



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



In the matter of:)
)
) ISCR Case No. 14-01503
)
Applicant for Security Clearance)

Appearances

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

02/23/2015

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 August 11, 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. On September 15, 2014, Applicant answered the SOR and requested a hearing. This case was assigned to me on November 5, 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 Exhibits (GE) 1 through 4, while Applicant testified and offered no exhibits. The record of the proceeding was left open until January 7, 2015, to provide Applicant an opportunity to present additional matters. He timely submitted documents that were marked as Applicant Exhibits (AE) A through H. 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 December 22, 2014.

Findings of Fact

Applicant is a 62-year-old employee of a defense contractor. He has been working for that employer since 1981. He graduated from high school in 1972 and earned a bachelor's degree in 1975. He is married and has a child, age 33, and three stepchildren, ages 41, 43, and 45. He has twice held a security clearance in the past for a total of about 12 years without incident.¹

The SOR alleged that Applicant filed Chapter 7 bankruptcy in 1995 that resulted in a discharge of his debts (SOR ¶ 1.a); that he filed Chapter 7 bankruptcy in 2011 that resulted in a dismissal of the proceeding (SOR ¶ 1.b); and that he had nine delinquent debts totaling about \$68,432 (SOR ¶¶ 1.c-1.k). In his Answer to the SOR, Applicant admitted each allegation with the exception of SOR ¶ 1.i that he denied. His admissions are incorporated as findings of fact.²

SOR ¶ 1.a – Chapter 7 bankruptcy in 1995. In January 1995, Applicant filed Chapter 7 bankruptcy. The bankruptcy petition listed that he had \$75,737 in assets and \$264,050 in liabilities, including \$186,750 in unsecured, nonpriority claims. At least three of the liabilities were personal loans from friends or family members for his real estate investments. Applicant testified that these real estate investments were not profitable. In April 1995, the bankruptcy judge issued an order discharging his debts. Applicant explained that, when he filed this bankruptcy, he had seven people living in his house. This included three stepchildren in high school or college, his mother-in-law who had Parkinson's disease, and the wife of his oldest stepson. His mother-in-law also fell, broke her hip, and incurred substantial medical expenses. His oldest stepson and

¹ Tr. 4-5, 22, 44-45; GE 1, 2.

² Applicant's Answer to the SOR.

his stepson's wife were both unemployed. Applicant and his wife were both working, but could not keep up with the expenses.³

SOR ¶ 1.b – Chapter 7 bankruptcy in 2011. In June 2011, Applicant again filed Chapter 7 bankruptcy. His assets totaled \$516,742 and liabilities totaled \$644,209. He indicated that he filed this bankruptcy because of an economic downturn. At that time, his wife was working for a real estate company, and they had three rental properties. In the downturn, the real estate rental market fell apart as tenants lost their jobs and moved out of the rental properties. Rents fell below mortgage payments. Applicant could not sell the rental properties because of the depressed market. The downturn also caused a significant reduction in his wife's income. She also developed medical problems during this period. In November 2011, the bankruptcy proceeding was dismissed because Applicant's earnings were too high. He indicated that he could neither sell nor refinance the rental properties. He stated that he was forced to give up the rental properties in foreclosure proceedings.⁴

SOR ¶ 1.c – collection account for \$7,370. This was a credit card account that was opened in April 2005, had a date of last activity of January 2011, and was charged off by November 2011. At the hearing, Applicant indicated that he was not sure whether or not he paid this account. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.⁵

SOR ¶ 1.d – collection account for \$10,719. This was a credit card account that was opened in March 2003, had a date of last activity of March 2010, and was charged off by October 2013. At the hearing, Applicant indicated that this account was possibly settled, but he was not sure of its status. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.⁶

SOR ¶ 1.e – mortgage loan past due for \$14,046 with a balance of \$24,597. This was a second mortgage loan on a rental property that was foreclosed. This loan was opened in August 2005 and had a date of last activity of November 2008. At the hearing, Applicant indicated that he was not sure whether he received an IRS Form 1099-C (cancellation of debt) for this loan, but would be willing to provide it if he received one. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.⁷

³ Tr. 19-20, 24-26; GE 3.

⁴ Tr. 20-22, 24, 26-29; GE 2, 4.

⁵ Tr. 37-38; GE 2, 4.

⁶ Tr. 39; GE 4.

⁷ Tr. 29-32, 39-40; GE 2, 4.

SOR ¶ 1.f – collection account for \$1,986. This was a retail charge account that was opened in June 2006, had a date of last activity of November 2010, and was charged off by October 2013. At the hearing, Applicant indicated that he did not think he settled this debt. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.⁸

SOR ¶ 1.g – mortgage loan placed for collection for \$26,669. This was a second mortgage loan on a rental property. This loan was opened in December 2004, had a date of last activity of June 2009, and was charged off by February 2013. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.⁹

SOR ¶ 1.h – collection account for \$5,239. This was a credit card account that was opened in January 2003, had a date of last activity of December 2010, and was charged off by June 2011. At the hearing, Applicant indicated that he was not sure whether he settled this debt. No documents were presented showing that he made any payments toward this debt or that he took other action to resolve it.¹⁰

SOR ¶ 1.i – past-due account for \$271 with a balance of \$2,462. This was a retail charge account that was opened in September 1984, had a date of last activity of November 2009, and was past due over 120 days by June 2010. In his Answer, Applicant denied this allegation. He indicated he did not recognize this debt during an Office of Personnel Management (OPM) interview in November 2013 and at the hearing. I find in favor of Applicant on this debt because it is a duplicate of the debt in SOR ¶ 1.j, below. Both debts are from the same creditor, and both have the same high credit amount.¹¹

SOR ¶ 1.j – collection account for \$2,312. This was a retail charge account that was opened in September 1984, had a date of last activity of December 2009, and was charged off by October 2013. During his OPM interview, Applicant indicated that this debt was not discharged in his first bankruptcy. He testified that he knew he settled several of his debts, but did not specifically indicate that this debt was one of them. No documentation was presented showing that he made any payments toward this debt or that he took other action to resolve it.¹²

⁸ Tr. 40; GE 2, 4.

⁹ Tr. 29-32, 40; GE 2, 4.

¹⁰ Tr. 40; GE 2, 4.

¹¹ Tr. 40-41; GE 2, 4.

¹² Tr. 41; GE 2, 4.

SOR ¶ 1.k – collection account for \$1,899. This was a credit card account that was placed for collection in October 2010. In his post-hearing submission, he provided a collection company letter dated May 1, 2014, offering to settle this debt for \$574. In a handwritten note, Applicant indicated he paid the debt, but could not find a letter confirming the payment.¹³

Applicant has not received financial counseling. He testified that he was earning about \$80,000 when he filed his second bankruptcy. In the last four years, his annual income fluctuated between \$100,000 and \$118,000 depending on the amount of overtime he worked. His mother-in-law is deceased. His child and stepchildren live on their own and are financially independent. In 2007, his wife inherited a 401(k) account of about \$300,000. This inheritance was taxable income. At some point, the IRS entered a judgment against them for the taxes due on the inheritance. He indicated that his wife spent the \$300,000, and he ended up paying the taxes on it. He testified that he ultimately paid the IRS about \$50,000 for the taxes due on the inheritance. His credit report dated November 1, 2013, reflected that he had tax liens entered against him for \$5,263, \$5,613, \$21,041, and \$15,845 between 2009 and 2011 that have been released. He also presented documents showing significant payments to the IRS. Furthermore, he testified that his wages were garnished for a state tax lien of about \$12,000. He stated that his wife's salary was based on commission and was about \$10,000 to \$15,000 annually. In his post-hearing submission, he presented a list of monthly expenses. However, he did not provide specific information about his and his wife's monthly income. Based on the information presented, I was unable to determine whether Applicant had a net monthly remainder after paying the expenses.¹⁴

In his post-hearing submission, Applicant presented documents showing he paid \$1,490 in May 2014 to settle a past-due credit card account of \$2,483. Based on the information provided, this settlement could not be correlated to one of the alleged SOR debts. He also presented an IRS Form 1099-A for a mortgage loan that was not alleged in the SOR.¹⁵

In 2011, Applicant received a certificate of recognition for 30 years of dedicated service to his employer. He received other letters of appreciation for his contributions to various entities. He successfully completed a citizen's public safety academy in 2011.¹⁶

¹³ Tr. 41; GE 2, 4; AE C.

¹⁴ Tr. 21-23, 32-37, 42-43, 48; GE 4; AE F.

¹⁵ AE B, C, E. AE G contains documents showing distributions to Applicant from an investment account of \$12,485 in 2011 and \$60,677 in 2012. It is unclear what exactly those distributions represent or why they are relevant to the SOR allegations. They may be distributions from a 401(k) account.

¹⁶ Tr. 44-46; GE 2; AE D.

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.

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.

In 1995, Applicant was granted a Chapter 7 bankruptcy discharge. He filed Chapter 7 bankruptcy again in 2011 and that proceeding was dismissed because his income was too high. He continued to accumulate delinquent debts that he was unable or unwilling to satisfy for an extended period. 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.

Applicant's financial problems are longstanding, significant, and ongoing. From the evidence presented, I cannot find that similar problems are unlikely to recur. His financial problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Prior to filing bankruptcy in 1995, Applicant had six family members living with him, including his ailing mother-in-law. Prior to his second bankruptcy filing, he was negatively impacted by an economic downturn in the real estate market. Due to that downturn, he had difficulty renting three properties and those properties were eventually foreclosed. While he encountered conditions beyond his control that contributed to his financial problems, he failed to establish that he has acted responsibly under the circumstances. He has been employed by the same defense contractor for the past 34 years. In the past four years, he has earned at least \$100,000. Nevertheless, he only provided proof of settling one alleged debt (SOR ¶ 1.k). While he paid federal and state tax liabilities and settled another debt that may or may not be one of the alleged debts, he did not establish a meaningful track record of payments on the delinquent debts or provide proof that he took other noteworthy actions to resolve them. He did not receive financial counseling. From the evidence presented, I am unable to find that his financial problems are being resolved or are under control. His financial problems remain a security concern. AG ¶¶ 20(b) and 20(d) partially apply. AG ¶ 20(c) does 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 has worked for the same employer for about 34 years. He is a valued employee. Nevertheless, he has a long history of financial problems and has not shown that he has acted responsibly in handling his financial matters. 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 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
Subparagraphs 1.a-1h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	For 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 grant Applicant a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge