



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-02161
)
 Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

06/27/2012

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 granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 20, 2008. On March 22, 2012, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it was clearly consistent with the national interest to continue his access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to continue or revoke his clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), 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 5, 2012; answered it on April 16, 2012; denied all the allegations in the SOR; and requested a hearing before an administrative judge. DOHA received the request on April 20, 2012. Department Counsel was ready to proceed on May 17, 2012, and the case was assigned to me on May 29, 2012. DOHA issued a notice of hearing on June 1, 2012, scheduling it for June 12, 2012. I convened the hearing as scheduled. Applicant affirmatively waived the 15-day notice requirement in Directive ¶ E3.1.8. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on June 19, 2012.

Findings of Fact

In his answer to the SOR, Applicant denied all the allegations in the SOR, but at the hearing he admitted the existence of some debts but disputed the amounts. His admissions at the hearing are incorporated in my findings of fact.

Applicant is a 43-year-old senior security engineer employed by a defense contractor since August 2007. From October 2005 until he began his current job, he was employed in the private sector or self-employed. He worked for other defense contractors from May 1997 to October 2005. He received a security clearance after beginning his current job, and he is seeking to continue it. (Tr. 13.)

Applicant married in July 1991, separated in 2005, and divorced in May 2007. He has custody of the three children born during this marriage. (Tr. 35, 49.) He remarried on a date not reflected in the record.

Between his jobs with defense contractors, Applicant began investing in real estate. He purchased and renovated homes, sometimes rented them, and then sold them, usually at a profit. He enjoyed financial success until the downturn in the real estate market and the destruction of one of his rental properties due to arson.

Applicant purchased an investment property in March 2006 and financed it with a first and second mortgage. He purchased a second property within a year and financed it with an adjustable rate mortgage (ARM). He intended to sell the first property before the ARM was due to adjust. However, his plan was derailed by an arson fire in August 2007 that destroyed the first property. (AX G and H.) He erroneously assumed that the liability to make the mortgage payments shifted to the insurance company. He continued to make mortgage payments on the first property until December 2007, at which time the insurance claim still was not settled. In response to DOHA interrogatories in April 2011, he stated: "When the insurance company failed to pay, I decided that I would cut my losses. . . . I worked with and waited for the insurance company to settle this claim. I informed the mortgage company that I was not going to pay any further on a property that I could not use." (GX 5 at 8-9.) After consulting with others whom he considered knowledgeable, including his facility security officer (FSO),

he decided to stop making payments on the property. The first and second mortgages on the first property were foreclosed. The first mortgage (SOR ¶ 1.d) was foreclosed on a balance of \$343,820, and the property was sold in June 2008 for \$270,000. (Answer to SOR at 5-6.) After the foreclosure, the insurance company paid the mortgage lender, but the insurance company would not disclose the terms of the settlement to Applicant because he was not a party to the settlement. (Tr. 65-66.) It appears, however, that the insurance proceeds were equal to or greater than the deficiency after the foreclosure, because Applicant's credit bureau report (CBR) dated April 6, 2011, reflected a zero balance on the account. (AX E at 11.) Applicant negotiated a settlement of the second mortgage. (Tr. 35-37, 65-66; GX 4 at 5.) The delinquent first and second mortgages are alleged in SOR ¶¶ 1.c, 1.d, and 1.e.

SOR ¶¶ 1.c and 1.e are the same debt, *i.e.*, the second mortgage on the first property. The original creditor referred the debt to a collection agency. The original creditor's account number (359276373) was changed to the collection agency's account number (4003530), and the collection agency's account number appears on the receipt for payment in full. (Answer at 9 and 13; GX 2 at 9; GX 5 at 35, 39.)

Because of the destruction of the first home and the damage to Applicant's credit rating caused by the foreclosures of the mortgages on it, Applicant was unable to renegotiate the ARM on the second property. The ARM adjusted drastically upward and the market value of the property declined by about 40 percent. Applicant unsuccessfully tried to negotiate a modification of the loan. (GX 5 at 17.) He offered the lender a deed in lieu of foreclosure, but his offer was not accepted. After consulting with several attorneys and financial advisors, he decided to let the lender foreclose on the second property. (Tr. 37-38.) He informed his FSO of this financial delinquency. (GX 5 at 14, 16.) In response to DOHA interrogatories, he stated: "The property payment had gone up over 30% and by then I had lost at least 25% or more in value. My credit [had] taken a hit due to the arson so I cut my losses with this property so I would be much better off in the long run." (GX 5 at 14.) The property was sold and the loan was paid in full in October 2010. (Answer at 8; GX 5 at 34.) This debt is alleged in SOR ¶ 1.b.

About three months after the arson, Applicant noticed transactions on several credit card accounts that he suspected were fraudulent. He suspected that between \$2,500 and \$3,000 of the \$8,000 balance had been fraudulently charged to the account alleged in SOR ¶ 1.a. He contacted all his credit card companies and notified them of the fraudulent transactions. He was unable to resolve the account in SOR ¶ 1.a. (Tr. 51-53.) His CBR dated April 2, 2008, did not reflect that the account was delinquent, but his CBR dated February 10, 2012 reflected that the debt alleged in SOR ¶ 1.a was charged off in August 2007. (GX 2; GX 3 at 1.)

In February 2008, Applicant enrolled in a debt negotiation and reduction program. An attorney associated with the program advised him to not make payments on the accounts, but to put funds in an escrow account while the attorney negotiated with the creditors. He followed the attorney's advice. (GX 4 at 4; AX F.) Five credit card accounts were included in the program, of which all were settled except the account

alleged in SOR ¶ 1.a. The attorney made multiple settlement offers to the creditor in SOR ¶ 1.a, but all were rejected, because the creditor would not accept less than payment in full. The balance grew to \$14,699 because of accrued interest, late charges, and penalties.

In 2009, the account was transferred to a collection agency. The attorney again made multiple offers, which were rejected. In February 2011, the collection agency informed Applicant's attorney that the statute of limitations on the debt had run and that they would violate the law if they accepted any payments on the debt. The original creditor declined to provide a document reflecting a zero balance. Applicant was "graduated" from the debt resolution program in April 2011, when the program operators determined that the debt in SOR ¶ 1.a could not be resolved. (AX A.)

Applicant submitted an SCA on March 20, 2008. He responded "No" to Question 28a, asking if, in the last seven years, he had ever been more over 180 days delinquent on any debts and Question 28b, asking if he was currently over 90 days delinquent on any debts. His CBR dated April 2, 2008, reflected a delinquent real estate mortgage with payments in the amount of \$11,524 that were 150 days past due, on which the date of last activity was October 2007. It also reflected a real estate mortgage with payments in the amount of \$5,162 that were 150 days past due, on which the date of last activity was October 2007. (GX 2 at 9.) Applicant did not disclose either of these delinquent real estate mortgages in his SCA.

In his answer to the SOR and at the hearing, Applicant testified that he did not disclose the two delinquent mortgages on his SCA because they were on the property that was destroyed, and he believed that the insurance company was responsible for resolving them. (Answer at 2; Tr. 80-81.) Although it was not alleged in the SOR, he also admitted that the credit card account alleged in SOR ¶ 1.a was more than 90 days delinquent and should have been disclosed. He attributed this omission to "a mistake." (Tr. 82).

In response to DOHA interrogatories, Applicant stated that he was unprepared for the financial "tragedy" that he encountered, that he did not understand at the time how to properly handle the situation, that he has learned from his experience, and that he is determined to never repeat his mistakes. He vowed that he will never again make risky investments dependent on the housing or financial markets. (GX 5 at 17-18.)

Applicant's annual income is about \$142,000. He has about \$10,000 in his checking account, between \$3,000 and \$5,000 in mutual funds, and gold and silver worth about \$40,000. (Tr. 85-87.) He resolved several medical debts and a credit card debt that became delinquent around 2008 but were not alleged in the SOR. (GX 5 at 27-33.) The mortgage payments on his primary residence are current and have never been delinquent. He has no active credit card accounts. He paid cash for a moderately priced automobile in February 2011. He also owns a 2006 model motorcycle and three older

automobiles of 1999, 1984, and 1983 vintage, all of which were purchased for cash. His wife is currently unemployed but is looking for another job. (Tr. 42-43, 90-91, 95-96; AX E.)

Applicant's program manager for the past year, who is a retired Army officer, describes him as an "exemplary employee." He states that Applicant has fully disclosed his financial issues. He believes that Applicant is truthful and honest, and his integrity is beyond reproach. (AX B.) Two retired police officers, who have known Applicant for six and seven years respectively, both describe him as kind, generous, family-oriented, honest, trustworthy, candid, and a man of high integrity. (AX C; AX D.)

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 that 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

The SOR alleges a delinquent credit card account (SOR ¶ 1.a) and four delinquent mortgage accounts (SOR ¶¶ 1.b-1.e). 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.

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money. It encompasses concerns about an applicant’s self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The evidence shows that the debts alleged in SOR ¶¶ 1.c and 1.e are the same debt. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Thus, I will resolve SOR ¶ 1.e in Applicant’s favor.

Applicant's credit reports and his testimony regarding SOR ¶¶ 1.a through 1.d establish the following 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.") Security concerns based on financial considerations may be mitigated by any of the following conditions:

AG ¶ 20(a): 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(b): 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(c): 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(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; or

AG ¶ 20(e): 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(a) is not established for the debt alleged in SOR ¶ 1.a, because it is not yet resolved. However, it is established for the delinquent mortgages, which have been resolved. Applicant's bad judgment in allowing the properties to be foreclosed occurred more than four years ago. His mortgage payments on his primary residence are current, and he no longer speculates in the real estate market. He has become financially responsible, and his past mistakes do not cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) is not established for the credit card debt alleged in SOR ¶ 1.a. This debt may have been due in part to fraud, but Applicant failed to document the basis for his suspicion that some of the transactions on his account were fraudulent. AG ¶ 20(b) is partially established for the delinquent mortgages alleged in SOR ¶¶ 1.b through 1.e, which were the result of arson and a drastic downturn in the real estate market. Applicant did not act responsibly by walking away from the two properties, but he receives some credit because he acted responsibly by remaining in contact with the mortgage lenders and negotiating settlements of the delinquent mortgages.

AG ¶ 20(c) is established. Applicant did not obtain the traditional financial counseling, but he enrolled in a debt negotiation and reduction program and consulted with attorneys about his financial problems. The delinquent credit card account is uncollectable and the collection agency has refused to accept voluntary payments. The delinquent mortgages are resolved.

AG ¶ 20(d) is established for the credit card debt. Applicant could have tendered payment on the credit card account for the transactions that he knew were not fraudulent, but he relied on the advice of his attorney and established an escrow account instead. He did not intentionally wait for the statute of limitations to run. To the contrary, he was unaware of the statute of limitations until the collection agency informed him of it. He acted responsibly by contacting the creditor, attempting to negotiate a settlement, and obtaining professional help when the creditor refused to negotiate. The debt is unpaid because of the intransigence of the original creditor, who allowed the statute of limitations to run. The collection agency has refused to accept payment.

AG ¶ 20(d) is not fully established for the delinquent mortgages, because Applicant stopped making payments on the first investment property when the insurance settlement stalled and he stopped payments on the second investment property when it turned out to be a bad investment. He receives some credit, however, because he remained in contact with the mortgage lenders and negotiated settlements of the delinquent mortgages.

AG ¶ 20(e) is applicable to the portion of the credit card debt attributable to fraud, but it is not established because Applicant submitted no documentary evidence of the basis for his suspicion that some transactions were fraudulent.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by failing to disclose the delinquent debts alleged in SOR ¶¶ 1.d and e. 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 testified that he did not disclose the delinquent mortgages on the home destroyed by arson because he thought the insurance company was responsible to settle the debt. He was candid, sincere, and straightforward throughout the hearing. I found his explanation plausible and credible. Thus, I conclude that AG ¶ 16(a) is not established for the failure to disclose the delinquent mortgages alleged in SOR ¶¶ 1.d and 1.e.

Department Counsel argued that Applicant should have disclosed the delinquent credit card debt on his SCA, and Applicant admitted that it was "a mistake" to have not disclosed it. However, failure to disclose the debt in SOR ¶ 1.a was not alleged in the SOR, and Department Counsel did not offer to amend the SOR. Thus, Applicant's failure to disclose the debt in SOR ¶ 1.a may not be relied upon as an independent basis for denying a security clearance. It may be considered, however, to assess Applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have limited my consideration of Applicant's failure to disclose the SOR ¶ 1.a debt to these purposes.

Whole-Person Concept

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. In applying 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.

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 has worked for defense contractors for about 12 years and has held his current security clearance for almost five years, apparently without incident. He was candid, sincere, and credible at the hearing.

A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant's financial world fell apart because of the confluence of the breakup of his marriage, the burden of suddenly being the sole parent and provider for three children, the destruction of one of his investment properties, the rapid rise in interest rates, and the drastic downturn in the real estate market. He was caught up in the exuberance of the real estate investment market and quickly learned the danger of overly leveraged investments. He kept his FSO informed of his financial problems, and he remained in contact with his creditors

Applicant's bad judgment in his risky investments and financially irresponsible behavior by walking away from his obligations occurred more than four years ago. He has learned from his experience and now lives a financially conservative life. He is debt free. He has earned the respect of his program manager and his friends. Based on all the evidence, I conclude that his past mistakes and bad judgment do not cast doubt on his current judgment, reliability, and trustworthiness.

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 of falsifying his SCA and mitigated the security concerns based on financial considerations. Accordingly, I conclude he has 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): FOR APPLICANT

Subparagraphs 1.a-1.e: For Applicant

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

Subparagraphs 2.a-2.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge