



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04608
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

April 29, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application on March 3, 2009. (Government Exhibit (GX) 5.) On November 30, 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 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR on December 12, 2009, and answered it on December 21, 2009, and requested determination on the record without a hearing.

Department Counsel submitted the government's written case on February 18, 2010. On February 22, 2010, 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 March 2, 2010. He responded in an undated document. The case was assigned to me on April 12, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.c., 1.e, 1.f, 1.g, 1.i, 1.j, and 1.k. His admissions are incorporated in my findings of fact.

Applicant is a security guard employed by a defense contractor since March 2009. He has held similar positions since 2000, but he was unemployed from March to September 2004, February through March 2005, and November 2008 to March 2009. He has never held a security clearance.

Applicant married in May 1980. He listed no children on his security clearance application, but he listed college expenses for a daughter on his personal financial statement. (GX 7 at 5.)

Applicant's financial problems began when he started his own security business on a date not reflected in the record, but sometime before 2002. As the company grew, he started paying employees with his own savings, and he stopped withholding state and federal taxes from employees. (GX 6 at 3.) A federal tax lien for \$11,149 was filed against him in August 2002. (GX 10.) State court records reflect a state tax lien filed against Applicant in April 1997 for \$14,345, released in December 1997, and renewed in November 2003. (GX 11-13.) State court records also reflect a state tax lien for \$8,381 released in December 1997 and renewed in March 2003. (GX 14 and 15.)

There is no evidence supporting SOR ¶¶ 1.j and 1.k, alleging two state tax liens. The FORM contains evidence of two civil judgments in favor of a private housing entity that were entered on the dates alleged in the SOR for the amounts alleged. Applicant disclosed these civil judgments in his security clearance application.

Applicant has hired a tax resolution firm to assist him in resolving the state and federal tax liens. There is no evidence that any of the liens have yet been resolved.

Applicant submitted a personal financial statement on October 9, 2009. It reflects that he and his spouse have a net monthly income of about \$5,400, expenses of \$1,740, and debt payments of \$2,445, leaving a net remainder of about \$1,215. It does not reflect any payments on the debts alleged in the SOR.

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

SOR	Debt	Amount	Answer to SOR	Status	Evidence
1.a	Federal tax lien	\$11,149	Admit	Unresolved	GX 9 at 4
1.b	State tax lien	\$14,345	Admit	Unresolved	GX 9 at 3
1.c	State tax lien	\$8,381	Admit	Unresolved	GX 9 at 3
1.d	Cell phone	\$362	Deny	Unresolved	GX 8 at 1
1.e	Credit card	\$364	Admit	Unresolved	GX 8 at 2
1.f	State tax lien	\$554	Admit	Unresolved	GX 9 at 3
1.g	Collection	\$834	Admit	Making payments	GX 9 at 6; GX 7 at 8-9
1.h	Collection	\$70	Deny	Payment not documented	
1.i	Collection	\$388	Admit	Making payments	GX 7 at 6-9
1.j	State tax lien	\$1,066	No response	Unknown	None
1.k	State tax lien	\$1,065	No response	Unknown	None

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, an administrative judge applies the 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, 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.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised by “a history of not meeting financial obligations.” AG ¶ 19(e) is raised by “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” 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’s financial history raises AG

¶¶ 19(a), (c), and (e). It does not raise AG ¶ 19(g), because there is no evidence Applicant failed to file the required reports or that he filed fraudulent reports. The evidence shows only that on an unknown date he stopped withholding state and federal taxes from his employees.

The record contains no evidence supporting AG ¶¶ 1.i and 1.j, alleging state tax liens. These two allegations are resolved in Applicant's favor.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c) and (e), 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 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 debts are numerous and most are unresolved. The tax liens occurred under circumstances making them unlikely to recur, because Applicant no longer has a private business, but his deliberate decision not to withhold state and federal taxes from his employees casts doubt on his current reliability, trustworthiness, and good judgment. 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.

There is no evidence of a business downturn. Instead, Applicant's failure to withhold taxes while running his business was deliberate. Applicant's periods of unemployment were conditions beyond his control, but the tax liens were imposed before he was unemployed. I conclude AG ¶ 20(b) is not established for the tax liens alleged in SOR ¶¶ 1.a, 1.b, 1.c, and 1.f, but it is applicable to the debts alleged in SOR ¶¶ 1.d, 1.e, 1.g, 1.h, and 1.i.

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). There is evidence that Applicant sought professional assistance with the tax liens, but no evidence that the problem is being resolved or is under control. There is no evidence that he has sought or received counseling regarding his other debts. I conclude AG ¶ 20(c) is not established.

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 has negotiated payment plans with the creditors alleged in SOR ¶¶ 1.g and 1.i, and is making payments pursuant to those plans. AG ¶ 20(d) is established for the debts alleged in SOR ¶¶ 1.g and 1.i, but not for the other 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). Applicant denies owing the cell phone debt alleged in SOR ¶ 1.d, asserting that the original creditor could not find a record of the debt, but he presented no documentation of the basis for disputing the debt and no evidence that he has requested its removal from his credit report. I conclude AG ¶ 20(e) is not established.

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. 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 various employers as a security guard since 2000. He has provided little information about himself and no indication of the quality of his job performance. He mentioned financial setbacks in his response to the FORM but provided no details. 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.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraphs 1.j-1.k:	For 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