



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-01562
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: Rick Morris, Esq.

04/15/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

On September 22, 2015, the Department of Defense (DOD) sent Applicant 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 answered the SOR on October 12, 2015, and requested a hearing before an administrative judge. Department Counsel amended the SOR on December 2, 2015, adding one additional allegation, and was ready to proceed on December 9, 2015. The case was assigned to me on January 6, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 13, 2016, scheduling the hearing for February 3, 2016. I convened the hearing as scheduled.

Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, called one witness, and submitted Applicant's Exhibits (AX) A through P, which were admitted without objection. I kept the record open until February 19, 2016, to enable Applicant to submit additional evidence. He did not submit any additional evidence. DOHA received the transcript (Tr.) on February 10, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted SOR ¶ 1.o and denied all the other allegations.² His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 41-year-old information technology (IT) programmer employed by a defense contractor since December 2015. (Tr. 43-44.) He held an interim security clearance until the SOR was issued, but he has never held a final clearance.³

After graduating from high school in 1992, Applicant began working for his brother in a printing business. In about 1999, he began participating in the business as an informal partner rather than an employee. In 2000, he started his own IT business, doing computer programming and home network installation. He continued to work for the printing company until September 2009, when he was laid off because of a business decline. He was rehired by the printing company from April 2011 until June 2013. He was self-employed from June 2013 to December 2015.

Applicant married in August 2001, separated in mid-2010, and divorced in March 2012. He has three children from this marriage, ages 9, 12, and 13. (Tr. 45.) He has resided with a cohabitant, to whom he is now engaged, since June 2013. (Tr. 19.) His fiancée served in the Army National Guard for five years, held a security clearance, and was honorably discharged. (Tr. 19-20.)

Applicant began taking college courses in November 2010. He continued as a full-time student after he was rehired by the printing company in April 2011. (GX 2 at 2.) He received an associate's degree in applied sciences information technology in April 2013. He is still a full-time student, working toward a bachelor's degree in computer science. (Tr. 46.)

Around 2003, Applicant and his brother started buying real estate as an investment. They bought a residence next to the printing shop, renovated it, and rented it. They bought a second property that was in poor shape and a neighborhood eyesore.

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

² Applicant denied SOR ¶¶ 1.a through 1.h and 1.j through 1.n. Due to incorrect lettering of the SOR paragraphs, there is no SOR ¶ 1.i.

³ Applicant was separated when his employer received the SOR, but he will be rehired if his application for a security clearance is granted. (Tr. 75-76.)

They rehabilitated the property and sold it for a small profit. They bought two more properties just before the real estate market began to decline. Applicant did not agree with the purchase of the fourth property, but he acquiesced in the purchase.

About two or three years before Applicant moved to his current location, his brother assumed total control of the real-estate investments. Applicant did not know that his brother stopped making payments on the mortgage loans on the investment properties until he submitted his application for a security clearance. (Tr. 33-37.) The debts alleged in SOR ¶¶ 1.a-1.c are the delinquent first and second mortgages on one of the investment properties and the related penalties and late fees. Applicant signed a quit-claim deed, giving his brother sole interest in the property, but Applicant remained liable on the loans. (Tr. 39-40.) He testified that he gave his brother sole interest in the property, hoping that his brother would feel more responsible as a sole owner and start making timely payments on the mortgage loans. (Tr. 53-54.)

Over the years, Applicant personally guaranteed several business loans and lines of credit for the printing business that are not alleged in the SOR. (Tr. 38.) His brother did not pay the sales taxes from the printing business in 2012, and a state tax lien for \$12,726, alleged in SOR ¶ 1.h, was filed against the business in May 2013. (GX 3 at 4.) Applicant was unaware of the tax lien until he was interviewed by a security investigator in August 2014. (Tr. 49; GX 2.) The basis for Applicant's liability for the tax obligations of the printing company is unclear, because there is no evidence that he held an ownership interest in the company. In November 2014, the printing company entered into a payment agreement with the state, providing for an initial payment of \$3,602 and monthly payments of \$654 for 24 months. The agreement was signed by Applicant's brother. (AX E.)

The debts alleged in SOR ¶¶ 1.d-1.g and 1.j-1.o were joint debts incurred by Applicant and his wife before they divorced. The debts in SOR ¶¶ 1.j and 1.k involve the same creditor. The debt in SOR ¶ 1.l includes the debt in SOR ¶ 1.e. His wife continued to use their joint accounts after the divorce, but she did not make any payments on them. Applicant was unaware that the accounts were delinquent, because he was living with his parents at an address other than the marital home to which the bills were sent. (Tr. 55-61.) He has settled several delinquent accounts that were not alleged in the SOR, including a credit-card bill, two medical bills, an electric bill, and a telecommunications bill. He made payments on the debt alleged in SOR ¶ 1.m. (Tr. 58-59.)

Applicant filed a petition for Chapter 7 bankruptcy in July 2015, listing asserts of about \$367,184 and liabilities of about \$591,676. The creditors alleged in SOR ¶¶ 1.a, 1.b, 1.d, 1.f, 1.g, and 1.l-1.n were specifically listed in the bankruptcy petition. In November 2015, his dischargeable debts were discharged. (GX 6; AX A.)

Before filing his bankruptcy petition, Applicant attempted to resolve several debts incurred during the marriage, including the debts alleged in SOR ¶¶ 1.e and 1.k. He was unsuccessful because the creditors insisted on large lump-sum payments. (Tr. 59-60.)

At the hearing, Applicant submitted a personal financial statement reflecting monthly income of \$5,500, expenses and debt payments of \$3,463, and a net monthly remainder of \$2,037. (AX I.) His child-support payments are current. He has student loans totaling about \$43,000, but they are in deferment because he is still a full-time student. (Tr. 43.) He anticipates that his payments on the student loans will be about \$150 per month when the deferment ends. (Tr. 47.)

A personal friend, who has known Applicant for about ten years, describes him as a trustworthy, hardworking, dedicated, and honorable friend. He states that Applicant's love of country and belief in the American dream and way of life are unmatched. (AX M.) Applicant's uncle, who has known him for 20 years, considers him a serious, responsible person who gives his family responsibilities first priority. (AX N.) Another uncle describes him as dedicated to his family, responsible, and always helpful. (AX O.) A neighbor, who has known Applicant for eight years, considers him a "person of integrity, decency, and honesty." (AX P.)

Applicant's fiancée testified that she has known Applicant for five years and they have lived together for two and a half years. (Tr. 26.) She testified that Applicant is very careful about spending money unnecessarily. They rarely go to restaurants because he does not want to spend the extra money. He prefers to use any extra money for his children's sports, music, and scouting, and to visit his children, who live in another state with their mother. His fiancée also testified that Applicant is very reliable and he avoids dishonest people. His distaste for dishonesty has strained his relationship with his brother, because he has discovered some questionable business dealings by his brother. (Tr. 21-24.) She testified that she is aware that Applicant's ex-wife obtained loans and credit cards in his name before the divorce and that he felt obligated to resolve those debts. (Tr. 26.)

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 and the documentary evidence submitted at the hearing establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). The sales tax debt alleged in SOR ¶1.h does not establish AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required"), because it applies only to income tax returns.

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.

AG ¶ 20(b) is established. Applicant encountered several conditions that were largely beyond his control: his periods of unemployment, the decline in the real estate

market, his brother's failure to share financial responsibility for the mortgage loans, and his brother's failure to remit sales taxes to the state. His ex-wife's continued use of the joint credit cards was not a condition beyond his control, because he could have removed himself as a joint owner. He acted responsibly about his periods of unemployment by actively seeking other employment. He settled several joint debts incurred by his ex-wife, tried to settle other debts, and resorted to bankruptcy only when his attempts to settle them were unsuccessful. He lives frugally and has avoided incurring any new debts.

AG ¶ 20(c) is established. A bankruptcy proceeding necessarily included financial counseling, and Applicant's financial situation is under control as a result of his Chapter 7 bankruptcy discharge.

AG ¶ 20(d) is not fully established. A bankruptcy proceeding is not a "good-faith" effort within the meaning of this mitigating condition. See ISCR Case No. 10-03578 (App. Bd. Oct. 4, 2012). However, Applicant resolved several consumer debts not alleged in the SOR and unsuccessfully attempted to resolve several other debts before resorting to bankruptcy. Furthermore, bankruptcy was a prudent means of avoiding additional financial vulnerability related to his brother's irresponsibility.

AG ¶ 20(e) is not relevant. Applicant has not disputed any of the debts alleged in the SOR.

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 candid, sincere, and credible at the hearing. He enjoys a reputation as a devoted father. After recovering from the marital debts and his brother's questionable business practices, he is living responsibly and frugally. He has a reputation for honesty, generosity, trustworthiness, and dedication.

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 mitigated the security concerns raised by his delinquent debts. Accordingly, I conclude he has 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): FOR APPLICANT

Subparagraphs 1.a-1.h and 1.j-1.o:⁴

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge

⁴ See footnote 2, *supra*.