. He has returned to his former employment and has no desire to venture into the private

business world again. The unusual circumstances causing the debts and his good-faith efforts to resolve them dispel any doubts about his current reliability, trustworthiness, and good judgment.

AG ¶¶ 20(b) and 20(d) are established. The business failure and marital breakup were circumstances largely beyond Applicant's control. He has acted responsibly by maintaining contact with his creditors, resolving seven of the debts alleged, and negotiating in good faith with the IRS. He began meeting with IRS agents in late 2010 or early 2011. He and his then wife submitted an offer in compromise while the business was still operating. The tax transcripts reflect that he sought payment agreements in 2013 and again in 2014. He contacted the IRS Taxpayer Advocate Service in July 2015, and he hired a CPA in September 2015, who is currently assisting him.

Applicant still has significant unresolved debt. He owes \$9,657 on a business-related credit card and about \$61,000 to the IRS. However, a security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) An applicant is not required to establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has made little progress with the credit-card debt, because his focus has been on the federal tax liens. However, he has been in contact with the credit-card company, and, based on his track record of resolving the other debts in the SOR, I am confident that he will resolve the credit-card debt responsibly.

AG ¶ 20(e) is not established. Applicant made a mistake in computing his gains and losses from stock trading, but he has not disputed the amounts claimed by the IRS.

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. An 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.

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 was candid, sincere, and credible at the hearing. He has worked for federal contractors for about 11 years and held a clearance for most of that time. He enjoys a reputation for reliability and trustworthiness. He has limited formal education, and he had no business experience when he quit his job and joined in the operation of his wife's commercial cleaning business. He and his wife made a bad decision to not pay over the federal income taxes withheld from their employees, not understanding the drastic implications of that decision. Based on Applicant's progress in resolving his debts, his reputation for trustworthiness and reliability, and his responsible efforts to resolve the remaining debts, I am confident that he will resolve the one remaining credit-card debt and the federal tax debt.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his delinquent debts and federal tax problems. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.i:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge