



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



In the matter of:)) -----) SSN: -----)) Applicant for Security Clearance)	ISCR Case No. 08-05612
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Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: Robin Szmansky, Personal Representative

February 13, 2009

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

Applicant submitted a security clearance application on October 5, 2006. On October 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on October 14, 2008; answered it on November 3, 2008; and requested a hearing before an administrative judge. DOHA received the

request on November 6, 2008. Department Counsel was ready to proceed on November 26, 2008, and the case was assigned to me on December 4, 2008. DOHA issued a notice of hearing on December 29, 2008, scheduling the hearing for January 14, 2009. On January 9, 2009, DOHA issued an amended notice of hearing, changing the hearing date from January 14 to January 13. I convened the hearing as rescheduled, with Applicant's agreement (Tr. 23). Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I granted Applicant's request to keep the record open to enable him to submit additional documentary evidence. He timely submitted AX D through H, which were admitted without objection (Hearing Exhibit I). DOHA received the transcript (Tr.) on January 27, 2009. The record closed on January 30, 2009.

Amendment of SOR

On my own motion, and without objection from either party, I amended the SOR to correctly reflect Applicant's middle name (Tr. 35). The amendment is handwritten on the SOR.

Findings of Fact

Applicant is a 57-year-old construction superintendent for a federal contractor. He has a high school education and has worked for his current employer since March 1995. He received a security clearance and eligibility for access to Sensitive Compartmented Information (SCI) in March 2003.

Applicant was married in September 1980 and divorced in June 1989. He remarried in May 2002 and was divorced in May 2003. He remarried his second wife in October 2004 and they were again divorced in March 2005. He has two daughters, ages 27 and 12. He pays child support for his 12-year-old daughter and is current on his payments (Tr. 38).

From about 1988 to 2000, Applicant owned a concrete business. Due in large part to his inexperience in running a business, he accumulated substantial delinquent federal taxes. Internal Revenue Service (IRS) records reflect that in April 1996 he failed to file a return; and in May 1997, he was assessed a penalty for underpayment of estimated tax and filing late. He did not keep records of expenses and could not support deductions from income. As of December 2000, he owed \$145,180 in taxes, \$51,707 in accrued interest, and \$15,755 in accrued penalties (GX 7 at 1).

In 1997, Applicant negotiated a payment plan with the IRS, providing for monthly payments of \$100 until 2007, and he complied with that agreement (Tr. 43-44; GX 7 at 1; AX F at 3). A federal tax lien was filed against him in November 2003 for \$141,072 (Enclosure 6 to GX 2; GX 3 at 2). The lien was released on October 30, 2008 (AX B).

The release recites that Applicant “has satisfied the taxes listed below and all statutory additions.”

Applicant placed a fraud alert on his credit record after suspecting that his ex-wife had incurred debts in his name (AX C, Personal Profile at 1). He disputed several debts on his credit bureau report (CBR) and the debts were deleted (CBR attached to answer to SOR).

The medical debts alleged in SOR ¶¶ 1.h, 1.k, and 1.j arose when Applicant received several surgical treatments on his neck in 2002. He testified he verified before the surgery that the treatments were covered by his company insurance plan, but coverage was denied after he received the treatments on the ground that his condition was pre-existing (Tr. 58-60). He disputed the debts, but all dialog has been telephonic and not in writing (Tr. 76). He attempted to obtain written documentation of his preapproval for the surgery, but his medical records were destroyed after six years (AX E at 1). However, he produced an invoice from his doctor for treatment in August 2002, reflecting \$17,775 to be covered by insurance and \$900 to be paid by Applicant (AX E at 2). The invoice shows that his doctor believed the treatment would be covered by insurance. Applicant’s general manager testified that local doctors routinely verify that treatment is preapproved because they want to make sure they will be paid (Tr. 90-91).

The table below summarizes the evidence concerning the delinquent debts alleged in the SOR.

SOR	Creditor	Amount	Status	Evidence
1.a	Federal Tax Lien	\$141,000	Lien released	AX B
1.b	Medical	\$45	Paid	AX G at 2
1.c	Medical	\$57	Paid	AX H; Tr. 48
1.d	Satellite TV	\$311	Disputed; removed from CBR	CBR attached to answer
1.e	Cell phone	\$1,453	Disputed; removed from CBR	CBR attached to answer
1.f	Furniture	\$4,435	Disputed; removed from CBR	CBR attached to answer
1.g	Gas credit card	\$85	Disputed	Tr. 56
1.h	Medical	\$507	Insurance coverage denied; disputed	Tr. 58-60; AX E
1.i	Medical	\$1,963	Insurance coverage denied; disputed	Tr. 58-60; AX E
1.j	Medical	\$220	Insurance coverage denied; disputed	Tr. 58-60; AX E
1.k	Collection	\$311	Same as 1.d	Tr. 51

Applicant's most recent CBR dated January 13, 2009, still reflects the furniture debt that he successfully disputed and a collection account that Applicant believes is related to the disputed medical bills (AX C, Account History at 1, 3).¹ Based on Applicant's testimony and the documentation submitted in his answer to the SOR, I am satisfied that he has successfully disputed the furniture debt in SOR ¶ 1.f, and that the medical debt in this CBR is related to the disputed medical debts in SOR ¶ 1.h-1.j.

Applicant submitted a personal financial statement (PFS) in response to DOHA interrogatories on July 28, 2008. It reflects net monthly income of about \$4,417, expenses of \$2,235, debt payments of \$1,745, and a net remainder of \$486 (GX 2 at 4). He testified he recently received a pay raise that increased his net monthly income to about \$5,200 (Tr. 63), but the expenses and debt payments remained unchanged, increasing his net monthly remainder to about \$1,300. The PFS does not reflect any payments on the debts alleged in the SOR. Applicant testified he is current on all his obligations, including child support.

The physical security officer at one of the military agencies supported by Applicant's company has known Applicant for 11 years and worked closely with him. He describes Applicant as trustworthy, reliable, and conscientious (AX A). The general manager and facility security officer for Applicant's employer testified he is in charge of construction at all the company's facilities, responsible for large sums of money, and responsible for security training and enforcement at the various worksites. She testified Applicant is trustworthy and has her full confidence (Tr. 83-84).

Applicant's general manager is certified to practice in IRS cases. She assisted Applicant in resolving his tax issues and gathering documentation regarding the disputed medical bills (Tr. 85-86; 93-94).

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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines 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

¹ Department Counsel moved to amend the SOR to allege the delinquent debts reflected in the CBR dated January 13, 2009, but he withdrew his motion when Applicant objected to the amendment (Tr. 69-72).

administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It 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. 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 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 a federal tax lien for \$141,000 (SOR ¶ 1.a); five delinquent medical debts (SOR ¶¶ 1.b, 1.c, 1.h, 1.i, and 1.j); a delinquent satellite TV bill (SOR ¶¶ 1.d and 1.k); a cell phone bill (SOR ¶ 1.e); a debt for furniture (SOR ¶ 1.f), and a gasoline credit card bill (SOR ¶ 1.g). In his answer to the SOR, Applicant responded, "I accept," to the allegations in SOR ¶¶ 1.b and 1.g, but stated he did not know the identity

of the creditor and did not know if the debts had already been paid. He denied the remaining allegations in the SOR. I have treated his answer as denying all the allegations.

The concern under this guideline 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.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." AG ¶ 19(c) is raised by "a history of not meeting financial obligations." AG ¶ 19(g) is raised by "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant financial history raises AG ¶¶ 19(a) and (c). AG ¶ 19(g) is raised by his failure to file a return in 1996. The evidence reflects that Applicant filed returns in subsequent years but either filed late or underpaid his taxes.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (g), the burden shifted to Applicant to produce evidence 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).

Security concerns based on financial problems may be mitigated if "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(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

The first two prongs ("so long ago" and "so infrequent") are not established because Applicant's debts are numerous. Some debts were satisfied only recently, and others are disputed and not yet resolved.

The third prong (“unlikely to recur”), however, is established for the federal tax lien, the disputed medical debts in SOR ¶¶ 1.h-1.j, and the fraudulent debts in SOR ¶¶ 1.d-1.g. Applicant learned he was not competent to operate his own business and is not likely to make that mistake again. The disputed medical debts arose because Applicant was informed that his surgical treatments were preapproved, but coverage was denied after the fact on the ground that his condition was pre-existing. He is now more attuned to the importance of monitoring his credit record, and he has placed a fraud alert on his credit record.

The final prong (“does not cast doubt”) is established. Applicant acted responsibly and resolved the tax debt. Like many citizens, he did not realize the importance of monitoring his credit record until his background investigation revealed the derogatory information in his CBR. He responded by resolving the debts in SOR ¶¶ 1.b and 1.c and disputing the debts in SOR ¶¶ 1.d-1.g. His financial situation is under control. Based on the evidence supporting the third and fourth prongs of AG ¶ 20(a), I conclude this mitigating condition is established.

Security concerns under this guideline also can be mitigated by showing that “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(b). Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established.

The tax lien was not due to conditions beyond his control, but rather conditions beyond his competence. His medical condition requiring treatment was beyond his control, and his failure to pay the disputed medical bills was due to the insurance company’s denial of coverage after he was preapproved for the treatment, also beyond his control. The debts due to fraud were beyond his control. Applicant acted responsibly by resolving the tax debt, paying undisputed medical debts, disputing the fraudulent debts, and challenging the insurance company’s denial of coverage. I conclude AG ¶ 20(b) is applicable.

Security concerns under this guideline also can be mitigated by showing that “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(c). Applicant’s general manager is experienced in IRS cases. She assisted him in resolving his tax debt, and it is now resolved. I conclude AG ¶ 20(c) applies to the federal tax debt alleged in SOR ¶ 1.a; but it does not apply to mitigate the overall financial concern because he has not received financial counseling.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith 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). “[A]n applicant is not required, as a matter

of law, to establish that [he/she] has paid off each and every debt listed in the SOR . . . All that is required is that an applicant demonstrate that [he/she] has . . . established a plan to resolve [his/her] financial problems and taken significant actions to implement that plan.” ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008).

Applicant has satisfied the federal tax lien, paid the undisputed medical bills, disputed the fraudulent debts, and disputed the medical debts for which insurance coverage was denied. The amounts of the disputed medical debts are within his ability to pay if the dispute is resolved against him. I conclude AG ¶ 20(d) is established.

Security concerns under this guideline also can be mitigating by showing “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(e). Applicant disputed three medical debts for which insurance coverage was denied. He was unable to provide documentation that his treatment was preapproved, because his medical records were destroyed after six years. He did, however, provide documentary evidence that his doctor believed the treatment was covered by insurance. I conclude AG ¶ 20(e) is established for the disputed debts in SOR ¶¶ 1.d-1.k.

Whole Person Concept

Under 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 the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. 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 is a mature adult who has worked for the same federal contractor since 1995, held a clearance for more almost six years, and is regarded as a trustworthy and valuable employee. Like many citizens, he learned the hard way about the importance of monitoring his credit record. He has resolved his tax problems and acted responsibly

about the other debts listed in the SOR. His personal financial situation is under control. His current income leaves him a substantial net monthly remainder. If the disputed medical debts are resolved against him, he has the financial resources to pay them.

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 based on financial considerations. Accordingly, I conclude he has 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 for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.k:

For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge