



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 14-02503
)
 Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

01/15/2015

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 March 18, 2013. On July 23, 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 received the SOR on August 5, 2014; answered it on August 23, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 29, 2014, and the case was assigned to me on October 31, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 3, 2014, scheduling the hearing for November 20, 2014. I

convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Department Counsel's letter transmitting GX 1 through 3 to Applicant is attached to the record as Hearing Exhibit (HX) I. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until December 5, 2014, to enable Applicant to submit additional documentary evidence. At his request, I extended the deadline to December 19, 2014. He timely submitted AX F through K. Department Counsel's comments regarding AX F through K are attached to the record as HX II.¹ DOHA received the transcript (Tr.) on December 8, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶ 1.a in part, admitted ¶¶ 1.b through 1.j, and denied ¶¶ 1.j-1.l. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old network engineer employed by a defense contractor. He is a high school graduate with some college but no degree. (GX 1 at 10-11; Tr. 43.) He was hired in February 2013 but did not start working until August or September 2013. He has never held a security clearance.

Applicant's performance review for 2013 rated him as achieving expectations. His manager commented that he had gained the respect of the technology team and management and has proved to be a valuable member of the team. (AX B.) His midpoint review for 2014 commented that he is "extremely responsive" and "is willing to go above and beyond" the technical support that is required. (AX A.)

Several friends, former employers, and coworkers submitted statements on Applicant's behalf. They have all known him for more than 20 years. They all describe him as caring, dependable, trustworthy, honest, and hard-working. (AX G-J.)

Applicant has never married and has no children. He was involved in a serious romantic relationship with a woman from 2007 to 2010. She was diagnosed with cancer in 2007 and given six months to live. Applicant cared for her for almost three years, until she passed away in 2010. (Tr. 42.) The woman's father submitted a letter expressing his admiration for Applicant's honesty, integrity, work ethic and overall character. (AX F.)

Applicant worked for a private-sector logistics company from August 1998 to February 2007, when he was laid off. He decided to start his own business and was self-employed from February 2007 to August 2008, when his business failed. He depleted all his savings and retirement funds to start the business. (Tr. 28.)

¹ The Department Counsel at the hearing left federal employment before Applicant submitted AX F through K. Applicant's submissions were reviewed by a substitute Department Counsel.

Applicant attributed the failure of his business to the declining economy. However, he admitted at the hearing that he had no business experience and did not know what he was doing. (Tr. 28, 31.)

Applicant estimated that he invested about \$100,000 in the business. (Tr. 61.) After his business failed, he worked at several low-paying intermittent jobs, with periods of unemployment between jobs. He was unemployed from June to August 2009, January to March 2010, and September to December 2010. He worked as an information technology (IT) contractor in the private sector from December 2011 until he was hired by his current employer. He attended a massage therapy school from October 2010 to May 2011 and worked in several part-time and full-time positions as a massage therapist. (Tr. 43; GX 1 at 11-19.)

Applicant failed to timely file his federal and state income tax returns for tax years 2008 through 2011. He testified that his tax returns for 2008 covered the period when his business failed, and he was unable to complete the returns without professional advice, which he could not afford. (Tr. 31.) As of the date the record closed, he had not filed his 2008 returns. He testified that he filed his 2009 returns, but he did not provide any documentary evidence supporting his testimony. He hired a professional tax preparer, who prepared and filed his federal and state returns for 2010 through 2012. In his answer to the SOR, he submitted a letter from the state department of taxation, stating that for tax years 2006 through 2013, "We found no outstanding assessments or delinquent notices on file." The evidence indicates that he does not owe any federal taxes for 2010 through 2012 and does not owe state taxes for 2006 through 2013, but the evidence does not show whether Applicant owes federal taxes for 2008 and 2009. Furthermore, the letter from the state, while indicating that he owes no state taxes, does not address whether he filed his state returns for 2008 and 2009.² (Answer to SOR; AX C, D, and E.)

Applicant fell behind on his house payments in 2009, and the lender foreclosed on the property. The sale of his house was sufficient to satisfy the first mortgage but not a line of credit secured by the property. The lender for the line of credit forgave the debt and Applicant reported the forgiven debt on his 2010 federal income tax return. (GX 1 at 48-51; GX 2 at 4-5; AX E; Tr. 69-74.) The debts related to the foreclosure on his home are not alleged in the SOR.³

Applicant's March 2013 credit bureau report (CBR) and April 2014 CBR reflect ten delinquent debts alleged in SOR ¶¶ 1.c-1.i. The evidence concerning these debts is summarized below.

² The SOR alleges that Applicant failed to timely file his tax returns, but it does not allege that he owes federal or state taxes.

³ Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence regarding the foreclosure on Applicant's home for these limited purposes.

SOR ¶ 1.c, credit card (\$5,715). This debt was referred for collection in 2009 and is unresolved. (GX 2 at 4; Tr. 76-78.)

SOR ¶ 1.d, medical (\$778). This debt was referred for collection in 2009. Applicant believes it may have been partially paid by interception of a federal tax refund, but he submitted no evidence supporting his belief. It is unresolved. (GX 2 at 4; Tr. 79.)

SOR ¶¶ 1.e, 1.g, and 1.j, cell phone service (\$385, \$188, 198). These debts are cell phone termination fees referred for collection. Applicant testified that he believed the service providers breached their contracts by not providing the level of service they had promised, and he switched service providers, thereby incurring early-termination fees. He complained to the service providers but has not disputed the debts with the collection agencies or the credit reporting agencies. They are unresolved. (GX 2 at 4, 6, 7; GX 3 at 2; Tr. 79, 83, 90, 91.)

SOR ¶ 1.f, cable service (\$697). Applicant testified that this debt was for unreturned equipment, that he had returned the equipment, and that the creditor informed him that the issue was resolved. He did not provide any documentation to support his testimony. The debt is unresolved. (GX 2 at 6; Tr. 82.)

SOR ¶¶ 1.h and 1.k, medical (\$155). These two debts are duplicates. Applicant testified that when he needed additional lab tests, the lab would not provide them until he paid the \$155 bill for the previous test as well as the fee for the additional test. He provided evidence that the \$155 bill for a lab test had been paid. The debt is resolved. (GX 2 at 7; GX 3 at 2; Tr. 85-86, 91.)

SOR ¶¶ 1.i and 1.l, cell phone (\$196) and medical (449). Applicant testified that he did not recognize these debts. He has not contacted the collection agency, the original creditors, or the credit reporting bureau to determine the validity of the debts. They are unresolved. (GX 2 at 7; GX 3 at 2; Tr. 90-91.)

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 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 in his answer to the SOR, his CBRs, and his testimony at the hearing establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same").

The following mitigating conditions under this guideline 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 delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur. While the complexity of his federal and state income tax returns for 2008 provides some

justification for an untimely filing, he has provided no reasonable justification for not filing his 2008 returns after five years. He has not provided evidence that he filed his 2009 returns, and he has provided no reasonable justification for not timely filing his returns for 2010 and 2011.

AG ¶ 20(b) is not fully established. Applicant's periods of unemployment and underemployment were conditions largely beyond his control. Although he attributes the failure of his business to a slowdown in the economy, it is not clear whether the business failed because of the economy or his ineptitude at establishing and running a business. Although he acted responsibly regarding the foreclosure on his home and the debts related to it, he took virtually no action to resolve the debts alleged in SOR ¶ 1.c-1.i, even though he has been steadily employed since December 2011. His inability to afford the professional help he needed to file his federal and state tax returns for 2008 was a condition beyond his control, but it does not excuse his failures to timely file returns for the subsequent tax years. He has not acted responsibly regarding the federal and state returns for 2008, because he still has not filed them.

AG ¶ 20(c) is not fully established. Applicant has not sought or received financial counseling. He has hired tax professionals to file some of his tax returns, but he has not resolved the issue regarding his 2008 and 2009 returns.

AG ¶ 20(d) is not established. Good faith within the meaning of this mitigating condition means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). There is no evidence that Applicant has paid or negotiated payment agreements for the debts alleged in SOR ¶¶ 1.c-1.g, 1.i, and 1.l. He paid the \$155 medical bill alleged in SOR ¶¶ 1.h and 1.k, but only because the lab would not perform the additional tests he needed until he paid for the previous test. Payment under these circumstances does not constitute "good faith" within the meaning of this mitigating condition.

AG ¶ 20(e) is not established. Applicant asserted that the cell phone providers alleged in SOR ¶ 1.e, 1.g, and 1.j breached their contract by failing to provide the level of service that they had promised, and he testified that he did not recognize the debts alleged in SOR ¶¶ 1.i and 1.l. However, he has not filed disputes with the original creditors, the collection agencies, or the credit reporting agencies.

The evidence indicates that SOR ¶¶ 1.h and 1.k allege the same medical debt for \$155. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I will resolve SOR ¶ 1.k in Applicant's favor.

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 was sincere and candid at the hearing. He has a reputation as a hard-working technician. He is an honest, caring and compassionate person. However, his chaotic financial situation does not inspire confidence that he will be trustworthy and reliable if he is entrusted with classified or sensitive information

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 raised by his financial problems and failure to timely file his tax returns. 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**

Subparagraphs 1.a-1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraphs 1.i-1.j	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	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