



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



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| In the matter of: |) | |
| |) | |
| [Redacted] |) | ISCR Case No. 14-03059 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on June 21, 2012. On November 7, 2014, 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 DOD on September 1, 2006.

Applicant received the SOR on November 17, 2014; answered it in an undated document; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015, and the case was assigned to an administrative judge on January 29, 2015. It was reassigned to me on February 3, 2015, to consolidate the docket. The Defense Office of Hearings and Appeals (DOHA) issued

a notice of hearing on February 5, 2015, scheduling the hearing for February 24, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant submitted numerous documents with his answer to the SOR but did not present the testimony of any witnesses or any additional documents at the hearing. I kept the record open until March 13, 2015, to enable him to present additional documentary evidence. He timely submitted AX A through L, which were admitted without objection. Department Counsel's comments regarding AX A through L are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on March 9, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.d, 1.e, 1.g, and 1.k. He denied SOR ¶¶ 1.a-1.c, 1.f, 1.h-1.j, and 1.l-1.o. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 45-year-old radiation safety manager employed by a defense contractor since August 1988. He has held a security clearance since December 1989. He married in June 1991 and divorced in June 1992. He remarried in July 1996 and separated in February 2012. He has three sons, ages 24, 20, and 17.

The SOR alleges 12 delinquent debts totaling more than \$300,000. (SOR ¶¶ 1.a-1.l) The largest debts are a judgment for \$50,354 in unpaid federal income taxes (SOR ¶ 1.g) and a mortgage loan in foreclosure with a balance of \$250,000 (SOR ¶ 1.l). The garnishment alleged in SOR ¶ 1.m is based on the debt alleged in SOR ¶ 1.g. The SOR also alleges in that Applicant failed to file his federal and state income tax returns for 2010 and 2011 (SOR ¶¶ 1.n and 1.o). The evidence concerning the allegations in the SOR is summarized below.

SOR ¶¶ 1.a and 1.b, cable service bills referred for collection (\$328 and \$275). The \$275 debt is reflected in Applicant's July 2012 credit bureau report (CBR). (GX 3 at 10.) During a personal subject interview (PSI) in October 2012, he told the investigator that he did not know anything about the debt. (GX 2 at 6.) Both debts are reflected in Applicant's December 2013 CBR, showing that the last activity on the \$328 debt was in December 2013 and the last activity on the \$275 debt was in August 2008. (GX 4 at 1-2) In his response to DOHA interrogatories in March 2014, Applicant stated that he had made payment arrangements for both debts but had no documentation. (GX 4 at 11, 13.) In his response to the SOR, he stated that both debts had been paid and were no longer reflected on his CBRs. Neither debt is reflected in his January 2015 CBR. (GX 5.) At the hearing, Applicant testified that the creditor had no record of these

debts. (Tr. 86.) The absence of these debts in the January 2015 CBR suggests that they have been resolved.¹

SOR ¶¶ 1.c-1.f, medical bills (\$349, \$137, \$118, \$112) and SOR ¶¶ 1.i and 1.j, judgments for medical bills (\$302 and \$206). Applicant testified that these debts were incurred when his wife failed to pay the copayments on medical care for their children. He testified that the children's medical care was covered by insurance in his name, and the providers sought reimbursement from him. (Tr. 26.) He testified that resolution of these debts was delayed because he was paying off a tax lien. (Tr. 87.) In his March 2014 responses to interrogatories, he stated that all the medical debts were resolved but that he had no documentation. (GX 2 at 11-13.)

In Applicant's response to the SOR and at the hearing, he stated that the judgment for \$302 in SOR ¶ 1.i was entered against another person whose Social Security number is not his. (Tr. 89-90.) He provided no documentation of the discrepancy and has not disputed this debt with the credit reporting agencies.

SOR ¶ 1.c alleged a medical debt for \$349 reflected on a CBR dated June 4, 2014. Applicant denied this debt in his answer to the SOR. There is no June 2014 CBR in the record, and the CBRs in the record do not reflect a \$349 medical debt.

SOR ¶¶ 1.d and 1.f alleged two medical debts reflected in a CBR dated October 17, 2014. There is no October 2014 CBR in the record, but the debt alleged in SOR ¶ 1.d is reflected in the December 2013 CBR (GX 4 at 2) and the debt alleged in SOR ¶ 1.f is reflected in the January 2015 CBR (GX 5 at 1.)

Applicant presented documentary evidence that the debt alleged in SOR ¶ 1.e was paid. (AX I.) He presented evidence of several other medical debts that were paid, but the account numbers do not match the account numbers of the debts alleged in the SOR. (AX J.)

SOR ¶¶ 1.g and 1.m, judgment for \$50,354 and garnishment for \$57,978. In 2006, Applicant withdrew funds from his 401(k) retirement fund to make improvements on his home. When his tax preparer computed his income tax for 2006, he determined that Applicant owed about \$9,000 in federal taxes. Applicant did not file his federal and state income tax returns for 2006 through 2010. (Tr.66.) The Internal Revenue Service (IRS) filed a substitute return for tax year 2006 in September 2009. (GX 2 at 28.) In 2012, the IRS obtained a judgment for \$50,354, filed a tax lien, and garnished Applicant's pay in the amount of \$161 per pay period (GX 2 at 20; GX 5 at 1). In 2013, Applicant paid off the tax lien, using a loan from his 401(k) account. (Tr. 72; GX 2 at 40.)

¹ Under the Fair Credit Reporting Act, a credit report may not list accounts placed for collection or charged off that antedate the credit report by more than seven years. 10 U.S.C. § 1681c. Since these two debts were referred for collection less than seven years ago, it is likely that they were deleted because they were resolved.

SOR ¶ 1.h, judgment in February 2009 for \$580. In his March 2014 response to interrogatories, Applicant stated that the debt was paid in full but he had no documentation. (GX 2 at 11.) At the hearing, he testified that he attempted to contact the creditor, without success; and that he contacted the law firm representing the creditor, but the firm had no record of the judgment. He testified that he contacted the court and was informed that the judgment appeared to have been satisfied, but the court had nothing from the law firm reflecting that the judgment was satisfied. (Tr. 88-89.) The debt is not resolved.

SOR ¶ 1.k, collection account for \$575. Applicant admitted this debt in his answer to the SOR. He testified that he has been unable to contact the creditor or the collection agency. (Tr. 91.) The debt is not resolved.

SOR ¶ 1.l, past-due mortgage loan in foreclosure, balance of \$250,000. Applicant and his wife separated in 2010. He moved out of the marital home and lived with his parents. His wife remained in the home with their three children. The mortgage loan was in Applicant's name only. (Tr. 49.) Applicant was ordered to pay \$1,229 per month in child support and \$1,000 for alimony. (AX-H.) He testified that his wife was obliged to make the mortgage loan payments, but the court order for alimony and child support does not allocate responsibility for making the mortgage loan payments. (AX H.) Applicant withdrew \$9,000 from his 401(k) account to catch up on the delinquent payments, but could not afford to continue making them while maintaining his separate residence. The mortgage was foreclosed, and the house was sold. Applicant believes that the sale price was adequate to satisfy the balance of the loan. (Tr. 27-28, 39, 46-50.) His federal income tax return for 2010 includes an IRS Form 982, reflecting that any deficiency after the mortgage sale was forgiven. (IRS Form 1040, attached to answer.) The debt is resolved.

SOR ¶¶ 1.n and 1.o, failure to file federal and state tax returns for 2010 and 2011. Applicant's wife filed separate federal and state tax returns in 2010 and 2011, claiming the exemptions for their three children. Applicant did not file tax returns for 2010 through 2013 until April 2014.² He calculated that he owed \$2,700 in federal taxes for 2010; \$9,700 for 2011; \$4,000 for 2012; and \$7,000 for 2013. He has not paid any of the taxes due. In February 2014, Applicant hired a tax service to help him resolve his tax liabilities. (GX 2 at 41; Tr. 74-75.) He is waiting for his tax service to negotiate a settlement with the IRS. He has about \$125,000 in his 401(k) account, and he intends to make a lump-sum settlement after the amount he owes is determined. (AX A; Tr. 75-80.)

² Based on Applicant's testimony, Department Counsel moved to amend the SOR to add allegations that Applicant failed to timely file his federal and state tax returns for 2012 and 2013. I denied the motion on the ground that the amendment would raise issues of fair notice and was unnecessary for a fair adjudication of the case, since I am permitted to consider the evidence of failure to file in 2012 and 2013 for limited purposes, including a determination whether disqualifying and mitigation conditions were established for the failures to file in 2010 and 2011. (Tr. 108-09.) See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

In response to DOHA interrogatories in March 2014, Applicant submitted a personal financial statement reflecting gross monthly income of \$6,843, net income (after \$4,300 in deductions) of \$2,543; monthly expenses of \$1,683; payments on three debts included in the SOR totaling \$359; and a net monthly remainder of \$501. (GX 2 at 17.) His total compensation in 2014, including a bonus and Reward Management Achievement Plan (RMAP) award, was \$98,656. (AX B.) His bonus and a RMAP award were accompanied by congratulatory letters from the company president. (AX C; AX E.) Effective February 23, 2015, his total compensation will be \$102,201, including a bonus and RMAP award. (AX D.)

In March 2015, Applicant's manager commended him and his team for their performance on a specific project. (AX F.) His current manager submitted a letter after the hearing, describing him as kind, dedicated, and generous, with a strong sense of duty and high integrity. (AX L.)

Applicant's performance appraisals are based on a four-level grading system: "below expectations," "meets expectations," "exceeds expectations," and "far exceeds expectations." His performance appraisals for 2013 and 2014 rated him as "exceeds expectations."

Applicant's child-support obligation will end in October 2015, thereby increasing the funds available to satisfy his debts. The court order regarding alimony and child support contains no provision for termination of alimony. (AX H; Tr. 92-93.)

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 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 denied the debt alleged in SOR ¶ 1.c, and it is not supported by any evidence in the record. This allegation is resolved in his favor.

Applicant submitted documentary evidence showing that the medical debt in SOR ¶ 1.e was paid. This allegation is resolved in his favor.

The judgment in SOR ¶ 1.g and the garnishment in SOR ¶ 1.m are based on the same tax debt. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Thus, SOR ¶ 1.m is resolved in Applicant's favor.

Applicant's admissions, his CBRs, his testimony, and the documentary evidence submitted are sufficient to establish SOR ¶¶ 1.a-1.b, 1.d-1.l, 1.n, and 1.o., and they raise three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(g): ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same").

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 for the defaulted mortgage loan alleged in SOR ¶ 1.i, because it occurred as a result of Applicant's marital breakup, a circumstance unlikely to recur, and his misunderstanding of his obligation to make the payments. It is not established for the other debts, because they are recent, numerous, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is established for the mortgage loan foreclosure and the delinquent copayments for medical debts, which were the result of Applicant's marital breakup. He made reasonable efforts to prevent the foreclosure and he resolved several of the medical debts.

AG ¶ 20(c) is partially established for Applicant's failure to file his income tax returns. He has hired a tax service, but he has not reached a payment agreement with the IRS. It is not established for the other debts alleged in the SOR, because there is no evidence that Applicant sought or received financial counseling, and several of his debts are not under control.

AG ¶ 20(d) is not fully established. Applicant paid the cable bills in SOR ¶¶ 1.a and 1.b and the medical debt in SOR ¶ 1.e. However, he took no action to resolve his tax liability for 2006 through 2010 until his wages were garnished. He has begun to resolve his tax liability for 2010 and 2011, but he has not negotiated a payment agreement or made any payments.

AG ¶ 20(e) is not established. Although Applicant disputed the judgment in SOR ¶ 1.i at the hearing, he did not submit any documentary evidence supporting his dispute and has not disputed the debt with the credit reporting agencies.

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 has worked for a defense contractor and held a security clearance for many years. He is highly regarded by his supervisors. He was candid and sincere at the hearing, but does not yet have a firm grasp on his financial situation. He has presented no plausible, reasonable explanation for his repeated failures to file his federal and state income tax returns. He resolved the \$50,354 judgment for unpaid federal taxes, but only after the IRS garnished his wages. 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.) The fact that Applicant settled the tax debt is not sufficient to mitigate the security concerns raised by the circumstances in which the debt was incurred.

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 not mitigated the security concerns raised by his delinquent debts and his failure to timely file his federal and state income tax returns. Accordingly, I conclude he has not 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): **AGAINST APPLICANT**

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|------------------------|-------------------|
| Subparagraphs 1.a-1.c: | For Applicant |
| Subparagraph 1.d: | Against Applicant |
| Subparagraph 1.e: | For Applicant |
| Subparagraphs 1.f-1.k: | Against Applicant |
| Subparagraphs 1.l-1.m: | For Applicant |
| Subparagraphs 1.n-1.o: | Against Applicant |

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicants eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge