



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



In the matter of:)
)
-----) ISCR Case No. 09-03411
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

February 3, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application on April 24, 2007 (Government Exhibit (GX) 4). On September 4, 2009, 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 Guidelines F and E (GX 1). 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR on September 9, 2009; answered it on October 2, 2009 (GX 3); and requested determination on the record without a hearing. Department Counsel submitted the government's written case on November 4, 2009. On November 6, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on November 18, 2009, but he did not respond. The case was assigned to me on January 19, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the delinquent debts alleged in SOR ¶¶ 1.a-1.f, but he denied the allegation in SOR ¶ 2.a that he falsified his security clearance application. His admissions are incorporated in my findings of fact.

Applicant is a 39-year-old employee of a defense contractor. At the time he submitted his security clearance application, he was a petty officer first class (pay grade E-6) in the U.S. Navy and had served on active duty since June 1988. He has since retired. He received a security clearance in March 2002.

When Applicant submitted his security clearance application, he answered "no" to question 28a, asking if he had been more than 180 days delinquent on any debt during the last seven years, and question 28b, asking if he was currently more than 90 days delinquent on any debt. His credit report dated May 1, 2007, reflected the six delinquent debts alleged in SOR ¶¶ 1.a-1.f (GX 5). The debt alleged in SOR ¶ 1.a was placed for collection in April 2007. All the other debts were placed for collection or charged off between November 2003 and June 2005. The six delinquent debts total about \$37,780. All the debts alleged in the SOR are reflected as unresolved in Applicant's credit report dated November 4, 2009 (GX 8).

Applicant was married in September 1990 and divorced in August 2000. He remarried in February 2006. When Applicant and his first wife were divorced, they agreed to resolve the joint debts accumulated during the marriage, but they did not allocate responsibility for each debt. After his ex-wife filed for bankruptcy in 2005, the creditors sought to collect from Applicant (GX 8 at 8).

The \$2,836 debt alleged in SOR ¶ 1.a, the \$12,945 debt in SOR ¶ 1.d, the \$5,876 debt in SOR ¶ 1.e, and the \$15,556 debt in SOR ¶ 1.f were loans cosigned by Applicant and his ex-wife. The \$427 debt in SOR ¶ 1.b was a joint cell phone account. The \$140 debt in SOR ¶ 1.c was for an unreturned cable box. During an interview in June 2007, Applicant told a security investigator he returned the cable box and that the bill was satisfied in full (GX 8 at 8), but in his answer to the SOR, he admitted the debt (GX 3 at 2; GX 8 at 8-9).

In his answer to the SOR, Applicant denied falsifying his application. He stated he had not received any documentation about the debts and did not think about them

when he completed the application. He also stated he submitted his application at a time when he was distracted by his impending retirement from the Navy and preparations for his squadron's deployment (GX 3 at 4).

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 administrative judge's overarching 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.

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 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 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 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.

Two disqualifying conditions under this guideline are raised by the evidence: AG ¶ 19(a) (inability or unwillingness to satisfy debts) and AG ¶ 19(c) (a history of not meeting financial obligations), shifting the burden to 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).

Security concerns based on financial problems can be mitigated by showing that "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). Applicant's delinquent debts are numerous and have persisted until the present. The circumstances under which they were accumulated make them unlikely to recur, because Applicant is divorced and there is no indication that his current marriage is in distress or that he has incurred significant financial problems during his current marriage. His failure to take meaningful action to resolve the delinquent debts for which he is liable raises doubt about his reliability and trustworthiness. I conclude AG ¶ 20(a) is not 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). Applicant’s marital break-up was a circumstance beyond his control. If his ex-wife reneged on any informal agreement to share the marital debts, her conduct also would have been beyond his control. However, the second prong of AG ¶ (b) (“acted responsibly”) is not met because Applicant has taken no meaningful action to resolve his financial liabilities.

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). This mitigating condition is not applicable because there is no evidence that Applicant has sought or 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). This mitigating condition is not established because Applicant has taken no meaningful action to resolve the debts.

Finally, security concerns under this guideline also can be mitigated 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 the cable box debt in a security interview in June 2007, but he has since admitted the debt. This mitigating condition is not applicable.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire). When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant was not a neophyte in the security clearance process. He received a clearance in March 2002 and held it throughout his Navy service. He knew he and his ex-wife had accumulated considerable debt during their marriage, and he knew she had filed for bankruptcy instead of resolving a share of the debts. He told a security investigator that creditors began contacting him after his ex-wife filed for bankruptcy in 2005, two years before he submitted his current application. After considering all the evidence, I find Applicant's explanation implausible and not credible. I conclude AG ¶ 20(a) is raised.

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 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.

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. I have incorporated my comments under Guideline F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who has held a clearance for many years. He served in the Navy 20 years. He recognizes his legal liability on the joint debts incurred during his first marriage, but he has not provided evidence of meaningful efforts to resolve those debts. He was not candid about his debts on his security clearance application, and his after-the-fact explanation for not disclosing his debts was implausible and not credible. After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal 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.f: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge