



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



In the matter of:)
)
) ISCR Case No. 14-01428
)
Applicant for Security Clearance)

Appearances

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

02/12/2015

Decision

DUFFY, James F., Administrative Judge:

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

Statement of the Case

On May 29, 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 a security clearance. Applicant answered the SOR on August

26, 2014, and requested a hearing on October 10, 2014. This case was assigned to me on November 19, 2014. On November 24, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for December 10, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 and 6, while Applicant testified and offered Applicant's Exhibits (AE) A and B. The record of the hearing was held open until January 7, 2015, to provide the Applicant the opportunity to submit additional documents. He timely submitted documents that were marked as AE C through G. Applicant's objection to GE 3 (Chapter 11 bankruptcy records) was overruled. All of the other proffered exhibits were admitted into evidence without objection. Department Counsel's memorandum forwarding Applicant's post-hearing submission was marked as Hearing Exhibit 1. The transcript (Tr.) of the hearing was received on December 22, 2014.

Findings of Fact

Applicant is a 67-year-old manager who works part time for a federal contractor. He also owns and operates a building services business. He graduated from high school in 1965, served in the U.S. Marine Corps from 1966-1968, including combat duty in Vietnam, and was honorably discharged. He earned a bachelor's degree in 1974. He married in 1969 and was widowed in 2005. He remarried in 2009. He has two children, ages 36 and 42. In the past, he held a security clearance without incident.¹

The SOR alleged that Applicant's business filed Chapter 11 bankruptcy in October 2008 (SOR ¶ 1.a), that Applicant filed Chapter 13 bankruptcy in December 2008 (SOR ¶ 1.b), that he owed the Internal Revenue Service (IRS) \$217,231 in unpaid payroll taxes (SOR ¶ 1.c), that he owed the IRS \$15,287 for a trust fund penalty (SOR ¶ 1.d); and that he had five state tax liens totaling \$41,420 (SOR ¶¶ 1.e-1.i). In his Answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.g, denied the allegation in SOR ¶ 1.h, and neither admitted or denied the allegation in SOR ¶¶ 1.i. His admissions are incorporated as findings of fact.²

After completing college, Applicant worked in a variety of jobs. He eventually was employed by a company that provided building services. The partners who ran that company were elderly, and he eventually purchased the company from them. His company was incorporated in 1986, had about 15 employees, and was certified as a Small Business Administration (SBA) entity. Under the SBA program, his company was awarded building service contracts at military bases and other federal facilities. Over the years, his business expanded to other states and included at least one overseas

¹ Tr. 6-7, 35-39; GE 1, 2.

² Applicant's Answer to the SOR.

contract. His business grew to about 800 employees and, at some point, became ineligible for SBA contracts, but bid on other competitive federal contracts.³

Applicant noted that his business did not qualify for federal contracts under the Javits-Wagner-O'Day Act of 1971, which provides that federal agencies must purchase specified supplies and services from nonprofit agencies employing persons who are blind or have other significant disabilities. Implementation of that Act began to impact his business in the late 1990s and early 2000s. Due to the Act, he lost a number of his federal contracts to qualifying nonprofit agencies. Nevertheless, he stated, prior to the economic downturn of 2006 and 2008, he always paid his bills on time, did not incur any delinquent debts, and had an excellent credit rating. The economic downturn, however, had a significant impact on his business. During the downturn, major companies cut back on their service contracts with his company. Some of his contracts were reduced by as much as 35-40%. This economic downturn had a substantial negative impact on his business and resulted in his company not being able to meet its financial obligations.⁴

SOR ¶ 1.a – Chapter 11 Bankruptcy. To survive the economic downturn, Applicant's company reorganized under a Chapter 11 bankruptcy. He noted that, in filing Chapter 11 bankruptcy in October 2008, he chose to work with his creditors so that they would get paid as opposed to shutting down the business and walking away from the debts. The Chapter 11 bankruptcy listed that his company had \$513,463 in assets and \$991,962 in liabilities. A reorganization plan was proposed to the creditors and confirmed by the bankruptcy court in August 2009. One of the liabilities was a \$650,065 secured claim on his company's building. As part of the bankruptcy proceeding, the building was surrendered to the creditor. His company moved to another building that it currently rents with an option to buy. His payments under the Chapter 11 reorganization plan are discussed under the debts addressed in SOR ¶¶ 1.c and 1.e-1.h, below. He testified that suppliers are again extending credit to his company.⁵

SOR ¶ 1.b – Chapter 13 Bankruptcy. In December 2012, Applicant filed Chapter 13 bankruptcy because business creditors were proceeding against him personally after his business filed Chapter 11 bankruptcy. His Chapter 13 bankruptcy listed \$284,830 in assets and \$1,016,257 in liabilities. One of the liabilities was an IRS trust fund penalty (**SOR ¶ 1.d**) for \$15,287, which apparently arose from his company's failure to pay IRS payroll taxes as required (discussed below). His Chapter 13 Plan provided that he would initially pay \$1,500 monthly, with those payments increasing to \$1,600 in November 2009. The payments were to be made for 60 months. Additionally, the plan provided that Applicant would pay the IRS only \$12,139 for the trust fund penalty because that was the amount approved by the bankruptcy trustee. On September 15,

³ Tr. 38-40.

⁴ Tr. 40-44, 75-78; Applicant's Answer to the SOR.

⁵ Tr. 43-44, 47, 50-51; GE 2, 3.

2014, this bankruptcy was discharged. The trustee's final report reflected that the IRS trust fund penalty was paid; \$105,877 was disbursed to creditors; and \$724,652 in unsecured claims was discharged without payment.⁶

SOR ¶ 1.c – IRS debt of \$217,231 for Unpaid Payroll Taxes. This debt was listed in Applicant's Chapter 11 bankruptcy, but not in his Chapter 13 bankruptcy. The Chapter 11 bankruptcy petition reflected this debt was disputed. An IRS Proof of Claim reflected that this debt consisted of secured claims totaling \$150,314 and unsecured claims totaling \$66,917. The Chapter 11 reorganization plan provided that Applicant's company would pay \$2,800 per month to the IRS for not more than five years for the secured claims totaling \$105,314 and pay \$1,700 per month for not more than five years for unsecured claims totaling \$102,000 from federal, state, and local taxing authorities. The monthly payments of \$2,800 to the IRS on the secured claims were at some point reduced to \$2,000. Applicant provided proof that he made periodic payments to the IRS from January 2010 to December 2014 that totaled \$185,600 toward the secured claims. At the time of the hearing, he was still making the monthly payments to the IRS.⁷

SOR ¶¶ 1.e-1.g – State Tax Liens for \$18,447, \$15,215, and \$5,648, respectively. These tax liens were from the state in which Applicant resides and where his company's main office is located. The underlying tax debts for these liens were apparently grouped together in the Chapter 11 bankruptcy as part of the unsecured tax claims from federal, state, and local taxing authorities. In his Answer to the SOR, Applicant provided a document signed by state tax auditor showing that the taxes owed under his Department of Labor employer account have been paid in full as of August 26, 2014. In his post-hearing submission, he provided documents from the state taxing authority showing that tax liens for \$18,447, \$15,215, \$5,648, \$21,278, and \$5,630 were satisfied.⁸

SOR ¶ 1.h – State Tax Lien for \$784. This lien was for property taxes that Applicant owed on two parcels of land. This debt was paid in July 2012.⁹

SOR ¶ 1.i – State Tax Lien for \$1,326. This tax lien is from a state in which Applicant does not reside. The Chapter 11 bankruptcy listed that taxes were owed to

⁶ Tr. 44, 48-52, 59-61; GE 2, 4; AE B.

⁷ Tr. 44, 52-59; AE E, F, G; Applicant's Answer to the SOR. Applicant was not questioned about the unsecured portion of the IRS claim and did not provide documentation showing proof of payments toward the unsecured portion. However, his payments toward the unsecured state tax liens in SOR ¶¶ 1.e-1.h supports a finding that he was making the \$1,700 monthly payments under Chapter 11 for the unsecured federal, state, and local tax liability. The reorganization plan noted the IRS secured claims accrued interest at a rate of 4%.

⁸ Tr. 61-67; AE C, D.

⁹ Tr. 67-68; Applicant's Answer to the SOR.

this state. Applicant testified that, when he contacted the state official about these taxes, he was informed that nothing could be done because of the “stay” on collection while his bankruptcy was pending. The officials informed him that they would not discuss this matter until six months after his bankruptcy was completed. He indicated this debt was not resolved, but would be resolved. Of note, it is likely this debt will be resolved as part of his Chapter 11 bankruptcy.¹⁰

Applicant received financial counseling when he filed Chapter 13 bankruptcy. In 2013, his company’s revenue was about \$1.4 million. He testified that his company then had about 85-95 employees, with most of them working on a part-time basis. He has not recently taken a salary or any income from his company while it is undergoing the Chapter 11 reorganization. He stated everyone else has to be paid before he is paid. He lives on a military retirement, Social Security payments, and income from rental properties.¹¹

In Vietnam, Applicant was assigned to a unit that was awarded two Presidential Unit Citations. He was wounded twice in combat and received two Purple Heart Medals. He was apparently medically retired from the military due to his wounds.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 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.

¹⁰ Tr. 68-69; GE 3.

¹¹ Tr. 31, 33, 69-74; AE A.

¹² Tr. 36-37.

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 incurred delinquent debts that he was unable to pay for an extended period. He filed Chapter 13 bankruptcy in 2008. His company filed Chapter 11 bankruptcy in 2008. 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.

An economic downturn negatively impacted Applicant's company in 2006 and 2007. This economic downturn was a condition beyond his control that caused his financial problems. To survive the downturn, Applicant's company filed Chapter 11 bankruptcy. He also filed Chapter 13 bankruptcy to preclude his company's creditors from proceeding against him personally on the company's debts. He obtained financial counseling when he filed Chapter 13 bankruptcy. He is complying with the requirements of the bankruptcies. The Chapter 13 bankruptcy is discharged, while the Chapter 11 bankruptcy is ongoing. As part of the bankruptcy proceedings, Applicant has resolved the IRS trust fund penalty in SOR ¶ 1.c and the state tax liens in SOR ¶ 1.d-1.h. He is making regular payments on the past-due payroll taxes in SOR ¶ 1.c and the amount of those payroll taxes has been significantly reduced. A state taxing authority advised Applicant that nothing could be done regarding the tax lien in SOR ¶ 1.i while his bankruptcy was pending. Of note, a tax liability owed to the state identified in SOR ¶ 1.i was listed in the Chapter 11 bankruptcy, and the tax lien in that allegation may be resolved as part of that bankruptcy proceeding. Applicant has acted responsibly under

the circumstances. His financial problems are under control, are being resolved and are unlikely to recur. AG ¶¶ 20(b), 20(c), and 20(d) apply. AG ¶ 20(a) partially applies.

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.

While in the Marine Corps, Applicant engaged in combat duty in Vietnam. He was awarded two Purple Heart Medals and was medically retired. He is a hard-working individual who has been operating his own company for a number of years. His company encountered financial problems during a recession in 2006 and 2007. He has been working hard to recover from those financial setbacks. At present, his Chapter 13 bankruptcy is discharged, his financial situation is stable, and his company's Chapter 11 bankruptcy should be completed in the near future. He has acted reasonably and responsibly in addressing his financial problems. He is well on the road to financial recovery. His financial problems appear to be behind him.

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.i: 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 Applicant a security clearance. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge