



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



In the matter of:)
)
) ISCR Case No. 14-01190
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: Russell Funk, Personal Representative

11/24/2014

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 May 12, 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 continue Applicant's security clearance. On June 4, 2014, Applicant answered the SOR and 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, Government Exhibits (GE) 1 and 3 were admitted into evidence without objection.¹ Applicant testified and offered Applicant Exhibits (AE) A through F that were admitted into evidence without objection. The record of the proceeding was left open until October 1, 2014, to provide Applicant the opportunity to submit additional matters. He submitted documents that were entered into the record as AE G through Q without objection. 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.²

At the hearing, Department Counsel made a motion to withdraw the allegations in SOR ¶¶ 1.h and 1.i. Applicant had no objection to the motion. The motion was granted. SOR ¶¶ 1.h and 1.i were withdrawn.³

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor. He has been working for his current employer since July 2012. He graduated from high school in 1989 and attended college for about two years without earning a degree. He served in the Army for over 22 years and retired in the grade of first sergeant (E-8) in May 2012. He is married and has three children, ages 10, 17, and 20, as well as a stepson, age 25. He held a security clearance for about 22 years without incident.⁴

Excluding the withdrawn allegations, the SOR alleged that Applicant had eight delinquent debts totaling about \$246,110, including a foreclosed mortgage in the amount of \$199,447. In his Answer to the SOR, Applicant admitted each allegation with the exception of SOR ¶ 1.d, which he denied. His admissions are incorporated as findings of fact.⁵

¹ GE 2 was the results of Applicant's Office of Personnel Management interview. GE 2 was presented at the hearing, but never offered into evidence. Because Applicant was never given an opportunity to adopt or object to GE 2, it is excluded from the record evidence.

² Tr. 11-12.

³ Tr. 12-15.

⁴ Tr. 6-7, 31-33; GE 1.

⁵ Applicant's Answer to the SOR.

Applicant attributed his financial problems to his wife's chronic health problems. In about 2004 she started having physical ailments, including chronic pain, after the birth of one of their children. From February to August 2004, she was on heavy pain medications for those ailments. She also suffered from severe mental health problems. She became dependent on pain medication and required inpatient treatment to address that dependency. At one point, she was employed as a supervisor of a janitorial service earning about \$40,000 per year. However, she was periodically hospitalized because of her health problems, including for six to eight weeks between 2008 and 2011. In April 2008, she was no longer able to work in her full-time job because of her health problems. She continued to work in her own eBay business, but this latter business was never profitable. Her health problems also resulted in the loss of her teeth and significant dental surgery. Her prescription medications were quite expensive, running as high as \$300 to \$900 per prescription for a 30-day period.⁶

SOR ¶ 1.a – charged-off account in the amount of \$30,245. This was a home equity line of credit that was opened in July 2006 and had a date of last activity of July 2011. In January 2013, the creditor obtained a judgment against Applicant in the amount of \$29,711, plus \$2,996 in attorney fees and \$267 in court costs, that accrues interest at a rate of 6.25%. From September 2013 to March 2014 and from July 2014 to the time of the hearing, Applicant's pay was garnished in the amount of about \$630 per month for this debt. The total amount garnished from his pay was about \$4,500. Applicant indicated that he planned to negotiate a repayment agreement with the creditor so that the garnishment would be discontinued.⁷

SOR ¶ 1.b – foreclosed mortgage loan in the amount of \$199,447. This was a Department of Veterans Affairs (VA) guaranteed home mortgage loan. Applicant initially admitted this debt in his Answer to the SOR, but later denied it at the hearing. He and his wife purchased the home for \$211,500 in January 2006. His credit report reflected this account had a date of last activity of July 2012, and the account was in foreclosure. The home sold in foreclosure for \$158,634 to the VA in August 2013. The VA later sold the home for \$157,000 in January 2014. Applicant stated that the original mortgage lender informed him that the balance on his account was zero, that the deficiency was written off, and that he would receive an IRS Form 1099 for the amount of the debt that was forgiven. An IRS Form 1099 was not part of the post-hearing submission.⁸

SOR ¶ 1.c – account past due 90 days in the amount of \$484 with a balance of \$6,819. This was a debt to a military exchange that had date of last activity of September 2013. Applicant's retired military pay was offset in the amount of \$242 in

⁶ Tr. 35-49, 64-65; GE 1; AE D, E.

⁷ Tr. 12-15, 45-47, 51-53, 57-59, 67, 69-70; GE 3; AE C, H, I, J. The total amount garnished from Applicant's pay is difficult to determine because there were pay periods in which it appears that pay previously garnished was reimbursed to him.

⁸ Tr. 45-47, 53, 57-60, 77-78; GE 3; AE H, K.

November 2013, \$273 in May 2014, and \$183 in October 2014 for this indebtedness. These offsets are apparently instituted after the past-due amount reaches a certain limit. At the hearing, he stated that he was behind about \$800 on this account and it had a balance of about \$5,695. He spoke to a representative of the exchange that indicated they were willing to negotiate a repayment arrangement, but no evidence of such an arrangement was presented.⁹

SOR ¶ 1.d – vehicle loan past due 30 days in the amount of \$601 with a balance of \$6,364. Applicant's credit report reflected that the vehicle was repossessed. He testified that he fell behind two and a half months in payments on the vehicle when it was repossessed. Three days after the repossession, he was able to pay off the delinquent amount and regain possession of the vehicle. The account is now current and has a balance of \$1,444. His final payment on this account is due in December 2014.¹⁰

SOR ¶ 1.e – charged-off account in the amount of \$4,652. Applicant's credit report reflected that this was a credit card account that had a date of last activity of November 2011. Applicant indicated that the creditor is willing to deeply discount this debt and forego the interest. He indicated that, once he develops a plan, he will resolve this debt.¹¹

SOR ¶ 1.f – charged-off account in the amount of \$3,047. Applicant's credit report reflected that this was a credit card account that had a date of last activity of March 2012. The creditor that holds this debt is the same creditor that holds the debt in SOR ¶ 1.e. As with that other debt, the creditor is willing to negotiate a settlement. Applicant indicated that, once he develops a plan, he will resolve this debt.¹²

SOR ¶ 1.g – collection account in the amount of \$1,201. This was a cell phone account that had a date of last activity of September 2011. Applicant indicated that the creditor is willing to settle this debt for \$480. He indicated that, once he gets cash freed up, he will resolve this debt.¹³

SOR ¶ 1.j – collection account in the amount of \$98. This was a mail service account that was assigned for collection in January 2010. Applicant and his wife were initially unaware this debt was delinquent. This debt was with a collection agency, but

⁹ Tr. 55-56, 60, 69-70; GE 3; AE H, L, M.

¹⁰ Tr. 53-55, 60; GE 3; AE C, H.

¹¹ Tr. 53, 60-61; GE 3; AE H. Applicant's credit report reflected that the past-due amount of this debt was \$4,352, instead of the amount listed above and in SOR ¶ 1.e.

¹² Tr. 60-61; GE 3; AE H.

¹³ Tr. 53, 61; GE 3; AE H.

has been transferred back to the original creditor. Applicant has been inquiring into the nature of this debt, but has had difficulty in confirming the validity of the debt. When the record closed, he was still attempting to determine whether he owed this debt. No documentation disputing this debt was presented.¹⁴

Before his wife's medical problems worsened in about 2008, Applicant paid his debts as agreed. After she lost her full-time job, they could not keep up with their debts. Applicant retired from the military in May 2012 and began working for his current employer on a part-time basis in July 2012. He continued to work as a part-time employee for about six months before obtaining a full-time position in January 2013. He indicated that he had no delinquent debts other than those listed in the SOR. He received financial counseling from the Army. He intends to pay his delinquent debts and was considering contacting a debt consolidation agency for assistance. He further noted that, after he pays off his vehicle loan in December 2014, he will have about \$600 each month to devote to paying other debts. At the time of the hearing, he had no money in his savings account and about \$50 in his checking account. In his post-hearing submission, he presented a monthly budget that reflected his total monthly income (military retirement and civilian salary) was \$6,153, that his total monthly expenses and debt payments (including the garnishments) was \$5,486, which left him a net monthly remainder of \$666.¹⁵

Applicant served as a Ranger. His service included combat duty in Iraq in 2004 and 2005. He has been awarded the Combat Infantry Badge, two Meritorious Service Medals, eight Army Commendation Medals, five Army Achievement Medals, seven Good Conduct Medals, and various unit awards. While serving in Iraq, he participated in a mission that resulted in the rescue of two high-level hostages. In his current job, he received grades on his work performance appraisal of "exceptional," "highly successful," and "fully successful." A manager indicated that Applicant was an integral player at his company.¹⁶

¹⁴ Tr. 44-45, 61; GE 3; AE H.

¹⁵ Tr. 49-53, 59, 61-71; AE C, D, H, N, Q. Applicant did note that the home owners association (HOA) for the foreclosed home had a tax lien against the property for about \$1,866. He inquired into the HOA debt and believed it may have been released when the home sold during the foreclosure sale. The tax lien was not alleged in the SOR. The first page of AE C (a monthly budget) listed a garnishment of \$700 for the debt in SOR ¶ 1.a; a garnishment of \$545 for the debt in SOR ¶ 1.c; and a garnishment of \$245 for the HOA debt. Those reported garnishment amounts, however, were not supported by the evidence. The garnishment for the debt in SOR ¶ 1.a is about \$630 per month, and only inconsistent offsets of his retired military pay have occurred for the debt in SOR ¶ 1.c. No proof was provided that his pay was garnished for the HOA debt. The post-hearing budget (AE Q) corrected the apparent errors regarding the garnishments listed in AE C.

¹⁶ Tr. 31-33, 36-37; AE A, B, D.

A former ranger who has known Applicant for more than 15 years stated that Applicant is one of the most responsible people he knows. He described him as a person who always goes above and beyond what is required.¹⁷

A deputy program manager at his company described Applicant as “a dedicated patriot and professional Soldier.” The chief of a military training division indicated that Applicant displayed a very high degree of honesty and loyalty. He stated that Applicant “is a great American and has served his country well.” A coworker stated:

[Applicant’s] willingness to help co-workers, ability to work on a team, integrity, and dedication to his family, work, and God are unmatched. [Applicant] is trust worthy and loyal beyond reproach. He understands and practices operation security for our company and the government.¹⁸

A military officer noted that Applicant served as the non-commissioned officer in charge of a four million dollar barracks complex, was directly accountable for COMSEC items, 240 weapons, and night vision devices. He indicated that Applicant maintained an impeccable record for all sensitive information and equipment.¹⁹

Applicant’s pastor indicated that he has complete trust in Applicant and would trust him with his life. He noted that Applicant served as a scoutmaster.²⁰

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

¹⁷ AE O.

¹⁸ AE A.

¹⁹ AE A.

²⁰ AE A.

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.

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.

A security clearance adjudication is aimed at evaluating an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) A person is not required, as a matter of law, 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 encountered extremely challenging circumstances. His wife suffers from chronic health problems that are debilitating. The costs of her prescription medications have been very expensive. In 2008, she lost her full-time job due to her health problems. After Applicant retired from the military, he had a part-time job for the first six months. His wife's health problems and his underemployment were conditions beyond his control that contributed to his delinquent debts. To receive full credit under AG ¶ 20(b), an applicant must show that he or she acted responsibly under the circumstances. In this case, Applicant paid the delinquency on his vehicle loan listed in SOR ¶ 1.d, recovered the vehicle following its repossession, and has since remained current on that loan, which will be paid off in December 2014. He contacted the mortgage lender after the foreclosure of his home and was informed the mortgage loan in SOR ¶ 1.b had a zero balance. His civilian salary is being garnished for the home equity loan in SOR ¶ 1.a, and his retired military pay is periodically offset for the debt in SOR ¶ 1.c. After paying off his vehicle loan, he will have additional money to devote to paying his remaining debts. He is living within his means and has not incurred any new delinquent debts since obtaining full-time employment. His financial problems are under control and are being resolved. AG ¶ 20(c) applies. AG ¶ 20(b) and 20(d) partially apply. AG 20(a) 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.

Substantial whole-person evidence was presented. Applicant served in the Army in an exemplary manner for over 22 years, including service in harm's way in Iraq. He is a devoted husband and father. His associates described him as a patriot. He is a hard-working, valued employee who has held a security clearance for many years without incident. In the past, he was entrusted with responsibility for expensive and sensitive government equipment. He testified in an open and honest manner at the hearing. He has shown that he is a reliable and trustworthy individual. There is no indication that he or his family lives extravagantly. He is making payments on some of his delinquent debts and indicated that he will resolve the remaining debts.²¹ In considering the record evidence in its entirety, particularly Applicant's lengthy service to the Government under arduous conditions and the difficulties he encountered with his wife's health problems, the whole-person analysis supports a favorable decision.

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 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.g: For Applicant
- Subparagraph 1.h-1.i: Withdrawn
- Subparagraphs 1.j: For Applicant

²¹ The Government can, of course, re-examine Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems."). This footnote should not be interpreted to mean that Applicant's security clearance is conditional.

Decision

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

James F. Duffy
Administrative Judge