



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



In the matter of:)
)
) ISCR Case No. 14-00962
)
Applicant for Security Clearance)

Appearances

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

10/05/2014

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 April 30, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken 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 Applicant's security clearance. In an undated document, Applicant

answered the SOR. On August 6, 2014, he requested a hearing. This case was assigned to me on August 18, 2014. On September 10, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for September 24, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, while Applicant and his wife testified and he offered Applicant Exhibits (AE) A through J. The record of the proceeding was left open until October 8, 2014, to provide Applicant an opportunity to present additional matters. He timely submitted documents that were marked as AE K through O. All proffered exhibits were admitted into evidence without objection. Department Counsel's memorandum forwarding Applicant's post-hearing submission was marked as Hearing Exhibit (HE) 1. The transcript (Tr.) of the hearing was received on October 2, 2014.

Procedural Matter

Applicant waived the 15-day notice requirement under ¶ E3.1.8 of the Directive.¹

Findings of Fact

Applicant is a 59-year-old aircraft mechanic who is being sponsored for a security clearance by a defense contractor. He graduated from high school in 1972. He received a master's degree in business management in 2008, but noted the school's academic accreditation is questionable. He served on active duty in the U.S. Navy from 1974 to 1991, attained the grade of petty officer first class (E-6), and received a disability retirement. He has been married twice. He married his current wife in 1981. He has two children, ages 29 and 30. He held a security clearance in the military.²

The SOR alleged that Applicant had six delinquent debts totaling about \$34,818 (SOR ¶¶ 1.a through 1.f). In his Answer to the SOR, Applicant admitted each allegation with comments. His admissions are incorporated as findings of fact.³

Applicant attributed his financial problems to the extra costs of maintaining two households from July 2008 to March 2013, a period of unemployment from March 2013 to July 2014, and a low-paying job since July 2014. From December 2005 to March 2013, he worked for the same company at two different locations. After starting with the company, he worked in State A, where his home is located, until July 2008. His job was then relocated to State B, which was about five hundred miles from his home. When his job moved, his wife and family stayed in their home in State A, while he rented an apartment in State B. Due to the cancellation of a government contract in March 2013,

¹ Tr. 11.

² Tr. 6-7, 32-41; GE 1, 2; AE B, D, E, L.

³ Applicant's Answer to the SOR.

Applicant was laid off from his job. In October 2013, his prior employer offered to rehire him for a job in State C, but this new position was contingent on him obtaining a security clearance. In July 2014, he began working in an interim, lower-paying job at a retail store while his security clearance was being processed.⁴

Applicant's wife filed Chapter 13 bankruptcy solely in her name in November 2012. She filed bankruptcy to protect their home from foreclosure. The bankruptcy petition listed \$155,000 in assets and \$166,413 in liabilities. The home was valued at \$138,000 with an outstanding home mortgage loan of \$158,827. The petition listed delinquent state taxes in the amount of \$4,475. It also listed two unsecured, nonpriority debts totaling \$3,110, neither of which was alleged in the SOR. Applicant's and his wife's combined annualized income was listed as \$91,680. At that time, her annual income was about \$27,000, while his was about \$65,000. She testified that she began paying \$575 per month into a Chapter 13 bankruptcy plan in January 2013 and stopped after she was laid off from her job in February 2014. She estimated she paid about \$6,000 into the plan. The Chapter 13 bankruptcy was dismissed in September 2014.⁵

SOR ¶¶ 1.a and 1.b – state tax liens filed in 2011 and 2012 in the amounts of \$2,546 and \$2,761, respectively. Applicant indicated these state tax deficiencies arose when his employer changed his income tax withholdings unbeknownst to him. This change occurred when he moved to State B. These tax deficiencies were for 2010 and 2011. Applicant presented documentation showing that his 2011 tax liability has been resolved and that he owed \$347 on his 2010 tax liability. His wife testified that some of the payments she made under her bankruptcy plan went toward paying these tax deficiencies. She also indicated that their federal income tax refunds for 2011 and 2012 were withheld.⁶

