



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-01204
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*¹

11/26/2014

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 August 2, 2013. On May 12, 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 answered the SOR on May 20, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 30, 2014, and the case was assigned to me on August 1, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 8, 2014, scheduling the

¹ Applicant is a licensed attorney in good standing with his state bar.

hearing for August 28, 2014. On August 26, 2014, Applicant requested a postponement due to a family emergency, and I granted his request. (Hearing Exhibit (HX) I.) On October 7, 2014, DOHA issued an amended notice of hearing, scheduling the hearing for October 28, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on November 7, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.c and denied SOR ¶ 1.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 63-year-old security response agent employed by a federal contractor since March 2013. He has never held a security clearance.

Applicant married in May 1982. He and his wife have three adult children, ages 38, 28, and 31. His wife is employed as a nurse.

Applicant was a police officer from October 1969 to December 1984, when he retired. After retirement, he worked in the security business, a restaurant supply business, and sold real estate. He attended college from August 1997 to May 1990 and received a bachelor's degree. He attended law school from August 1990 to May 1993 and received a juris doctor (JD) degree. He was admitted to practice in 1994. He was employed by a law firm and started making payments on his student loans in 1995. In January 1998, he and a law school classmate started their own firm, and a third partner joined the firm about 18 months later. He testified that the firm did "okay" but not "great," because it took time to build a client base. His income from the law firm was inadequate to continue paying his student loans. He paid interest only for several years. (Tr. 16-17.)

In 2008, Applicant's law firm was paid \$250,000 for settling a lawsuit, and Applicant's share of the fee was \$135,000. He used his share of the fee to pay past-due bills, including his student loans and his home mortgage loan. He claimed that he was unable to pay his federal and state income taxes for 2008, because of his drastic increase in income. He contacted the federal and state tax authorities and negotiated payment agreements, and he began paying \$406 per month on his federal tax debt. (GX 5 at 3; AX A.) He owed about \$7,000 for state income tax. The state imposed a tax lien in October 2009. Applicant paid the taxes due, and the lien was released in August 2012. (GX 5 at 4; Tr. 32.)

In August 2009, a judgment for \$10,511 was entered against Applicant for a delinquent credit card account. He testified that this debt was "put on the back burner" because of his other delinquent debts. The judgment is unsatisfied. (GX 4; Tr. 38.)

In December 2009, Applicant agreed to “retire” from the law firm because his share of the practice, which was largely devoted to real estate transactions, was no longer producing sufficient income. (Tr. 18.) He was unemployed until November 2011. He worked as a security officer from November 2011 to June 2012. In June 2012, he voluntarily left this job after his employer told him that his job would be downgraded and his pay reduced. (GX 1 at 12; Tr. 61.) He was unemployed from June 2012 to March 2013, when he began his current job.

In February 2012, a judgment for \$64,318 was entered against Applicant for delinquent student loans. (GX 4.) Applicant testified that he received settlement offers “over the years,” but he could not afford to accept them. He has not made any payments on the judgment or tried to negotiate a lesser settlement amount. (GX 5 at 3; Tr. 51.)

During 2012, Applicant’s wife worked an unusual amount of overtime as a nurse, earning about \$105,000 from February through June 2012. They decided to travel across the United States for about two months. (Tr. 24-25.) The trip expenses totaled about \$7,500. (Tr. 27.) They claimed that they were unable to pay their federal and state income taxes resulting from their increased joint income during 2012.

In June 2013, Applicant and his wife negotiated another payment agreement for their federal tax debt. They are now paying a total of \$700 per month for the combined tax debts for 2008 and 2012. Their total tax debt is now about \$27,857. (AX A.)

Applicant’s police pension is about \$3,000 per month. (Tr. 21.) His wife earns about \$90,000 per year. His net weekly income from his primary job is about \$240. He works a second job for 16 hours a week, earning another \$240. (Tr. 29-30.) His wife intends to resign from her current job and return to part-time work for an agency, because she is recovering from a hip replacement. (Tr. 28-29.)

Applicant’s family home is in his wife’s name because of his poor credit. They purchased the home for \$600,000, with a \$480,000 loan secured by a first mortgage and a \$120,000 loan secured by a second mortgage. The value of the home is now about \$420,000. They refinanced the home in 2006 and took out equity for repairs and upgrades. (Tr. 35-36.) Their current monthly payments are \$3,400 for the loans, insurance, and property taxes. They are currently now seeking a loan modification and have not made any house payments for about ten months. (Tr. 42.) Applicant has not sought or received financial counseling. (Tr. 51, 55.)

Applicant’s credit bureau reports (CBRs) reflect a delinquent medical debt for \$174. (GX 2 at 1; GX 3 at 5.) Applicant denies owing this debt, because it should have been covered by his medical insurance. (GX 5 at 4-5.) He has not contacted the creditor or the credit reporting bureau to dispute the debt. (Tr. 50-51.) It is not resolved.

Applicant and his wife took foreign vacations of 6-10 days in January 2010, January 2012, February 2013, and March 2014. He estimates that they spent about \$2,200 for each trip. (GX 1 at 31-33; Tr. 31-32.)

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 a federal income tax debt of about \$57,000 for tax years 2008 and 2012 (SOR ¶ 1.a); a judgment for about \$10,511 for a delinquent credit card account (SOR ¶ 1.b); a judgment for about \$64,318 for delinquent student loans (SOR ¶ 1.c); and a delinquent medical bill for \$174 (SOR ¶ 1.d). 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 and his credit bureau reports 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 following mitigating conditions 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 not established. Applicant's debts are numerous, recent, and did not occur under circumstances making them unlikely to recur.

AG ¶ 20(b) is not established. The downturn in the real estate market that adversely affected Applicant's area of practice was a circumstance beyond his control. Arguably, his spike in income in 2008 and his wife's spike in income in 2012 were circumstances beyond his control, but the tax debts that followed were due to his failure to set aside sufficient funds to pay the increased taxes. Applicant's decision to quit his job rather than work for less pay after his position was downgraded in 2012 was not a circumstance beyond his control. He acted somewhat responsibly regarding his tax debts by paying the state income taxes and setting up a payment plan for his federal tax debt. He has not acted responsibly in response to the judgment for delinquent student loans or the judgment for a delinquent credit card account. He has chosen to spend his discretionary money for vacations rather than resolve his delinquent debts. He has not acted responsibly toward the medical debt, because he has not contacted the creditor, disputed the debt, or taken any action to resolve it.

AG ¶ 20(c) is not established, because Applicant has not sought or received financial counseling, and his financial problems are not under control. AG ¶ 20(d) is established for the federal tax debt, but it is not established for the student loans, delinquent credit card debt, or the medical debt. AG ¶ 20(e) is not established, because Applicant has not disputed any of the debts alleged in the SOR.

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 served as a police officer for many years. He hoped to earn a comfortable living as a lawyer, but he was disappointed. When he was unable to meet his financial obligations, he did not adjust his lifestyle. He spent his discretionary money on vacations instead of using it to resolve his debts. 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 based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him 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**

Subparagraph 1.a: For Applicant

Subparagraphs 1.b-1.d: Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge