



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



In the matter of:)
)
) ISCR Case No. 11-06916
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

04/16/2012

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on October 28, 2010. The Defense Office of Hearings and Appeals (DOHA) later issued Applicant an undated Statement of Reasons (SOR) detailing security concerns under Guideline F. DOHA took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOHA was unable to find under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On December 12, 2011, Applicant answered the SOR and requested a hearing. The case was assigned to me on February 9, 2012. DOHA issued the Notice of Hearing on February 13, 2012. The hearing was held as scheduled on March 6, 2012. Department Counsel offered Government Exhibits (GE) 1 through 4. Applicant had no objections to GE 1, 2, and 4. He objected to GE 3 because information in that credit report was no longer accurate. His objection was overruled. GE 1 through 4 were admitted into evidence. Applicant testified, but called no witnesses and offered no exhibits. The record was left open until March 20, 2012, for Applicant to submit additional matters. He timely submitted five documents that were marked as Applicant Exhibits (AE) A through E and admitted into evidence without objection. Department Counsel's memorandum indicating he had no objection to Applicant's post-hearing submission was marked as Hearing Exhibit (HE) 1. The transcript (Tr.) of the hearing was received on March 15, 2012.

Findings of Fact

Applicant is a 40-year-old software engineer who works for a federal contractor. He has worked for that contractor since October 2010. He earned an associate's degree in 1998. He served on active duty in the Army from about November 1990 to October 1994, attained the grade of sergeant (E-5), and received an honorable discharge. He has never been married. He has seven children who range in age from seven to sixteen. This is the first time that he sought to obtain a security clearance.¹

The SOR listed 12 delinquent debts totaling \$144,069. These debts involve federal and state taxes, student loans, child support obligations, and consumer debts. In his Answer to the SOR, Applicant admitted three delinquent debts (SOR ¶¶ 1.b, 1.d, and 1.e) totaling \$1,315 and denied the remaining debts. His admissions are incorporated as findings as fact. In its exhibits, the Government provided substantial evidence of each alleged debt.²

Applicant attributed his financial problems to several periods of unemployment and low-paying jobs. He was unemployed from May to July 2002, from April to June 2004, from February to March 2006, and from June 2009 to October 2010. In total, he was unemployed for about two years in the last ten years. The alleged delinquent debts are addressed below.³

SOR ¶¶ 1.a and 1.c – federal tax liens for \$4,315 and \$90,434, respectively. The \$90,434 tax lien was filed in January 2010, while the \$4,315 tax lien was filed in March

¹ Tr. 5-6, 15, 22-23, 72; GE 1.

² Applicant's Answer to the SOR; GE 1-4.

³ Tr. 24-31; GE 1, 2.

2011. From about 2002 to 2008, Applicant held a series of independent contractor or subcontractor jobs during which he neither had federal income taxes withheld from his pay nor paid quarterly estimated income taxes. The lack of withholdings or payments resulted in the tax deficiencies. At the hearing, he indicated that he was unaware he could pay estimated taxes until about 2007 or 2008. During these tax years, he filed his income tax returns and was aware that he owed back taxes. He noted that, in more recent years, his income tax refunds have been withheld because of his back taxes, and he has made other payments towards the delinquent taxes. He claimed he has paid his delinquent taxes for 2000, 2001, and for a portion of 2002. However, he provided no documentary proof that his tax refunds were withheld or that he made other payments to the Internal Revenue Service (IRS). He stated that the IRS has placed him in a “non-collectable status.” He also indicated that, in about October 2010, he consulted with an IRS representative about an Offer in Compromise, but he has not taken any additional steps because the IRS is not currently pursuing these taxes due to his non-collectable status. He provided no documents showing that the IRS has placed him in a non-collectable status. At the hearing, he indicated that he could not recall why he denied SOR ¶ 1.a and changed his SOR Answer for that allegation. He now admits the debt in SOR ¶ 1.a.⁴

SOR ¶ 1.b – state tax lien for \$1,004. This lien was filed in March 2011. Applicant believes this debt represents the full extent of his state tax liability for 2001 through 2010. He provided no proof of payments towards this debt.⁵

SOR ¶ 1.d – collection account for \$155. This was a television service bill that was placed for collection in November 2010. Applicant indicated that he made one payment towards this bill a few months ago. He provided no proof of payments towards this bill.⁶

SOR ¶ 1.e – collection account for \$156. This was an internet bill that was placed for collection in February 2011. Applicant indicated that there have been no changes in the status of this debt.⁷

SOR ¶ 1.f – collection account for \$2,274. This debt was placed for collection in March 2010. It arose from Applicant’s failure to pay rent for three months while he was unemployed. He moved from that apartment in about October 2009. He indicated that he has been paying \$100 per month to the apartment since September 2011, but provided no proof of those payments.⁸

⁴ Tr. 24-39, 48-51, 60-61; GE 2-4.

⁵ Tr. 51-52; GE 4.

⁶ Tr. 52-53; GE 2, 4.

⁷ Tr. 53; GE 2, 4.

⁸ Tr. 53-55; GE 2, 4.

SOR ¶ 1.g – collection account for \$719. The date of first delinquency/date of last activity on this account was March 2010. Applicant indicated that he has no knowledge of this debt.⁹

SOR ¶¶ 1.h and 1.i – student loans placed for collection for \$2,073 and \$5,858, respectively. The date of first delinquency/date of last activity for both of these accounts was September 2009. Applicant stated that he has a payment plan for these debts that started in about October 2011. He stated that the student loans were consolidated into one account and he has been paying \$110 per month under the payment plan. He provided no documentation of the payment plan or any payments.¹⁰

SOR ¶¶ 1.j and 1.k – child support arrearages for \$16,223 and \$16,718, respectively. These accounts are for two different children who reside in different states. Applicant denied these arrearages because the amounts are not correct. He testified that he is under four court orders to pay child support. In his post-hearing submission, he provided a pay stub that reflected \$428 per week was garnished from his pay. He also indicated that garnishment does not meet the court ordered requirements. Additionally, he pays \$800 per month in non-court ordered child support payments. One of his children currently lives with him, but he still pays child support to that child's mother. He testified that he has child support arrearages for each of his children. Insufficient evidence has been provided to show that the child support arrearages are being resolved.¹¹

SOR ¶ 1.l – collection account for \$4,140. The date of last activity for this account was December 2005. This debt is for a deficiency on a repossessed vehicle. Applicant could not make the payments on this vehicle and returned it to the dealer. He denied this debt because a Form 1099-C: Cancellation of Debt was issued for this debt. He did not provide any documentation showing a Form 1099-C was issued.¹²

During an Office of Personnel Management interview in November 2010, Applicant stated that he was earning \$65,000 per year. He now earns about \$67,500 annually. He resides with his mother to reduce expenses and save money. At the hearing, he testified that he lives paycheck-to-paycheck and has nothing left over at the end of the month after paying bills and expenses. He received financial counseling at his church in about 2007 or 2008. He indicated that he is attempting to work on the smaller debts before getting to the larger ones. He stated that he intends to pay all the debts listed on his credit report.¹³

⁹ Tr. 55; GE 4.

¹⁰ Tr. 45-48, 55-56; GE 2, 4.

¹¹ Tr. 39-45, 56-59, 71-74; GE 2, 3; AE B.

¹² Tr. 50-51, 59-63; GE 2, 3.

¹³ Tr. 30-31, 63-69, 72; GE 2, 3.

In his post-hearing submission, Applicant presented an employer work performance review dated December 1, 2011, that reflected he was a “successful contributor.” It also indicated that he is a competent performer and valued team player. In March 2012, he received a spot award for work performance that stated he was the most reliable and dedicated employee on his team. A fellow employee described him as sincere, honest, dedicated, and hard working. He also presented an NCO Evaluation Report dated October 19, 1994, that reflected he successfully performed all of his military duties. He testified that he received two or three Army Achievement Medals.¹⁴

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s 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, to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the

¹⁴ Tr. 72-73; AE A, C-E

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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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 security concern for Financial Considerations is set out in AG ¶ 18 as follows:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated delinquent debts totaling over \$144,000 that he has been unable or unwilling to satisfy for a number of years. This evidence is sufficient to raise the above disqualifying conditions.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant has multiple unresolved delinquent debts totaling over \$144,000. His financial problems are ongoing, significant, and cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not applicable.

In the past ten years, Applicant experienced periods of unemployment and underemployment. For the past year and a half, however, he has been gainfully employed. At the hearing, he stated his annual salary was about \$67,500. Although his periods of unemployment and underemployment were conditions beyond his control, he failed to show that he has taken meaningful steps to resolve his past-due debts while employed. Consequently, he has not established that he acted responsibly under the circumstances. AG ¶ 20(b) is not applicable.

Applicant's pay is being garnished for court ordered child support payments. This garnishment, however, does not meet his court ordered child support obligations. His child support arrearages apparently are continuing to increase. Although he claimed he made payments on some of the other debts (SOR ¶¶ 1.a, 1.c, 1.f, 1.h, and 1.i), he provided no proof of payments towards them. Although he obtained financial

counseling, he failed to establish that his delinquent debts are being resolved or are under control. AG ¶¶ 20(c) and 20(d) are not applicable.

While Applicant denied a number of the alleged debts, he did not present any documentation showing that he has a legitimate basis for disputing those debts. AG ¶ 20(e) is not applicable.

Applicant has failed to mitigate the concerns raised by the alleged delinquent debts. His financial problems remain a security concern.

Whole-Person Concept

Under the whole-person concept, the 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. The 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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. 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.

I considered Applicant's military service and his civilian employment in support of the Federal Government. His debts arose from periods of unemployment and underemployment. Nonetheless, he failed to present a realistic plan for resolving the alleged delinquent debts. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns under Guideline F.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a – 1.l: Against Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge