



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-05485
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

November 22, 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 a security clearance application on April 30, 2009. On April 12, 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 April 21, 2010; answered it on June 14, 2010; and requested a hearing before an administrative judge. DOHA received the request on

June 21, 2010. Department Counsel was ready to proceed on July 31, 2010, and the case was assigned to an administrative judge on August 6, 2010. It was reassigned to me on August 19, 2010, to consolidate the docket. DOHA issued a notice of hearing on August 6, 2010, scheduling it for August 31, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 12 were admitted in evidence without objection. Department Counsel also submitted a demonstrative exhibit summarizing the Government evidence, which was marked as Hearing Exhibit (HX) I. Applicant testified and submitted Applicant's Exhibits (AX) A through M, which were admitted without objection. I kept the record open until September 17, 2010, to enable Applicant to submit additional documentary evidence. At Applicant's request, I extended the deadline to October 1, 2010. (HX II.) He timely submitted AX N through Q. Department Counsel's comments regarding AX N through Q are attached to the record as HX III. DOHA received the transcript (Tr.) on September 8, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR, except SOR ¶¶ 1.g, 1.o, 1.p, and 1.s. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is 58 years old. He was an administrator at a private school from July 1984 until December 2001, when the school closed. He was unemployed until he began working for a federal agency in September 2002. He was terminated for absenteeism due to medical problems in June 2006. He admitted at the hearing and in his security clearance application that he should have informed his supervisor of his medical problem. (GX 1 at 23.) He held a security clearance during his federal employment. He was unemployed until April 2007, when he found employment in the private sector. He was unemployed from July 2008 until January 2009, when he began his current job as a weapons handler for a defense contractor.

Applicant's current supervisor, a retired U.S. Army sergeant major, submitted a letter recommending that Applicant be granted a clearance. He described Applicant as a dedicated and trustworthy leader and employee whose performance has been frequently recognized as outstanding. (AX A.)

Applicant married in July 1975 and divorced in August 1978. He remarried in June 1980. He and his wife separated in November 2003. (GX 2 at 7.) Neither has filed for divorce. (Tr. 39.)

Applicant's financial problems began with his unemployment in December 2001. They were exacerbated by his wife's unsuccessful attempt at operating a childcare center that began failing in 2000. (Tr. 35.)

Applicant filed Chapter 13 bankruptcy petitions in September 2001, June 2002, July 2003, and January 2004. (GX 8-11.) The June 2002 petition was filed solely by Applicant; the other three were jointly filed by Applicant and his wife. All four were

dismissed for failure to make the required payments. (GX 4 at 4.) The four bankruptcies are alleged in SOR ¶¶ 1.a-1.d.

Since 2006, Applicant has lived with another woman and her son. She owns the home, but they share the living expenses. All the utilities and other credit accounts are in her name. (Tr. 47.) Applicant's take-home pay is between \$442 and \$449 per week, and he gives his companion about \$300 per week to pay their living expenses. (Tr. 46.) His companion lost her job about two months before the hearing, and her application for unemployment benefits was denied on the ground that she was terminated for willful misconduct. (Tr. 49-50; AX H.) As of the date of the hearing, her electric bill, telephone bill, and homeowner's insurance bill were past due. (AX F, J, L, and M.)

In addition to the four bankruptcies, the SOR alleges 15 delinquent debts totaling about \$31,000. Applicant testified that he has been unable to make payments on any of his debts since 2000. (Tr. 54.) He admitted all the debts except for those alleged in SOR ¶¶ 1.g, 1.o, 1.p, and 1.s, and his admissions are corroborated by his credit bureau reports. (GX 5, 6, 7, and 12.)

The debt alleged in SOR ¶ 1.g is a federal tax lien. Applicant testified that his tax refunds were seized to pay the debt. He received a refund for tax year 2010, indicating that the lien was satisfied. (Tr. 57; AX P.)

Applicant testified he paid the medical bills alleged in SOR ¶¶ 1.j and 1.k, but he presented no documentation of payment. (Tr. 59.) He testified that the debt in SOR ¶ 1.o was for overpayment of wages by a previous employer and that it was satisfied by withholding part of his final pay, but he presented no documentation. (Tr. 63.) He denied the state tax lien in SOR ¶ 1.p and the insurance bill in SOR ¶ 1.s, but he presented no evidence that the debts were resolved or that he had filed a dispute with the credit bureau. He presented evidence that the deficiency from a car repossession alleged in SOR ¶ 1.r was being collected by garnishment of his pay. (Tr. 63; AX B; AX Q.)

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, 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 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.

Applicant's financial history raises 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 him 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). This mitigating condition is not established because Applicant's delinquent debts are numerous, ongoing, and not the result of circumstances making them unlikely to recur.

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 failure of the childcare business operated by Applicant's wife was a circumstance beyond their control. Applicant's unemployment after his school closed in December 2001, and his unemployment from July 2008 to January 2009 were circumstances beyond his control. However, Applicant has not acted responsibly. He lost his job in June 2006 through his own fault. As of the date of the hearing, he had been employed for 20 months but had taken no action to resolve his delinquent debts.

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 there is no evidence that Applicant has sought or received counseling, and his financial situation is not under control.

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 testified that the delinquent debts alleged in SOR ¶¶ 1.j, 1.k, and 1.o were resolved, but he submitted no documentary evidence to support his testimony. He denied the state tax lien in SOR ¶ 1.p and the insurance bill in SOR ¶ 1.s, but presented no evidence to show that he had resolved the debts or disputed them. The federal tax lien in SOR ¶ 1.g was satisfied by seizure of tax

refunds, and the car repossession deficiency in SOR ¶ 1.r is being resolved by garnishment of his pay, but those involuntary collections do not show good faith. I conclude AG ¶ 20(d) is not established.

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). In his answer to the SOR, Applicant denied the debts alleged in SOR ¶¶ 1.g, 1.o, 1.p, and 1.s. He provided evidence that the federal tax lien in SOR ¶ 1.g was recently satisfied, but he presented no documentary proof of a basis for disputing the debts in SOR ¶¶ 1.o, 1.p, and 1.s. I conclude AG ¶ 20(e) is established for the debt in SOR ¶ 1.g, but it is not established for the remaining debts.

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 established a good reputation with his current employer. He was candid and sincere at the hearing. He has reacted passively to his financial situation, allowing his income tax refunds to be seized and his pay to be garnished, but he has taken no affirmative action to resolve his debts. Although Applicant denied the federal tax lien alleged in SOR ¶ 1.g and provided evidence that it had been satisfied, the involuntary collection of this debt by seizure of his tax refunds is insufficient to mitigate the security concerns raised by it.

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.s:

Against Applicant

Conclusion

I conclude that 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