



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 14-05482
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Philip J. Katauskas, Esq., Department Counsel  
For Applicant: Stephen B. Plott, Esq.

08/17/2015

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 12, 2013. On November 24, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and J. 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 the DOD on September 1, 2006.

Applicant answered the SOR on December 29, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 18, 2015, and the case was assigned to an administrative judge on March 25, 2015. On March 27, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant

that the hearing was scheduled for April 14, 2015. The administrative judge convened the hearing as scheduled. At the hearing, Applicant informed the administrative judge that he had retained counsel, and he presented a written request from his counsel for a continuance. (Applicant's Exhibit (AX) A.) The administrative judge granted the request.

The case was reassigned to me on April 23, 2015. On May 8, 2015, DOHA notified Applicant that the hearing would be resumed on June 2, 2015. I completed the hearing on that date. Government Exhibits (GX) 1 through 5 were admitted without objection. Applicant testified but did not call any witnesses or submit any documents. At Applicant's request, I kept the record open until June 23, 2015, to enable him to submit additional documentary evidence. DOHA received the transcript (Tr.) on June 11, 2015.<sup>1</sup>

On June 22, 2015, Applicant's counsel requested that the deadline for submitting post-hearing evidence be extended to July 23, 2015. I granted the request. (Hearing Exhibit (HX) I.) Applicant timely submitted AX B through G, which were admitted without objection. (HX II.)

### **Findings of Fact**

In his answer to the SOR, Applicant did not specifically admit or deny any of the Guideline F allegations. However, he stated that the delinquent debts alleged in SOR ¶¶ 1.a, 1.d, 1.e, 1.g, 1.h had been paid; he had made payment arrangements for the debts alleged in SOR ¶¶ 1.b, 1.c, 1.f, and 1.i; and he had filed the state and federal income tax returns alleged in SOR ¶¶ 1.j and 1.k. He admitted that he had been convicted of the criminal offenses alleged in SOR ¶¶ 2.a and 2.b. I have treated his responses to SOR ¶¶ 1.a-1.k as denials. I have incorporated his admissions in my findings of fact.

Applicant is a 38-year-old paint supervisor employed by a federal contractor since August 2006. At the hearing, he testified that he has held a security clearance since 1995 or 1996. (Tr. 6-7, 18, 20.) However, when he submitted his SCA, he stated that he has never held a security clearance. (GX 1 at 28.)

Applicant graduated from high school in June 1996. He testified that he has worked in shipyards since about 1998. (Tr. 20.) However, his SCA reflects that he worked in private-sector warehouses from March 2001 until he was laid off in November 2005, and he was unemployed until he began his current job in August 2006. (GX 1 at 11-13.) On the date of the hearing, he was unmarried, but was scheduled to be married on August 1, 2015. He has a six-year-old daughter from a previous relationship, for whom he pays child support of about \$468 per month. (Tr. 43-45.)

Applicant testified that he had resolved all the delinquent debts alleged in SOR ¶¶ 1.d-1.i by obtaining a \$10,000 debt-consolidation loan in November 2014. He attributed his delinquent debts to immaturity and not knowing how to handle his debts

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<sup>1</sup> A transcript of the proceedings on April 14, 2015 was received by DOHA on April 22, 2015. All references to a transcript in this decision refer to the proceedings on June 2, 2015.

after they were incurred. (Tr. 23.) His monthly payments on the loan are \$298. (Tr. 19, 25.)

Applicant testified that he earns between \$45,000 and \$53,000 per year and is confident that he can repay the debt-consolidation loan. He hopes to buy a home. However, a loan officer has advised him that, unless he can increase his income well above \$45,000 by working overtime, his debt-to-income ratio will be too high to qualify for a home mortgage loan. (Tr. 19-20; AX C.)

Applicant testified that the debts alleged in SOR ¶¶ 1.a-1.c were not included in his debt consolidation plan and that he paid them directly. (Tr. 26.) He did not submit documentation that each debt was paid by paying the creditors directly, but he testified that his recent credit bureau report (CBR) would reflect that the debts were satisfied. (Tr. 27-28.)

After the hearing, Applicant submitted documentation of disbursements from his credit union account which he claimed to resolve the debts in SOR ¶¶ 1.d, and 1.f-1.i. The check issued to the creditor in SOR ¶ 1.d matches the amount and creditor alleged. However, the account numbers and the amounts disbursed do not correspond to the debts alleged in SOR ¶¶ 1.f-1.i. After the hearing, he submitted an April 2015 CBR that does not reflect any of the debts alleged in the SOR and states that he has no negative accounts or collection accounts on file. (AX D.)

Applicant testified that he did not timely file his federal and state income tax returns for 2008 through 2012 because he was discouraged when he tried to file the returns without professional help, and he was sidetracked by his personal problems, including issues regarding custody of his daughter. He testified that he filed his state and federal returns for 2008 through 2012 in September 2014. (Tr. 30.) He credited his fiancée with persuading him to file his tax returns and resolve his delinquent debts. (Tr. 35-37.) He testified that he would have obtained refunds for the years in which he did not file. (Tr. 42.) After the hearing, he submitted copies of his returns and tax transcripts for 2008, 2010, and 2011. (AX E, F, and G.) However, he did not submit documentary evidence that he filed the returns for 2009 and 2012.

During his testimony, Applicant admitted that he had not filed his 2014 federal and state tax returns or requested an extension of time to file, because he had “a lot going on.” (Tr. 38.) His post-hearing submission did not include any evidence that he had filed his 2014 returns or requested an extension of time to file.<sup>2</sup>

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<sup>2</sup> Failure to file federal and state income returns for 2014 was not alleged in the SOR. 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 Applicant's failure to timely file his 2014 tax returns for these limited purposes.

In July 2010, Applicant was charged with driving under the influence (DUI). He was convicted and sentenced to 12 months in jail, with 11 months and 20 days suspended. In a personal subject interview (PSI) in July 2013, he told an investigator that the court ordered him to seek alcohol counseling, but he did not comply because of his work schedule. He promised to complete the requirement. At the hearing, he testified that he had completed the alcohol counseling, but he submitted no documentary evidence to corroborate his testimony. (GX 2 at 2; Tr. 32.)

In February 2013, Applicant was charged with DUI (2<sup>nd</sup> offense); disregarding, eluding, or escaping from a police officer; and driving on a license that was revoked for an alcohol-related offense. During the July 2013 PSI, he told the investigator that he was stopped by police for speeding and that he ran away because he was scared. He returned to the scene about ten minutes later and was arrested. His blood-alcohol content was .06%, below the legal limit. In July 2013, he was convicted of escaping from a police officer, sentenced to 60 days in jail, which was suspended, and was placed on probation for two years. He was also convicted of violating the terms of his restricted license, sentenced to 90 days in jail, of which 70 days were suspended, and placed on probation for two years. (GX 2 at 3.)

Applicant testified that he stopped consuming alcohol in October 2014, when he and his fiancée became engaged. (Tr. 21.) In his answer to the SOR, he stated that he had been attending Alcoholics Anonymous (AA) meetings for several months. At the hearing, he testified that he was no longer on probation. (Tr. 32.) The record contains no official government records reflecting Applicant's arrests, convictions, sentences, and probation. The evidence consists solely of Applicant's disclosures in his SCA, his admissions during the PSI, his answer to the SOR, and his testimony at the hearing.

### **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 nine delinquent debts totaling about \$8,074 (SOR ¶¶ 1.a-1.i.). It also alleges that Applicant failed to file federal and state income tax returns for tax years 2008 through 2012 (SOR ¶¶ 1.j and 1.k). 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 testimony at the hearing and his CBRs 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; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶¶ 20(a) and 20(b) are not established. Applicant's debts are numerous, recent, did not occur under circumstances making them unlikely to recur, and were not incurred because of circumstances largely beyond his control.

AG ¶ 20(c) is not fully established. Applicant did not present any evidence of financial counseling, but there is "clear evidence" that his financial problems are under control, at least for the time being. Insufficient time has passed to determine whether he will continue to exercise financial responsibility.

AG ¶ 20(d) is established for the delinquent debts alleged in SOR ¶¶ 1.a-1.i. The evidence reflects that Applicant had numerous delinquent debts that were not alleged in the SOR. His most recent credit report reflects no past-due debts or collection accounts, indicating that the debts alleged in the SOR, as well as several others, have been resolved. However, Applicant has not demonstrated a good-faith effort to resolve his income tax problems.

## **Guideline J, Criminal Conduct**

The SOR alleges that Applicant was charged with criminal offenses on two occasions (SOR ¶¶ 2.a and 2.b). The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” Applicant's admissions and his testimony at the hearing establish two disqualifying conditions under this guideline: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

The following mitigating conditions are potentially applicable:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Neither of these mitigating conditions is established. Applicant did not comply with the July 2010 court order to seek alcohol counseling until after his July 2013 PSI. He was on probation until recently. His failures to timely file federal and state tax returns are ongoing and demonstrate an unwillingness or inability to comply with the law.

## **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 Guidelines F and J in my whole-person analysis. Some of the factors were addressed under those guidelines, but some warrant additional comment.

Applicant has resolved the delinquent debts alleged in SOR ¶¶ 1.a-1.i and taken significant steps to stabilize his finances. However, his payment of the debts alleged in the SOR and his belated filing of federal and state income tax returns does not end the inquiry. A security clearance adjudication is not a debt-collection procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant's casual attitude toward his obligation to timely file federal and state tax returns and his dilatory response to a court order to obtain alcohol counseling raise doubts about his reliability, trustworthiness, and willingness to follow rules and regulations.

After weighing the disqualifying and mitigating conditions under Guidelines F and J and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his failures to file federal and state tax returns as required and his criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his 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.i:  
Subparagraphs 1.j-1.k:

For Applicant  
Against Applicant

Paragraph 2, Guideline J (Criminal Conduct):

**AGAINST APPLICANT**

Subparagraphs 2.a-2.b:

Against Applicant

## **Conclusion**

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

LeRoy F. Foreman  
Administrative Judge