



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 11-02528
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Stuart Kagen, Esq., and Michele Perino, Esq.

February 10, 2012

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 August 9, 2010. On September 7, 2011, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it is 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 revoke his clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), 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 September 13, 2011; answered it on October 26, 2011; and requested a hearing before an administrative judge. DOHA received the request on November 1, 2011. Department Counsel was ready to proceed on December 8, 2011, and the case was assigned to me on December 15, 2011. DOHA issued a notice of hearing on January 5, 2012, scheduling it for January 23, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and presented the testimony of two witnesses. He submitted Applicant's Exhibits (AX) A through U with his answer to the SOR, and the lettering sequence was continued on AX V through CC, which were presented at the hearing. AX A through CC were admitted without objection. Department Counsel submitted a demonstrative exhibit summarizing the evidence, which is attached to the record as Hearing Exhibit (HX) I. Department Counsel's exhibit list is attached as HX II. Appellant's witness and exhibit list is attached as HX III. DOHA received the transcript (Tr.) on January 31, 2012.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, and 1.c. He denied SOR ¶¶ 1.a(1)-(15), 1.d, and 1.e. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old engineering associate employed by a federal contractor since October 2008. He first received a security clearance in September 2001.

Applicant married in August 1985 and divorced in April 1999. His 17-year-old daughter was born during this marriage. He has lived with the woman who is now his fiancée since February 1999.

Applicant attended a technical institute and received a diploma in September 1984. He worked as an engineering associate from 1984 to 1998, earning about \$65,000 per year, until he was laid off. (Tr. 36-41. AX W.) He was unemployed from 1998 to 2000. He returned to the workforce in 2000, and he began working for his current employer in September 2001. He suffered disabling injuries in an automobile accident on March 3, 2004, and was laid off in July 2004 after exhausting his medical leave. (AX J-O.) He was unemployed until October 2005, when he began working as an engineering technician in the private sector. He was unemployed from March to July 2006, worked as a swimming pool maintenance technician from July to October 2006, and was unemployed from October 2006 to May 2007. He worked as a senior technician in the private sector from May 2007 to October 2008, when he began his current job, returning to the same employer who had laid him off because of his injuries in July 2004. His annual pay in 2009 was about \$61,000. His pay increased every year, and his annual pay for 2011 was about \$85,000. (Tr. 71-72; AX W.)

Applicant's gross annual income was about \$4,667 per month before he was laid off in July 2004. He was making monthly home mortgage payments of \$2,700, car

payments of \$375, and child support payments of \$600, leaving him about \$992 per month to cover income taxes and other deductions from his gross pay, as well as car insurance, debt payments, and living expenses. (Tr. 102-03.)

Applicant incurred numerous delinquent debts while he was unemployed and recovering from his automobile accident. In 2004, he recovered \$60,000 in damages resulting from the accident. He used it to repay a \$10,000 loan from his father, a \$6,000 loan from his sister, and a \$16,000 child support arrearage. He used the remaining \$28,000 to pay delinquent bills. (Tr. 94-95.) He was not satisfied with the condition of his car after it was repaired, and he traded it for a new car, a luxury SUV. He was still employed when he bought the SUV. (Tr. 102-03.)

Applicant filed a Chapter 13 bankruptcy petition in October 2005. He received the mandatory credit counseling as part of his bankruptcy filing. (Tr. 107.) The petition was dismissed in March 2006 on motion of the bankruptcy trustee because Applicant had not filed his state and federal income tax returns for 2005 and 2006. (GX 3; GX 2 at 8.) Applicant testified that he did not file his income tax returns because he did not have the money to pay an accountant to prepare his returns. He did not seek help from legal aid or tax counseling agencies and did not request extensions of time to file. (Tr. 99-100.)

Applicant filed a second Chapter 13 bankruptcy petition in May 2006, and it was dismissed in August 2006 on motion of the bankruptcy trustee because Applicant still had not filed his state and federal income tax returns for 2005 and 2006. (GX 2 at 8; GX 4.) Both of his Chapter 13 bankruptcy petitions listed all the delinquent debts alleged in SOR ¶¶ 1.a(1) through 1.a(15).

Applicant eventually filed his 2005 and 2006 returns in 2009. His federal income tax return for 2005 was an uncomplicated return, with no itemized deductions, and it reflected that he was entitled to a refund of \$2,520. He filed a short-form return (Form 1040A) for 2006, and it reflected that he was entitled to a refund of \$968. (AX P.)

Applicant testified that his home was about to be foreclosed in November 2007. The lender offered him \$800 to surrender the home, and he accepted the offer. (Tr. 104-05.) The home was worth more than the balance on the mortgage, and the debt was resolved. (AX Q.) The delinquent mortgage is not alleged in the SOR.

Applicant's credit report dated August 24, 2010, reflects the delinquent debts alleged in SOR ¶¶ 1.a(1)-(5), 1.a(9), 1.a(14), 1.c, 1.d, and 1.e. (GX 6.) His credit report dated August 19, 2011, reflects the delinquent debts alleged in SOR ¶¶ 1.a(1)-(3) and 1.a(9). (GX 5.) The debts alleged in SOR ¶¶ 1.a(4)-(8), and 1.a(10)-(13) do not appear on his credit report dated October 27, 2011 (AX A.) The debts alleged in SOR ¶¶ 1.a(6)-(8), 1.a(10)-(13), and 1.a(15) do not appear on any of the three credit reports in the record, but they were listed in his two bankruptcy petitions. He admitted that the debts alleged in SOR ¶ 1.a(1)-(15) were delinquent when he filed his bankruptcy petitions and that he had not made payments on any of them. (Tr. 100-01.) He testified that he did nothing about the debts included in the bankruptcy petitions, because "nobody

contacted [him], so [he] didn't go forward and try to contact anybody else." (Tr. 115.) Under the applicable state law, collection of the debts in SOR ¶ 1.a(2)-(4), 1.a(6)-(15), and 1.e is barred by the six-year statute of limitations. (AX B.)

The debt alleged in SOR ¶ 1.a(1) was for a recreational boat that Applicant surrendered in November 2005 because he could not afford the payments. He asserted that the sale of the boat covered the balance due and that his credit report dated October 27, 2011, reflected that the debt was no longer delinquent. (Tr. 61; Answer to SOR at 2.) However, this credit report reflects only that the collection account was closed because it was included in a Chapter 13 bankruptcy. (AX A at 25.) Applicant's August 2010 and August 2011 credit reports reflect that the debt was charged off. (GX 5 at 1; GX 6 at 5.)

The debt alleged in SOR ¶ 1.a(5) was cancelled by the creditor in November 2008 and an IRS Form 1099-C was issued to Applicant. (AX C.) This debt is resolved.

In April 2008, a judgment was entered against Applicant for \$11,546 for the debt alleged in SOR ¶ 1.c, which was a deficiency after repossession of an automobile. (GX 6 at 4; GX 7.) This debt was listed in his two bankruptcy petitions and shown as three months past due on his October 2005 petition and as current on his May 2006 petition. (GX 3ii; GX 4ii.) He later fell behind on his payments and the vehicle was repossessed in 2007. (Tr. 62-63.)

In May 2011, Applicant hired a debt resolution agency to assist him with his delinquent debts. (AX AA; Tr. 75.) The agency contacted the creditor alleged in SOR ¶ 1.c and offered to settle the debt for \$5,000, payable over six months. (AX G.) The attorneys for the creditor accepted the offer and forwarded it to the creditor for formal approval. (GX 2 at 19.) As of the date of the hearing, the debt had not been resolved. Applicant testified that he had the funds to pay this debt when the settlement offer was tendered, however, at the time of the hearing, he did not have the money to settle the debt after paying for attorney's fees and the debt resolution services. (Tr. 112.)

Applicant testified that his debt resolution agency advised him against making any payments on debts barred by the statute of limitations. He was advised that any payment would revive the debts and waive his rights under the statute of limitations. (Tr. 122-23.)

In August 2010, the creditor alleged in SOR ¶ 1.d offered to settle the \$340 debt for \$25. (AX H.) Applicant accepted the offer and paid the agreed amount. (GX 2 at 18.) The parties stipulated that the debt was settled. (Tr. 29.)

The debt alleged in SOR ¶ 1.e was listed on both of Applicant's bankruptcy petitions. It is reported as "dismissed" on his August 2011 and October 2011 credit reports. However, the same debt, with the same account number but listed under the name of the original creditor instead of the collection agency, is reported as "seriously past due" on his October 2011 credit report. (GX 6 at 12; AX A at 16.)

Applicant has paid for his 12-year-old car, lives in a rented apartment, is current on his child support payments, and is current on his federal and state income taxes. He has only one credit card with a \$700 limit, which is current. He is not delinquent on any of his current obligations. (Tr. 85-89.) He currently earns about \$85,000 and has a net monthly remainder of about \$800 per month after paying all his living expenses and legal obligations. (Tr. 110-11.)

Applicant's fiancée testified that she has known him for about 25 years, and they have been engaged for about six years. While Applicant was unemployed, she paid most of the living expenses. She tried to take over the mortgage on Applicant's home but was turned down by the bank because her income was too low. Now that Applicant is employed, they share all living expenses. She considers Applicant to be financially dependable. (Tr. 130-37.)

Applicant's division director rehired Applicant in 2008 and was his immediate supervisor at that time. Before he rehired Applicant, he interviewed Applicant's supervisor for the period preceding his layoff in July 2004, and he determined that Applicant was considered an exemplary employee before he became medically disabled. He believes that Applicant is a valuable, loyal, and dependable employee. He believes that Applicant's work is critical to the national defense, and he would be very difficult to replace. He recently gave Applicant an outstanding performance evaluation. (Tr. 150-60.)

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 that Applicant filed a petition for Chapter 13 bankruptcy in May 2006 that was dismissed without any payments being made, and that 15 delinquent debts were listed in the bankruptcy petition and remain unpaid (SOR ¶ 1.a). It alleges that he filed another petition for Chapter 13 bankruptcy in October 2005, and it was dismissed without any payments being made. (SOR ¶ 1.b). Finally, it alleges an unsatisfied judgment and two collection accounts that remain unpaid (SOR ¶¶ 1.c-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.

Applicant's admissions, his credit reports, and his two bankruptcy petitions establish two disqualifying conditions: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same") was not alleged in the SOR and may not be considered as an independent basis for revoking Applicant's clearance. However, it may be considered 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 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). I have considered Applicant's failure to timely file his federal and state tax returns in 2005 and 2006 for these limited purposes.

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 ongoing and numerous. Applicant receives some credit under AG ¶ 20(a) because his financial problems were triggered by circumstances not likely to recur. However, his failure to timely file his income tax returns and failure to address his delinquent debts after returning to the workforce raise concerns about his current reliability, trustworthiness, and good judgment. I conclude that this mitigating condition is not fully 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.

Applicant's disabling injuries were conditions beyond his control. He was living on a tight budget before his car accident, but he was able to meet all his financial obligations. However, he did not act responsibly. He missed an opportunity to right his financial ship through a Chapter 13 bankruptcy in October 2005, when he failed to file his federal and state tax returns, causing his petition to be dismissed. He missed an opportunity to receive a substantial refund for tax year 2005. He did not learn from his mistake, because his May 2006 bankruptcy petition was dismissed for the same reason. He took no meaningful action to address the debts included in his bankruptcy petitions for six years. I conclude that the second prong of this mitigating condition, *i.e.*, responsible conduct, is not established.

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 completed the mandatory debt counseling in connection with his bankruptcy petitions, and he has received advice from his current debt resolution agency. The debts that are uncollectible because of the statute of limitations are “under control,” but the judgment alleged in SOR ¶ 1.c is unsatisfied, and the debt alleged in SOR ¶ 1.a(1) is unresolved. I conclude that this mitigating condition is not fully 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). An applicant is not required 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).

Even if a delinquent debt is legally unenforceable under state law, an administrative judge should consider the facts and circumstances surrounding an applicant’s conduct in incurring and failing to satisfy the debt in a timely manner. See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). Reliance on a statute of limitations “is not normally a substitute for good-faith efforts to pay off debt.” ISCR Case No. 07-16427 (App. Bd. Feb. 4, 2010). “[R]eliance upon the non-collectibility of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive.” ISCR Case No. 07-06841 at 4. Bd. Dec. 19, 2008). Furthermore, the evidence indicates that Applicant ignored the debts included in his bankruptcy because no one contacted him about them. He was not aware of the statute of limitations until he was informed of it by his debt resolution agency in May 2011.

Applicant made good-faith efforts to resolve some of his delinquent debts that are not alleged in the SOR, such as his child support arrearage and his delinquent home mortgage. In addition, he resolved the debts alleged in SOR ¶¶ 1.a(5) and 1.d. I conclude that AG ¶ 20(d) is established for the debts alleged in SOR ¶¶ 1.a(5) and 1.d, but not for the remaining debts alleged in the SOR.

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 denied most of the debts alleged in the SOR, but he based his denial on the statute of limitations. He has not disputed any of the debts within the meaning of this mitigating condition. I conclude that AG ¶ 20(e) is not established.

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 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 suffered disabling injuries, lost his job, and fell into serious financial problems. He missed his opportunity to resolve his financial problems because he failed to timely file his tax returns. He ignored most of his debts after his bankruptcy petitions were dismissed. On the other hand, he was regarded as an exemplary employee until he suffered his disabling injuries. His old employer rehired him in October 2008, and he has continued his exemplary performance of duty. He has held a security clearance for many years, apparently without incident.

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.) Thus, the ultimate question in this case is not whether the debts have been resolved or whether actions to collect them are barred by a statute of limitations. The ultimate question is whether Appellant's response to his debts demonstrated the judgment, reliability, and trustworthiness required of persons entrusted with a security clearance.

After weighing the disqualifying and mitigating conditions under Guideline F, 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 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

Subparagraph 1.a:	Against Applicant
Subparagraphs 1.a(1)-(4):	Against Applicant
Subparagraph 1.a(5):	For Applicant
Subparagraphs 1.a(6)-(15):	Against Applicant
Subparagraph 1.b-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

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