



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-02576
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

June 4, 2011

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 denied.

Statement of the Case

Applicant submitted a security clearance application on December 8, 2009. On January 6, 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 January 12, 2011; answered it in an undated document; and requested a hearing before an administrative judge. DOHA received the

request on February 3, 2011. Department Counsel was ready to proceed on February 25, 2011, and the case was assigned to me on March 2, 2011. DOHA issued a notice of hearing on March 17, 2011, scheduling the hearing for April 6, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until April 22, 2011, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through G, which were admitted without objection. Department Counsel's comments regarding AX D through G are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on April 13, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR, except SOR ¶ 1.cc, which he denied. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old logistician employed by a defense contractor since July 2007. He has worked for defense contractors since August 1996. He served on active duty in the U.S. Army from February 1981 to August 1995, and he elected to take an early retirement because of limited promotion opportunities. He has held a second job since September 1997, working two nights a week as a security guard and doorman at a night club. (GX 1 at 15; Tr. 73.) He has held a security clearance since January 1999.

Applicant married in June 1981, separated in August 1995, and divorced in May 2000. He married his current wife in May 2009. He has four adult children from his first marriage. His current wife is employed as a laboratory technician at a local hospital. (Tr. 36.)

Applicant was required to pay child support after he and his first wife separated, and he also was responsible for most of the debts incurred during the marriage. (GX 6.) He filed a Chapter 7 bankruptcy in May 2001, and received a discharge in September 2001. (GX 9 at 1.) This bankruptcy is alleged in SOR ¶ 1.dd.

Applicant incurred two student loans, alleged in SOR ¶¶ 1.a and 1.b, while attending college courses in criminal justice. After the loans were referred to a collection agency, he made five monthly payments, but he stopped sending payments because he was not receiving any responses from the collection agency. (Tr. 47-52; AX D; AX E.)

The delinquent debts alleged in SOR ¶¶ 1.c-1.e, 1.k, 1.l, and 1.cc are credit card accounts. The account alleged in SOR ¶¶ 1.cc was settled for ten percent of the amount due. (Answer to SOR; GX 5 at 24-25.) The remaining credit card debts are unresolved.

Applicant suffers from recurrent kidney stone problems requiring hospitalization or treatment about every 90 days. He testified that his medical problem was caused by his exposure to burning oil fields during the first Gulf War. The 19 delinquent medical

bills alleged in SOR ¶¶ 1.h-1.j and 1.m-1.bb are related to treatments for kidney stones. He has medical insurance, but he is indebted for the copayments. (Tr. 38-41.) Of the 19 delinquent medical bills, five are for less than \$100 and one is for \$107. None of the medical debts are resolved.

Applicant testified that he had done nothing to resolve his medical debts because he is concentrating on resolving his federal and state tax debts. He testified he “forgot” to file his state tax return for tax year 2009, because he had just married and “had so much going on.” The return was due on May 1 and he realized he had missed the filing date about May 15. He did not consider filing late or requesting an extension of time to file. He decided he would do nothing until he filed his return for tax year 2010. (Tr. 72, 82-83.) He owed state taxes of \$1,165, which were collected by a tax levy on his pay. (GX 4 at 11, 14.) He owes federal income taxes of about \$1,295 for tax year 2009, and he expects to owe about \$2,000 for tax year 2010. (GX 4 at 13; Tr. 60.) His deliberate failure to file his 2009 state tax return is alleged in SOR ¶ 1.dd. The federal and state tax debts are not alleged in the SOR.

Applicant submitted a personal financial statement in September 2010, reflecting net monthly income, including his wife’s income, of \$4,777, expenses of \$2,611, debt payments of \$1,127, and a net monthly remainder of \$1,039. (GX 5 at 26.) He and his wife each drive three-year-old economy cars. They live in a rented apartment. He has about \$1,200 in his savings account and \$600 in his checking account. He does not have a retirement account other than his military retirement. After their marriage in 2009, he and his current wife spent their honeymoon on a cruise to the Bahamas. (Tr. 74.)

Applicant submitted two receipts for payments to a law firm, but he did not show any connection between the law firm and the debts alleged in the SOR. (AX A; AX B.) He also submitted 30 pages of accounting documents from the hospital where he receives treatment for kidney stones, but the documents do not reflect any payments on the debts alleged in the SOR. (AX C.)

Applicant completed an online financial management course and has consulted with a bankruptcy attorney. He has not sought or obtaining any other financial management counseling. (Tr. 75-76.)

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 27 delinquent debts (SOR ¶¶ 1.a-1.e and 1.h-1.cc).¹ Applicant's admissions, corroborated by his credit reports, establish all the allegations in the SOR, except SOR ¶ 1.cc. The debt alleged in SOR ¶ 1.cc has been resolved. 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 three disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

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 and ongoing, and they did not occur under 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. Applicant's marital breakup in 1995 and the financial obligations resulting from that breakup were conditions beyond his control, but the financial consequences of his marital breakup were resolved by his bankruptcy discharge in September 2001. His chronic problem with kidney stones is a condition beyond his control, but he has not acted responsibly in resolving the medical

¹ There are no subparagraphs 1.f and 1.g in the SOR. Subparagraph 1.e is followed by subparagraph 1.h.

copayments for his treatment. His financial statement reflects that he has a significant monthly remainder. He was able to finance a honeymoon cruise to the Bahamas, but he has done nothing to resolve his medical debts, even though many of them are for small amounts. I conclude that AG ¶ 20(b) is established for the bankruptcy alleged in SOR ¶ 1.dd, but it is not established for the delinquent debts alleged in SOR ¶¶ 1.a-1.e and 1.h-1.bb.

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). Neither prong of this mitigating condition is established. His completion of a two-hour online course falls short of the type of counseling contemplated by AG ¶ 20(c), and his financial problems are 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). 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). This mitigating condition is established for the debt alleged in SOR ¶ 1.cc, but not for the other debts alleged in the SOR. He has made no effort to resolve the other debts alleged in SOR ¶¶ 1.a-1.e and 1.h-1.bb, and he has no plan for doing so.

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 not disputed any of the debts alleged.

Guideline E, Personal Conduct

The SOR cross-alleges the allegation in SOR ¶ 1.ee that Applicant deliberately failed to file his state income tax return for tax year 2009 (SOR ¶ 2.a). The security concern under this guideline is set out in AG ¶ 15: “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. . . .” The relevant disqualifying condition is AG ¶ 16(c):

[C]redible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant's explanation that he "forgot" to file his state tax return was plausible and credible in light of his track record of inattention to financial matters. However, it does not explain or justify his failure to submit a late return or request an extension of time when he realized two weeks later that he had forgotten to file it. He decided to do nothing and address the problem during the following tax year. I conclude that AG ¶ 16(c) is established.

Security concerns raised by personal conduct may be mitigated if: "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 17(c). Applicant's failure to file his return is arguably minor and it occurred only once. However, it did not happen under unique circumstances. When considered in the context of his overall history of financial neglect, it raises questions about his reliability, judgment, and willingness to comply with rules and regulations. I conclude that AG ¶ 17(c) is not established. No other enumerating mitigating conditions are applicable.

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 is a mature adult. He served honorably in the U.S. Army for 14 years, including service in a combat zone. He has worked for defense contractors and held a clearance for many years. He suffers from a chronic medical problem that apparently was caused or aggravated by his combat service. On the other hand, he has a long track record of financial neglect. His approach to his debts has been generally passive. He has not demonstrated the sense of obligation expected of someone entrusted with classified information.

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 not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not 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): **AGAINST APPLICANT**

Subparagraphs 1.a-1.e:	Against Applicant
Subparagraphs 1.f and 1.g:	Omitted from SOR
Subparagraphs 1.h-1.bb:	Against Applicant
Subparagraphs 1.cc-1.dd:	For Applicant
Subparagraph 1.ee:	Against Applicant

Paragraph 2, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 2.a:	Against Applicant
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Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge