



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 11-02717  
 )  
 Applicant for Security Clearance )

**Appearances**

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

December 21, 2011

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on November 5, 2010. On July 20, 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 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 August 2, 2011; answered it in an undated document; and requested a hearing before an administrative judge. DOHA received the request on August 31, 2011. Department Counsel was ready to proceed on September

22, 2011, and the case was assigned to me on October 6, 2011. DOHA issued a notice of hearing on October 18, 2011, scheduling it for November 9, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. I kept the record open until November 30, 2011, to enable Applicant to submit additional documentary evidence. He timely submitted AX K through P, which were admitted without objection. Department Counsel's comments regarding AX K through P are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on November 21, 2011.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the three allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 57-year-old contracting officer employed by a defense contractor. He attended college from September 1976 to December 1977 but did not receive a degree. After he dropped out of college, he worked in the construction industry, starting as a common laborer and rapidly moving up to supervisory positions. He worked as a general contractor from January 2000 to December 2006, was unemployed from December 2006 to February 2007, and worked as a purchasing manager for a private company from February to July 2007. He worked as a project manager for a private company from July to December 2007, when the company went out of business. He was self-employed as a general contractor from December 2007 to September 2009, and unemployed from September 2009 to August 2010, when he began his current employment. (GX 1 at 13-19; Tr. 43-44.) He has never held a security clearance.

Applicant married in May 1978. Two children, ages 30 and 26, were born during the marriage. His wife is a licensed massage therapist, but her income last year was only about \$19,200.

For most of Applicant's married life, he relied on his wife to manage the family finances, including paying the mortgage and filing the income tax returns, and she did so faithfully for about 30 years. During his period of unemployment from September 2009 to August 2010, he frequently asked his wife about their financial condition. She responded that it was "fine" and Applicant did not inquire further. During the past five years, she became increasingly unreliable because of her addiction to marijuana. When Applicant and his wife went through marriage counseling about two years ago, his wife promised to abstain from using marijuana, but she continued to use it. Applicant no longer trusts her to do anything. He has assumed responsibility for resolving their financial problems. He has moved out of their home, manages his own finances, and intends to file separate income tax returns for the current year. (Tr. 82-83.) Applicant and his wife intend to live apart for a year and file for divorce. Applicant gives his wife \$1,000 every other week and sometimes gives her additional funds as needed. (Tr. 25-26.)

When Applicant and his wife first began receiving correspondence from the Internal Revenue Service (IRS), his wife told him that it was about a procedural issue, and he did not look into it. He discovered in late 2009 or early 2010 that she had not filed any of their federal tax returns for tax years 2004 through 2008, and he owed \$10,882 for tax years 2004 and 2008. He tried to negotiate a payment plan, and he sent \$500 to the IRS, but he did not make any further payments because he was unemployed. (Tr. 50-52.)

In March 2011, Applicant hired a tax resolution firm to negotiate with the IRS. (AX C; AX D; AX E.) At the time of the hearing, the firm was preparing an offer in compromise to settle his federal tax debt. (Tr. 49-56.) In the meantime, the IRS has garnished Applicant's pay. (Tr. 70.) The IRS has collected \$5,530 through garnishment and seized Applicant's \$931 tax refund for 2010, leaving a balance due of about \$4,368. (AX K; AX O; AX P.)

In March or April 2011, Applicant contacted the state tax authorities about his unpaid taxes totaling about \$5,526. He has negotiated a payment plan for his delinquent state taxes, with an initial payment of \$860 followed by \$248 per month for 36 months. (Tr. 58-59; AX F; AX G; AX L.)

Applicant and his wife purchased their house in 1984 and were able to keep current on their mortgage payments, even after Applicant's income started declining in 2004. When he was unemployed, they refinanced the house, took out some equity, and brought the payments up to date. At some time in 2008 or 2009, his wife stopped making the house payments. The mortgage was foreclosed, the house was sold, and the first mortgage was satisfied. The purchaser at the foreclosure sale allowed them to rent the house for about a year. The holder of the second mortgage referred the unpaid balance of about \$24,000 to a collection agency. Applicant negotiated a payment plan for the second mortgage and has been making monthly \$150 payments to the collection agency. Applicant's wife signed and kept a copy of the payment agreement, but Applicant was unable to produce it at the hearing. He did, however, produce documentation of the \$150 payments. His ability to produce documentation in this case was hindered because his wife maintained most of the household financial records, which are in disarray, and she still has them in her possession. (Tr. 61-63, 70-71; GX 2 at 11-12; AX H; AX I; AX K; AX N.)

Applicant's current net take-home pay after taxes and the IRS garnishment is about \$2,200 per month. The IRS garnishment takes about \$1,080 per bi-weekly pay period. (Tr. 70.) His monthly living expenses are rent (\$1,500), groceries (\$400), and gasoline (\$300). He has no car payment. His life insurance and medical insurance are deducted from his pay. He has no active credit card accounts. He is using his 401k retirement account to pay the delinquent state taxes and second mortgage. He is holding some cash in reserve from his retirement account to settle the federal tax debt if his offer in compromise is accepted. (Tr. 72-74.)

Applicant's facility security officer (FSO) testified on his behalf and submitted a written testimonial to his good character. The FSO testified that Applicant has been open and straightforward about his financial and marital problems. He describes Applicant as reliable, trustworthy, and loyal; and he strongly endorses granting Applicant a clearance. (Tr. 31-33; AX J.)

A rear admiral with 28 years of service in the U.S. Navy, who has known Applicant for more than eight years, submitted a testimonial to his character. The admiral states that Applicant has exceptionally high values and moral integrity. He states that Applicant has been open and forthright about his financial problems, that he has addressed his financial problems directly and aggressively, that his fitness for a security clearance has been "battle tested," and that he has passed the test with flying colors. (AX M.)

A program manager for a major U.S. Navy program, who has known Applicant for more than 20 years, describes Applicant as a "consummate patriot," with high integrity and honesty. He has "absolutely no hesitation" in recommending that Applicant be granted a security clearance. (AX A.) A vice-president of a construction company, who was Applicant's immediate supervisor from 1990 to 1999, describes him as an "honest, sincere, hard-working, and devoted employee." (AX B.)

### **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 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 is established by his credit reports, his admissions in his security clearance application, his responses to the SOR, and his testimony at the hearing. The evidence establishes 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). Applicant has multiple delinquent debts that are not yet fully resolved. However, now that he has discovered his wife’s mismanagement, taken over the responsibility for financial management, and is on his way toward resolving his delinquent debts, they are unlikely to recur. His responsible approach to his financial problems allays any doubt about his current reliability, trustworthiness, and good judgment. I conclude that AG ¶ 20(a) is 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 periods of unemployment and reduced income were circumstances beyond his control, but they did not cause the delinquent debts alleged in the SOR. However, his wife’s marijuana use and financial mismanagement were circumstances beyond his control, and he has reacted responsibly. I conclude that AG ¶ 20(b) is 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 has obtained professional assistance to resolve his tax delinquencies, and all three debts alleged in the SOR are being resolved. I conclude that AG ¶ 20(c) is 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, 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. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has a realistic plan to resolve his delinquent debts and has taken significant steps to execute it. I conclude that AG ¶ 20(d) is established.

Security concerns under this guideline also can be mitigated by showing “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.” AG ¶ 20(e). This

mitigating condition is not applicable, because Applicant has not disputed any of the debts alleged in the SOR.

### **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 with a reputation for integrity and honesty. He was embarrassed, sincere, and credible at the hearing. His wife's drug abuse, their marital breakup, and the related financial issues were heavy blows, but he has reacted with dignity, integrity, and good judgment.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has 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 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): FOR APPLICANT

Subparagraphs 1.a-1.c:

For Applicant

## **Conclusion**

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

LeRoy F. Foreman  
Administrative Judge