



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



In the matter of:)
)
) ISCR Case No. 14-01802
)
Applicant for Security Clearance)

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/15/2015

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 June 18, 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 August 15, 2014, Applicant answered the SOR and requested a hearing. This case was assigned to me on January 23, 2015. On February 10, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for February 16, 2015. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 3, while Applicant testified, called three witnesses, and offered Applicant's Exhibits (AE) A through O. The record of the proceeding was left open until March 12, 2015, to provide Applicant an opportunity to present additional matters. Applicant timely submitted documents that were marked as AE P through AH. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on March 10, 2015.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor. He has worked for his current employer since May 2011. He served on active duty in the U.S. Navy from November 1988 to April 2011, attained the grade of senior chief petty officer (E-8), and retired honorably. In about 2011, he attended college for a year without earning a degree. He has been married twice. His first marriage began in 1990 and ended in divorce in 2011. He married his current wife in 2011. He has three children, ages 17, 19, and 23, from his first marriage and one child, age 4, from his second marriage. He has held a security clearance since about 1991.¹

The SOR alleged that Applicant had three delinquent debts totaling \$209,750. In his Answer to the SOR, Applicant denied each allegation. Over 95% of the alleged debt involves the mortgage foreclosure alleged in SOR ¶ 1.a. A credit report dated September 27, 2013, contains substantial evidence of each alleged debt.²

Applicant attributed his financial problems to his marital separation and divorce. From February to August 2009, he deployed to Afghanistan. While he was deployed, his wife's boyfriend moved into their house. Shortly after his return, she moved out of the house, which resulted in \$2,200 reduction in the monthly household income. Upon his return, he also learned that she took out a \$90,000 second mortgage on the house solely in her name. Furthermore, she did not pay a number of other bills while he was deployed. Those bills became delinquent, but he later paid them.³

¹ Tr. 28-29, 34-35, 53-55; GE 1, 2; AE H.

² Applicant's Answer to the SOR; GE 3; AE A. "It is well-settled that adverse information from a credit report can normally meet the substantial basis standard and the government's obligation under ¶ E3.1.14 [of the Directive] for pertinent allegations." See ISCR 08-12184 at 7 (App. Bd. Jan. 7, 2010).

³ Tr. 30-32, 36-37, 55-56, 67-68; Applicant's Answer to the SOR; GE 1, 2; AE M, P. A Temporary Needs Order reflected that Applicant had an extramarital affair with a woman from Bosnia in 2008. His extramarital affair may have been a factor in his ex-wife's extramarital relationship. See AE A.

In January 2010, Applicant initiated divorce proceedings. His wife was initially granted custody of the children, and he was required to pay \$2,100 monthly in temporary alimony and child support. The divorce proceedings lasted almost two years. During that period, he struggled financially and fell behind on his mortgage payments. In October 2011, the divorce was granted. At that time, his oldest child was emancipated. He was granted custody of the two younger children. In the divorce, he was awarded the house and agreed to assume responsibility for the first and second mortgages. He paid approximately \$32,000 in attorney's fees during the divorce proceeding. He no longer is required to pay child support. His ex-wife is entitled to \$730 of his monthly military retirement pay.⁴

SOR ¶ 1.a – mortgage foreclosure in the approximate amount of \$207,831

a. In 2010, Applicant's house went into a foreclosure status. Since then, he entered into two temporary repayment plans in an attempt to rehabilitate the primary mortgage loan. Under those plans, he made mortgage payments for about four months before the creditor demanded a lump-sum payment of the entire past-due amount, which he could not afford. His last mortgage payment was made in December 2011, but he continues to reside in the home. After his last mortgage payment, the creditor refused to accept any further payments. He continued to contact the creditor in an attempt to modify the mortgage, but he said the creditor would advise him that there was a flaw in his credit report or give him some other reason that made him ineligible for a loan modification.⁵

b. Applicant thought that his home was worth about \$250,000, and the creditor was just interested in foreclosing on it. He noted that a smaller home across the street from his house recently sold for \$240,000. In his post-hearing submission, he provided a document from a real estate website that valued his home at \$207,511 and noted that comparable homes were selling between \$183,000 and \$218,000.⁶

c. When he was served with foreclosure papers in March 2013, Applicant hired a lawyer to represent him. His lawyer succeeded twice in blocking the creditor from foreclosing on the home. He pays the lawyer \$500 monthly and checks each month on the lawyer's progress in resolving this debt. The lawyer has attempted to contact the creditor to negotiate a settlement, but the creditor refuses to talk to the lawyer.⁷

d. Applicant's original plan was to stay in the home and pay what he agreed in the mortgage loan. At the hearing, however, he indicated that he now plans to move into

⁴ Tr. 31-33, 37-46, 53-56; Applicant's Answer to the SOR; GE 2; AE A, B, N.

⁵ Tr. 38-45, 47-51, 60-62; Applicant's Answer to the SOR; GE 2, 3; AE P, Q, W.

⁶ Tr. 44-45, 56, 62-63; Applicant's Answer to the SOR; AE AH.

⁷ Tr. 31-33, 38-45, 47-48, 50-52, 57-64; Applicant's Answer to the SOR; GE 2; AE C, X, Y, Z.

an apartment in May 2015 after his son graduates from high school and attempt to sell the home in a short sale. He stated that the second mortgage holder recently indicated that it would settle its debt for about \$26,000. He believes that he could sell the home for about \$230,000 and with the proceeds resolve both mortgages. This plan recently became a possibility because of the second mortgage holder's settlement offer.⁸

SOR ¶ 1.b – charged-off account for \$419. A credit report dated September 27, 2013, listed this debt as a credit card account that had a date of last activity of March 2008. In his Answer to the SOR, Applicant claimed this account was reported in error. He provided a letter from the creditor dated July 11, 2014, indicating that this account would be deleted from his credit report. Two credit reporting agencies were already reporting that this account had a zero balance.⁹

SOR ¶ 1.c – charged-off account for \$1,500. This debt was a credit card debt that had a date of last activity of January 2009. In his Answer to the SOR, Applicant provided documentation that he settled and paid this debt for \$1,480 in August 2011.¹⁰

In February 2015, Applicant completed a money management course. His current wife does not work outside the home. With the exception of the mortgages on his house, he is current on his financial obligations. A recent credit report confirmed he had no other delinquent debts. At the time of the hearing, he had \$5,000 in his checking account and about \$100 in a saving account. The amount in his savings account was recently depleted because he paid attorney's fees for this hearing. Applicant earns about \$74,000 annually. In his post-hearing submission, he presented a personal financial statement that indicated his net monthly income was \$5,780, his total monthly expenses were \$1,450, and his total monthly debt payments were \$1,819, which left him a net monthly remainder of \$3,961. His total monthly debt payments did not include payments toward the delinquent mortgage because, as noted above, the creditor will not accept them.¹¹

At the hearing, three witnesses testified that Applicant is trustworthy. One of the witnesses, Applicant's manager, traveled a significant distance to testify on his behalf. The manager stated that Applicant was "one of our better employees, trusted employees and we thought it was worth the effort for me to come down and be a character witness to assure the Court that [Applicant], in our opinion, is of high character." Applicant also submitted a number of character reference letters that describe him as a true professional who is held in the highest regard.¹²

⁸ Tr. 30-33, 38-45, 56-64; Applicant's Answer to the SOR; AE U.

⁹ Tr. 33-34; Applicant's Answer to the SOR; GE 2, 3; AE D.

¹⁰ Tr. 34; Applicant's Answer to the SOR; GE 2, 3; AE E, F, G.

¹¹ Tr. 35-37, 45-48, 52-53; AE L, M, O.

¹² Tr. 10-27; AE J, K.

In the Navy, Applicant was awarded the Defense Meritorious Service Medal, two Navy-Marine Corps Commendation Medals, three Navy-Marine Corps Achievement Medals, seven Good Conduct Medals, and various service awards.¹³

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.

¹³ AE H, I.

“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 three delinquent debts totaling approximately \$210,000 that he was unable or unwilling to satisfy for an extended period. Record 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 were the result of conditions beyond his control. Expenses arising from his marital separation and divorce had a detrimental impact on his financial situation. He acted responsibly in resolving a number of delinquent debts that his ex-wife incurred while he was deployed to Afghanistan. His only remaining delinquent debts are the first and second mortgages on his home. He twice tried to rehabilitate the first mortgage by entering into repayment plans, but in both instances the creditor made demands that he could not meet. Following the most recent repayment plan, he continued to make payments, but the creditor refused them. He believes the creditor is only interested in foreclosing on the home. He hired an attorney to represent him in resolving the mortgages. This financial problem is not conducive to a quick resolution. He has been doing what he can under difficult circumstances to address it. Based on a recent settlement offer by the second mortgage holder, he believes that he can resolve both mortgages through a short sale. Given the current value of the home, his plan appears to be a realistic possibility. The evidence shows that Applicant has been persistent in his efforts to address his financial problems. His track record of resolving other delinquent debts supports a conclusion that he will continue working on the delinquent mortgages in a responsible manner until they are resolved.

Besides the delinquent mortgages, Applicant is financially stable. His financial problems occurred under circumstances that are unlikely to recur. He has acted responsibly under the circumstances in addressing his financial problems. AG ¶ 20(b) fully applies. AG ¶ 20(e) applies to the debt in SOR ¶ 1.b. AG ¶ 20(d) applies to the debt in SOR ¶ 1.c. AG ¶¶ 20(a) and 20(c) partially 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 honorably in the Navy for 23 years, including in Afghanistan. He has worked for his current employer for four years. He is a valued employee. He had held a security clearance for many years without any apparent problems. He encountered financial problems and has been working persistently to resolve them. I am confident that he will continue to act in a responsible manner in addressing the delinquent mortgages. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all the above reasons, I conclude that Applicant mitigated the financial consideration 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-1c: 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