SOR ¶ 1.c – a mortgage account over 120 days past due in the amount of \$22,151. Applicant and his wife purchased this home in 1998. At some point, they refinanced the home and their monthly mortgage payments were \$1,231. His credit report dated December 12, 2013, reflected that this mortgage loan had a date of last activity of November 2012 and was past due \$22,151. During his Office of Personnel Management interview in December 2013, Applicant stated that he had just learned the home was being foreclosed.⁷

At the hearing, Applicant's wife testified that she had been working with the bank to modify the mortgage loan and went through many of the bank's agents in that

⁴ Tr. 27-29, 32-33, 43-45, 61-65; GE 2; AE C, N.

⁵ Tr. 45-49, 67-72, GE 2, 3; AE B. Applicant's wife is 64 years old. After being laid off, she started collecting \$1,040 per month in social security payments. See Tr. 61, 67.

⁶ Tr. 49-54, 60, 70; GE 2, 4; AE G; Applicant's Answer to the SOR.

⁷ Tr. 42-54, 60, 67-69, 72-77; GE 2, 4; AE H; Applicant's Answer to the SOR.

process. She initially stated that she and her husband participated in a rehabilitation program for the mortgage loan before she filed Chapter 13 bankruptcy. If they made the required payments under that program, the bank would then reevaluate the amount of their monthly mortgage payments. She later testified that she made three payments in about June, July, and August 2013 (which would have been after the bankruptcy filing) and the bank refused the fourth payment, returned it to her, and told her to stop making payments. At the hearing, no documentation concerning the rehabilitation program or payments under the rehabilitation program were offered into evidence.⁸

In his post-hearing submission, Applicant provided documentation showing that he and his wife made the following mortgage loan payments:

Date	Amount
3/15/13	\$1,000
4/1/13	\$1,050
7/3/13	\$1,050
8/1/13	\$1,050
8/6/13	\$800
10/1/13	\$800
11/8/13	\$1,050

At the hearing, Applicant's wife also testified that the mortgage loan had been transferred to another mortgage servicer and that she was working with the new mortgage servicer on a loan modification. Documents submitted at the hearing showed Applicant and his wife received a letter from the bank dated July 11, 2014, that notified them their mortgage loan was being transferred to another servicer on August 1, 2014, and it indicated that they should continue making their monthly payments to the bank until July 31, 2014. Another letter from the bank dated August 12, 2014, stated the bank was no longer collecting payments and the next mortgage servicer (who was specifically identified) would collect the payments. The bank's letter contained specific information about how to make payments and indicated the amount owed on the mortgage loan was \$164,550.⁹

SOR ¶¶ 1.d and 1.e – collection accounts in the amount of \$237 and \$63, respectively. Both of these debts are from the same cable television company. They have dates of last activity of January 2010 and November 2010. Applicant testified that he made payments to the cable television company and did not receive credit for those payments. He stated that he contacted the company about these discrepancies. However, he did not provide any documentation showing that he disputed these debts.

⁸ Tr. 42-54, 60, 67-69, 72-77; GE 2, 4; AE H; Applicant's Answer to the SOR.

⁹ Tr. 72-77; AE H, O; Applicant's Answer to the SOR.

He indicated that, when he obtains his proposed job, he will pay these debts to get rid of them.¹⁰

SOR ¶ 1.f – collection account in the amount of \$7,060. This debt arose from an apartment that Applicant leased in State B. This debt had a date of last activity of August 2010. He signed a one-year lease on July 22, 2010. He received a company discount from the lessor and had a monthly rent payment of \$635. He stated that he thought the military clause in the lease applied to him. By its terms, however, that clause only applied to active duty military personnel who received change of duty station orders. He stated the lady he dealt with in executing the lease told him that she would “give” him the military clause because he was retired military, but nothing to that effect was put in writing. The lease had a provision for early termination that provided for the payment of two month’s rent at the time of submitting the notice to vacate. If the lessee failed to pay the termination fee, then he or she would be responsible for fulfilling all of the lease obligations.

On July 30, 2010, Applicant received a reduction in force notice that indicated he would be laid off on September 30, 2010. On August 16, 2010, he submitted a notice to vacate the apartment on September 30, 2010. Applicant vacated the apartment. At some point, the reduction in force was apparently cancelled because Applicant was not laid off from the employer until March 2013. In April 2011, the lessor sent Applicant a final accounting of his lease by registered mail. Applicant’s son signed the registered mail receipt. The final accounting indicated that Applicant owed \$6,233 on the terminated lease. Applicant stated he never received the final accounting. He was apparently unaware of this debt until being informed of it during the security clearance screening process. At the hearing, he indicated that he is willing to pay this debt when he has funds available, but also stated he might hire an attorney to get this matter settled.¹¹

Applicant provided letters of reference that indicated he is a reliable worker and a man of integrity. A former manager and supervisor are seeking to rehire him because of his strong work ethic and professionalism. In his former job, Applicant made deployments with military units to the Caribbean, Central America, and South America. In the Navy, he was awarded the Navy Achievement Medal and Good Conduct Medal. He was also selected as Sailor of the Year several times.¹²

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

¹⁰ Tr. 54-56, 60; GE 2; AE I; Applicant’s Answer to the SOR.

¹¹ Tr. 33, 56-61; GE 2; AE J; Applicant’s Answer to the SOR.

¹² Tr. 34-41, 63-64; AE E, L.

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 unfavorable, 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.

Starting in about 2010, Applicant accumulated delinquent debts that he was unable or unwilling to satisfy. 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 are ongoing and significant. Insufficient evidence was presented to conclude that his financial problems are unlikely to recur. AG ¶ 20(a) does not apply.

Each of the alleged debts became delinquent between 2010 and 2012. This was a period when both Applicant and his wife were working. At that time, they had an annual income of about \$91,000. Insufficient evidence was presented to establish that these debts were incurred due to conditions beyond their control. AG ¶ 20(b) does not apply.

Applicant provided proof that the tax lien in SOR ¶ 1.b was resolved and a balance of \$347 remained on the tax lien in SOR ¶ 1.a. The payments towards these tax liens were apparently made as part of the payments under the Chapter 13 bankruptcy plan and the withholding of income tax refunds. Because the bankruptcy proceeding has been dismissed, it is unclear what action will be taken to satisfy the remaining amount owed on the tax lien in SOR ¶ 1.a. Applicant also provided proof that he and his wife made payments on their mortgage loan between March 2013 and November 2013. Those payments were apparently part of a mortgage loan rehabilitation program, but were not made on a regular monthly basis. No payments on the mortgage were made in May, June, or September 2013. The failure to make consistent monthly payments may have been the reason the bank terminated the rehabilitation program. At the close of the record, the status of the mortgage loan was unclear. Applicant was not making mortgage loan payments. It is unknown whether the mortgage loan will be modified or whether the property will be foreclosed. AG ¶ 20(d) partially applies.

Applicant indicated that he intended to pay the debts in SOR ¶¶ 1.d, 1.e and 1.f when he has funds available. A promise to pay in the future is not a substitute for a meaningful track record of payments and is given limited weight. He also implied that he may dispute these debts, but provided no documentation to show that he had a legitimate basis for disputing them. From the evidence presented, I am unable to find that Applicant's financial problems are being resolved and are under control. AG ¶¶ 20(c) and 20(e) do not 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 served in the military for over 17 years and received a disability retirement. He worked for a defense contractor for about eight years and was a valued employee. His former employer is seeking to rehire him. Nonetheless, he has failed to show that his financial problems are being resolved. His delinquent debts continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c – 1.f:	Against Applicant

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