



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-03899
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

August 17, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves unsatisfied tax liens and a delinquent debt that raise security concerns under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on February 19, 2009. On January 25, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on February 4, 2010; answered it on February 18, 2010; and requested a determination on the record without a hearing. DOHA received his answer and request on February 22, 2010. Department Counsel submitted the government's written case on April 2, 2010, and on the same day a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on April 22, 2010, but he did not respond. The case was assigned to me on July 19, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the all the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 64-year-old truck driver. He has worked for a federal contractor since January 2009. He was unemployed from November 2008 until he obtained his current position. His security clearance application reflects previous periods of unemployment from December 2006 to September 2007 and from September 2004 to March 2005.

Applicant graduated from college in 1969. He married in June 1970, divorced in October 1975, remarried in June 1976, divorced in October 1977, remarried in June 1983, and divorced in October 1989. Since August 2006, he has cohabited with a woman he intends to marry. He and his fiancée work as a truck-driving team. (GX 5 at 5.)

A federal tax lien for unpaid income taxes was entered against Applicant in August 1993 for about \$13,217. A state tax lien for unpaid income taxes was entered against him in May 1994 for about \$3,165. The tax debts were incurred because Applicant worked as an independent contractor, with no taxes withheld from his income, and he was unable to pay the taxes due when he filed his tax returns. (GX 5 at 4.) The liens are unsatisfied.

Applicant's credit bureau report also reflects an unpaid debt for \$552 that was placed for collection in November 2006. Applicant attributed his delinquent debts to dissolution of his marriage, loss of his family, and "an abrupt career change," leaving him with insufficient income to pay them. He has provided no details about the "abrupt career change."

Applicant has resolved several delinquent debts not alleged in the SOR. (GX 5 at 5; GX 6 at 3-4.) In his answer to the SOR, he promised to pay the \$552 debt alleged in SOR ¶ 1.c, but he has submitted no evidence that it is paid.

In a personal financial statement (PFS) submitted by Applicant in August 2009, he listed his Social Security payments \$1,490 as his only monthly income. His PFS reflects that he has a monthly remainder of about \$158 after paying his share of the

living expenses for himself and his fiancée. Their apartment, automobile, utilities, cell phone, and insurance are all listed in his fiancée's name. Their truck-driving team earns about \$1,500 per month, which is collected by his fiancée. Applicant's PFS does not list his share of their jointly earned income. (GX 5 at 5; GX 6 at 5.)

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 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 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 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 state tax lien for \$3,165 (SOR ¶ 1.a); a federal tax lien for \$13,217 (SOR ¶ 1.b); and an unpaid collection account of \$552 (SOR ¶ 1.c). Applicant’s admissions, corroborated by his credit bureau report and responses to DOHA interrogatories, establish all three delinquent debts.

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.

The evidence establishes 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”), 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 has accumulated several delinquent debts that were incurred “long ago” but have not yet been resolved. They did not arise under unusual circumstances. 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). Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established. Applicant has encountered multiple marital breakups and periods of unemployment, but his last divorce was in 1989. The two tax liens predate the periods of unemployment reflected on his security clearance application. He was employed from March 2005 to December 2006 and from September 2007 to November 2008, and he has been employed since January 2009. He has paid some delinquent debts not alleged in the SOR, but he has done nothing to resolve, compromise, or settle the two tax debts alleged in SOR ¶¶ 1.a and 1.b. In his response to the SOR, he promised to settle the collection account alleged in SOR ¶ 1.c, but he has produced no evidence of settlement. I conclude AG ¶ 20(b) is not established.

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 established because Applicant produced no evidence that he has sought or received 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). Applicant produced no evidence that he has contacted the creditors alleged in the SOR or attempted to resolve the debts.

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). This mitigating condition is not established because Applicant has admitted all the debts alleged in the SOR.

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 in my whole-person analysis. 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 based on financial considerations. 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.c:

Against Applicant

Conclusion

In light of all of the circumstances, 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