



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-00144
)
 Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

July 29, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Applicant refuted the allegations under Guideline E, but he did not mitigate the security concerns under Guideline F. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 2, 2009. On April 12, 2011, 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 Guidelines F and E. 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, 2011; answered it on April 29, 2011; and requested a hearing before an administrative judge. DOHA received the request on May 2, 2011. Department Counsel was ready to proceed on May 13, 2011, and the case was assigned to me on May 20, 2011. DOHA issued a notice of hearing on May 24, 2011, scheduling the hearing for June 8, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I kept the record open until July 8, 2011, to enable Applicant to submit additional documentary evidence. He timely submitted AX I. He submitted AX J on July 11 and AX K on July 13, 2011. Department Counsel did not object to the untimely submissions nor did he object on any other grounds. Accordingly, AX I, J, and K were admitted. Department Counsel's comments regarding AX I, J, and K are attached to the record as Hearing Exhibits I and II. DOHA received the transcript (Tr.) on June 15, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d and denied the allegations in SOR ¶¶ 2.a and 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 46-year-old research associate employed by a federal contractor since January 2008. He has a high school education. He and his wife married in November 1995. They have four children, ages 17, 14, 13, and 11. He has never held a security clearance. (Tr. 18.)¹

Applicant worked for another federal contractor as an inventory specialist from July 2000 to October 2005. He also was a self-employed owner-operator of a commercial moving company from December 1998 to December 2007.

Applicant and his wife formed their company in December 1998, but it did not become a full-time enterprise until about 2005. Until October 2005, Applicant was working full-time for a federal contractor and part-time in the evenings for his moving business. (Tr. 54, 71.) In October 2005, Applicant left his contractor job and began full-time work with their moving business. They expanded the company from one cargo van to four 24-foot trucks. They provided services to several federal agencies and private companies, but about 75 percent of the income was from one federal agency, with which they had contracts that generated income of about \$200,000 per year. Their income abruptly stopped when an employee of that agency was investigated for fraud and every vendor who had done business with that employee was suspended. They were underbid on several other contracts, and their business declined rapidly. (Tr. 49-50, 54-55.) The business shut down in December 2007, and all its assets have been sold.

¹ Applicant stated in his SCA that he received a security clearance in February 2008 (GX 1 at 37), but he stated at the hearing that he has never held a clearance.

Applicant and his wife filed a joint Chapter 13 bankruptcy petition in January 2009, and they completed the debt counseling required by the bankruptcy court. (GX 2 at 26.) Their primary purpose was to protect their home from foreclosure. They had refinanced their home several times to acquire trucks and equipment for the moving company and were unable to make their mortgage payments, which were about \$4,000 per month. The bankruptcy petition listed only three debts: their home mortgage and two motor vehicle loans. (GX 2 at 27, 35, 53, and 58.) They voluntarily dismissed the bankruptcy petition in September 2009, because they believed they could make more progress in resolving their debts by dealing directly with their creditors rather than through the bankruptcy trustee. (GX 2 at 9; Tr. 66-67, 72.)

When Applicant submitted his SCA, he disclosed the Chapter 13 bankruptcy petition in response to question 26a. He also disclosed a vehicle repossession in response to question 26b. However, he answered "No" to question 26d, asking if he had a lien placed against his property for failing to pay taxes or other debts in the last seven years. He also answered "No" to question 26e, asking if he had a judgment entered against him in the last seven years. He did not disclose a judgment entered against him in October 2008 by the creditor alleged in SOR ¶ 1.a and tax lien entered against him in April 2009 by a local government alleged in SOR ¶ 1.b. The judgment and tax lien were reflected on his credit report dated October 6, 2009. (GX 3 at 3.)

Applicant testified that he was unaware of the judgment and the tax lien when he submitted his SCA. (Tr. 58.) His wife, who handled the finances for the moving business as well as the family, testified that they learned about the tax lien when they were informed of it at the hearing on their motion to dismiss the bankruptcy petition in February 2010, and they learned about the judgment when she applied for a security clearance in May 2010. She testified that they moved shortly after the repossession and never received notice that a lawsuit had been filed. (Tr. 72-73.)

On June 3, 2010, Applicant and his wife sold their home and paid off the mortgage with the proceeds. (GX 2 at 16.) The HUD-1 settlement statement reflected that \$10,171 was paid from the proceeds of the sale to satisfy income tax liens. (GX 2 at 18.) Applicant's wife testified that the proceeds were intended to satisfy their personal taxes, but the funds were erroneously applied to their business taxes. (Tr. 74.) In April 2011, Applicant's credit report reflected that the lien for unpaid personal income taxes was unsatisfied. (GX 5.)

In December 2010, Applicant and his wife made a \$25 payment on the judgment alleged in SOR ¶ 1.a but had made no further payments as of the date of the hearing. (AX G.) In June 12, 2010, the creditor agreed to a payment plan providing for payment of the balance due in two installments on July 12 and July 26, 2011. (AX K.) Although Applicant made an untimely submission of documentary evidence on July 13, 2011, he submitted no evidence showing that the first installment was paid.

In April 2009, a tax lien was imposed on Applicant for unpaid local income taxes. On a date not reflected in the record, he and his wife submitted an offer in compromise

for the unpaid taxes. In August 2010, the tax authorities requested additional information regarding the offer in compromise, and also advised them that they might be eligible for a tax amnesty program. (GX 2 at 12.) The record contains no response from Applicant or his wife regarding the offer in compromise or the tax amnesty program. (GX 2 at 12.) On July 1, 2011, Applicant and his wife executed a payment agreement for the tax lien, providing for an initial payment of \$100, to be paid immediately, and monthly \$300 payments on the 16th of each month until the debt is satisfied. (AX I.) Applicant did not submit any evidence showing that the initial \$100 was paid. His federal tax refunds have been applied to the local tax lien alleged in SOR ¶ 1.b. (AX B.) His local tax exemptions have been reduced to zero until the tax debt is satisfied. (AX C.)

In April 2010, Applicant and his wife accepted an offer to settle the debt alleged in SOR ¶ 1.c, and they made one \$250 payment in July 2010. (GX 2 at 13-14.) The record does not reflect any other payments pursuant to this agreement. On June 6, 2011, Applicant and his wife accepted another settlement offer to resolve this debt by making a \$300 down payment and paying \$166 per month for 36 months. (AX H.) They paid the initial \$300 on June 30, 2011. (AX J.)

Applicant's wife was a federal employee until July 2010. She is now unemployed, but she is actively looking for a new job. (Tr. 102-03.) Her net monthly income while she was employed was about \$1,640. (GX 2 at 8.) As of the date of the hearing, the family's net income was about \$4,632, their projected expenses were about \$3,323, and their projected debt payments totaled about \$968, including payments pursuant to the three payment plans for the debts alleged in the SOR. Their anticipated net monthly remainder was about \$342. (Tr. 110-11.)

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, an administrative judge applies these 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 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 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).

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 an unsatisfied judgment for about \$450 (SOR ¶ 1.a), an unsatisfied tax lien for about \$9,502 (SOR ¶ 1.b), and a delinquent debt for \$9,671 (SOR ¶ 1.c). It also alleges a Chapter 13 bankruptcy petition filed in January 2009 and dismissed in February 2010 (SOR ¶ 1.d).

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.

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") Although one of the debts alleged in the SOR is a tax lien, AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same") is not established, because Applicant's tax debt was not due to failure to file or fraudulent filing of tax returns.

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 recent and numerous, but they occurred under circumstances making them unlikely to recur. Applicant appears to have learned from his mistakes and is not likely to make another attempt to establish and operate a private business by borrowing heavily against his home and personal credit card account. However, his failure to timely resolve his delinquent debts raises doubt about his current reliability, trustworthiness, and good judgment. He has been employed since January 2008 and his wife was employed until July 2010, but they did not negotiate their most recent payment agreements until they received the SOR. Thus, I conclude that 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 business was thriving and growing until an unexpected business downturn, but he did not react responsibly. He and his wife had an opportunity to resolve some of their debts when they filed a Chapter 13 bankruptcy petition in September 2009, but they voluntarily dismissed the petition before the debts were fully resolved. They did not negotiate the most recent payment agreements for the debts alleged in SOR ¶¶ 1.a-1.c until after the SOR was issued in April 2011.

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

and his wife completed the mandatory counseling required by the bankruptcy court. They have negotiated payment agreements for their three unresolved debts, but they have not yet established a record of compliance with those agreements. Thus, I conclude that AG ¶ 20(c) is not established, because the evidence falls short of the “clear indications” required to establish this mitigating condition.

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). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

On the other hand, a history of delinquent debts is not mitigated by payment of debts if payment is motivated primarily by the pressure of qualifying for a security clearance. The three payment plans for the debts alleged in SOR ¶¶ 1.a-1.c are recent and were negotiated after the SOR was issued. Applicant made one payment under the agreement for repayment of the debt alleged in SOR ¶ 1.c, but he presented no evidence of payments on the debts alleged in SOR ¶¶ 1.a and 1.b. I conclude that AG ¶ 20(d) is not established.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by failing to disclose the judgment alleged in SOR ¶ 1.a and the tax lien alleged in SOR ¶ 1.b. 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 “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” AG ¶ 16(a).

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).

An applicant's level of education and business experience are relevant to determining whether his failure to disclose relevant information on his SCA was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010). Applicant has a high school education and limited business experience. He has never held a clearance. He was candid and sincere at the hearing. His testimony about his lack of knowledge about the judgment and the tax lien was credible and plausible. I conclude that Applicant did not intentionally falsify his SCA. Thus, I conclude that AG ¶ 16(a) is not established. No other disqualifying conditions under this guideline are 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 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 Guidelines 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 and his wife made significant financial commitments to establish a commercial moving company, but their lack of business experience left them vulnerable to a business turndown. At the hearing, Applicant was candid and sincere, but he demonstrated little knowledge of the family's financial situation or the financial operation of their former business. He recently negotiated payment agreements for the three delinquent debts alleged in the SOR, but the evidence reflects only a single payment on the debt alleged in SOR ¶ 1.c, and there is no evidence of payments on the agreements for the debts in SOR ¶¶ 1.a and 1.b. Applicant has a history of negotiating settlements but not following through. It is too soon to determine if he will comply with his most recent payment agreements.

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 refuted the allegations under Guideline E, but he has not mitigated the security concerns under Guideline F. 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.d: Against Applicant

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

Subparagraphs 2.a-2.b: For 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