



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



In the matter of:)
)
) ISCR Case No. 13-01295
)
Applicant for Security Clearance)

Appearances

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

07/28/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On March 12, 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 grant or continue Applicant's security clearance. On April 10, 2014, Applicant

answered the SOR and requested a hearing. On May 19, 2014, the case was assigned to me. 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 3, while Applicant testified and offered Applicant Exhibits (AE) A through G. The record of the proceeding was left open until July 7, 2014, for Applicant to submit additional matters. He timely submitted documents that were marked as AE H through K. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on July 1, 2014.

Findings of Fact

Applicant is a 39-year-old software engineer who works for a defense contractor. He has been employed in his current job since August 2012. He holds a master's degree. He has never been married, but was engaged to be married at the time of the hearing. He has no children. From about August 2000 to May 2006, he held a security clearance.¹

The SOR alleged that Applicant had two delinquent student loans totaling \$24,613 (SOR ¶¶ 1.a – 1.b) and that he failed to file his federal income tax returns for 2009, 2010, and 2011 as required (SOR ¶¶ 1.c through 1.e). In his Answer to the SOR, Applicant admitted each allegation with explanations. His admissions are incorporated as findings as fact.²

From August 2000 to May 2006, Applicant worked as a systems engineer for a major defense contractor. In January 2006, he started graduate school. He voluntarily left his job in May 2006 to attend graduate school full time and was unemployed until December 2006. He earned a master's degree in May 2007 and continued graduate studies until May 2009. As a graduate student, he worked as a teaching assistant at his university from January 2007 to May 2008.³

In May 2008, Applicant became self-employed as a programmer of computer games and cell phone applications (apps). During 2009, his business was still getting started, and he had no income that year. At that time, he was living on withdrawals from his retirement account. He testified that he had no excuse for failing to file his 2009 federal income tax return on time.⁴

¹ Tr. 5-6, 38-40; GE 1, 2; AE J. Although Applicant has been employed in the same position since August 2012, his employer has changed. He started working in that position as a temporary employee for a contractor and later switched to a permanent employee of his current company.

² Applicant's Answer to the SOR.

³ Tr. 32-33, 40; GE 1.

⁴ Tr. 31-34, 50; GE 1; AE C, D.

In about February 2010, Applicant decided his business as a computer programmer was not prospering and switched to working as a mathematics tutor. He was able to generate income as a private math tutor and also took a position working part time in that same role at a community college. When it came time to file his 2010 federal income tax return, he realized that he did not have good records of his earnings and did not know how to file an income tax return as a self-employed individual. He indicated that he was more concerned about filing an inaccurate tax return than filing a late one. He further stated that he failed to file timely his 2010 federal income tax return because of the complexities of such a filing. In 2011, he realized that he was not earning enough to pay his student loans and other debts and needed a better job. At that time, he again changed jobs by assuming a position as an adjunct mathematics instructor at the community college but continued working part time as a private tutor. He also incurred capital losses in 2011 and needed information from his previous year's income tax return, which he did not possess and resulted in him failing to file his 2011 federal income tax return as required.⁵

In August 2012, Applicant obtained his current software engineer position in which he earned more money. Upon obtaining that position, he filed his federal income tax returns for 2009, 2010, and 2011. He owed the Internal Revenue Service (IRS) back taxes of \$1,920 for 2009, \$2,595 for 2010, and \$320 for 2011. He proposed a repayment plan to the IRS for his back taxes that was approved. He completed making payments on that plan in early 2013. Shortly after obtaining his current position, he also entered into a rehabilitation agreement to remove his student loans from default status. He was required to make monthly payments of \$254 on the student loans, but regularly paid about double that amount each month. In May 2014, the student loans were removed from default status and transferred to another creditor for further processing. He has continued paying the new creditor \$500 per month. He provided a letter showing that he consulted with a certified public accountant regarding his student loans and federal income tax returns.⁶

In 2011, Applicant's home was foreclosed. The foreclosure sale covered the primary mortgage; however, a second mortgage of about \$93,000 remains unresolved. The second mortgage was not alleged in the SOR. Applicant's friend who is attorney is assisting him in negotiating a settlement of the second mortgage. At the time of the hearing, both parties have exchanged settlement offers, but no agreement had been reached. Applicant testified that, besides the alleged debts and the foreclosed home, he had no other delinquent debts. He currently earns about \$75,000 per year.⁷

⁵ Tr. 25-26, 34-36, 50-51; GE 1, 2, 3. State income tax return filings are not an issue in this case.

⁶ Tr. 23-32, 36-38; GE 1, 2; AE A-G.

⁷ Tr. 40-46, 49, 51-52; GE 1, 2, 3. The non-alleged debt will not be considered in applying the disqualifying conditions. It 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).

In his post-hearing submission, Applicant provided character reference letters. Supervisors described him as responsible, honest, truthful, an exceptional worker, and an asset to the company. His mother recounted his educational achievements and indicated he “is a man of great integrity.”⁸

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 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

⁸ AE H-K.

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. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file his federal income tax returns for 2009, 2010, and 2011 as required. Two of his student loans became delinquent in 2011 and remained in that status for an extended period. This evidence is sufficient to raise the above disqualifying conditions.

Four 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant admitted that he had no excuse for failing to file his 2009 federal income tax return as required. He filed his 2010 and 2011 federal income tax returns late because he was not prepared adequately to file those returns as a self-employed individual. He also struggled financially as a graduate student and was unable to pay some of his student loans and his home mortgage loans.

Since obtaining his current job in August 2012, Applicant has consulted with an accountant, filed his delinquent federal income tax returns, paid his back taxes, and rehabilitated his student loans. He has resolved the alleged financial problems. The second mortgage on his foreclosed home remains unresolved. An attorney is assisting him in negotiating a settlement of the second mortgage. Both parties have exchanged settlement offers on the second mortgage, but no agreement was reached at the time of the hearing. Nonetheless, Applicant has shown that he is determined to resolve his outstanding debt and will continue to take appropriate steps to do so.

Applicant did not establish that his failure to file his federal income tax returns in a timely manner were due to circumstances beyond his control. AG ¶¶ 20(a) and 20(b) do not apply. He did establish, however, that he has taken appropriate action in resolving the alleged financial problems. He presented sufficient evidence to show that his financial problems are under control, are being resolved, and are unlikely to recur. AG ¶¶ 20(c) and 20(d) 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 encountered financial problems as a graduate student. He has taken responsible steps to resolve his financial problems. His financial situation is stable and improving. He has established that he is a valued, reliable, and trustworthy employee.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated 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: FOR APPLICANT

Subparagraphs 1.a – 1.e: For Applicant

Decision

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge