



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-08262
)
 Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

12/26/2012

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 March 21, 2011. On July 6, 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 grant him access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to grant or deny his application. 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 answered the SOR on July 23, 2012, and requested a hearing before an administrative judge. DOHA received the request on July 24, 2012. Department Counsel was ready to proceed on August 21, 2012, and the case was assigned to an administrative judge on August 23, 2012. It was reassigned to me on September 7, 2012, because Applicant had moved out of the assigned administrative judge's region. DOHA issued a notice of hearing on September 20, 2012, scheduling it for October 10, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but presented no documents or witnesses. I kept the record open until October 26, 2012, to enable him to present documentary evidence. DOHA received the transcript (Tr.) on October 24, 2012.

On November 7, 2012, Applicant requested an extension of the deadline for submitting documentary evidence, on the ground that he had evacuated from his home before the landfall of Hurricane Sandy, his home was currently flooded and without electricity, and his wife had given birth to their third child on November 6, 2012. I granted his request and extended the deadline until November 16, 2012. His request and my response are attached to the record as Hearing Exhibit (HX) I. On December 4, 2012, he submitted 28 documents, marked as AX A through BB. Department Counsel did not object to the untimely submission or on any other grounds, and AX A through BB were admitted. The record closed on December 13, 2012. Applicant's explanation for his untimely post-hearing submission is attached to the record as HX II, and Department Counsel's comments are attached as HX III and HX IV.

Amendment of SOR

On Department Counsel's motion, without objection by Applicant, I corrected Applicant's name on the SOR by adding the suffix reflected on his security clearance application. (Tr. 13.)

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b-1.e, 1.g, and 1.i. He denied the allegations in SOR ¶¶ 1.a, 1.f, 1.h, and 1.j-1.m. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 46-year-old network administrator employed by a federal contractor since March 2011. He was given an interim clearance shortly after he was hired, but it was revoked in August 2012. (Tr. 31.) He was laid off when his interim clearance was revoked, but his employer is still sponsoring him for a clearance. He has been working temporarily on a project for another employer pending a decision on his security clearance. (Tr.28, 31.)

Applicant graduated from high school in May 1985. He attended college from May 1985 to December 1987 and from July 1993 to January 1994, but did not receive a degree. He attended college from August 1994 to July 1996 and received a certificate in

network administration. He returned to college from January 2003 to May 2004, but he did not receive a degree.

Applicant worked as a technical support specialist for a pharmaceutical company from October 2002 to March 2007 and as a UNIX systems engineer for a technology company from March 2007 to August 2008. He worked as a UNIX systems engineer for a telecommunications company from August 2008 to March 2011, when he began working for the federal contractor that is sponsoring him for a clearance. (GX 1 at 17-21; AX-J; AX-S.)

Applicant married in January 1997. He and his wife bought a home in 2005. After Applicant started a new job in another location in 2007, his wife left him and returned to their previous home. (Tr. 21.) In July 2008, he began working in a foreign country and became involved with a woman who was a citizen and resident of that country. (GX 2 at 5.) They had two children, now ages three and one, both born outside the United States. (AX L; AX V.) The childbirth costs were not covered by insurance, and Applicant paid about \$27,700 in medical bills. (AX N and O.) After Applicant was transferred back to the United States, he traveled about once a month to visit and care for the woman and their children, incurring costs of about \$350 per trip for round-trip air travel. His security clearance application reflects 20 trips ranging in duration from 2 to 30 days between November 2008 and October 2010. (GX 1 at 34-41.)

In April 2008, Applicant traveled overseas with his mother for a six-day vacation. He used airline points to pay for his air travel, but incurred other expenses totaling about \$1,200. (GX 2 at 151; Tr. 35.)

In early 2009, while Applicant's divorce was pending, his first wife filed criminal charges against him. His wife recanted her accusation in court, and the charges ultimately were dismissed as unfounded, but Applicant incurred substantial attorney's fees to defend himself. He estimated that he paid about \$10,000 in legal fees. (GX 2 at 17-18; Tr. 24-25, 56.)

Applicant divorced his first wife in June 2010 and married his second wife in July 2010. (Tr. 23; AX-F; AX-Q.) He and his second wife now have a third child, born on November 6, 2012. His second wife recently immigrated to the United States and was granted permanent resident status. Applicant incurred significant legal fees to bring his second wife to the United States. (GX 2 at 3; Tr. 51.)

Applicant has a 15-year-old daughter from his first marriage. (AX M.) He testified that he pays monthly child support of \$1,428, which is automatically deducted from his pay. (Tr. 47.) Court records reflect monthly payments of \$1,428 from August 2009 through February 2010, payments totaling \$2,405 in March 2010, payments of \$1,428 from April 2010 through June 2011, payments in various amounts between \$500 and \$714 in July through November 2011, no payments in December 2011, and monthly payments of \$1,856 from January 2012 through July 2012. (AX B.)

As part of the divorce settlement, Applicant gave his first wife the family home, their automobile, and all assets that were acquired during the marriage. He paid off the mortgage on the house by using his retirement funds and investments. (GX 2 at 9, 13.) His ex-wife continued to use a credit card and a cell phone for which Applicant was financially responsible. (Tr. 41-42.)

In June 2011, in response to DOHA interrogatories, Applicant provided a personal financial statement (PFS) reflecting that his net monthly remainder, after paying all his living expenses, was about \$576. The PFS does not reflect any payments on the debts alleged in the SOR. (GX 2 at 20.)

Applicant testified that he was earning about \$87,000 while employed by a federal contractor. He is earning about \$95,000 per year in his temporary job, but his employment will end when the project is completed. (Tr. 32-33.)

Applicant filed a petition for Chapter 13 bankruptcy in February 2012. The petition was dismissed because Applicant had congestive heart failure in May 2012, and was unable to attend the creditors' meeting. He had a defibrillator implanted in his chest, is being treated with medications, and his doctor believes he is doing well. (Tr. 27; AX-U.)

The SOR alleges 13 delinquent debts totaling about \$56,276. Applicant denied ever having accounts with the creditors alleged in SOR ¶¶ 1.h, 1.j, and 1.m, and he believes that the debt alleged in SOR ¶ 1.l duplicates the debt in SOR ¶ 1.f, but he has not filed disputes with the creditors or the credit reporting agencies. (Tr. 43, 52-55.) In addition to the debts alleged in the SOR, he testified that he owes about \$13,000 in federal income taxes for 2008 and 2009. (Tr. 59-61.)

The debt alleged in SOR ¶ 1.j has been delinquent since 2006, the debt alleged in SOR ¶ 1.l has been delinquent since 2007, and the debt alleged in 1.m has been delinquent since 2008. The debts alleged in SOR ¶¶ 1.a-1.d and 1.g have been delinquent since 2009. The debt alleged in 1.i has been delinquent since 2010, and the debts alleged in SOR ¶¶ 1.e and 1.k have been delinquent since 2011. (GX 4; GX 5; Tr. 36-43, 52-56.)

At the hearing, Applicant testified that he had filed another Chapter 13 bankruptcy petition in August 2012. (Tr. 18, 51-52.) The bankruptcy plan provides for payments totaling \$46,500 at \$775 per month. It lists a federal tax debt of \$18,552, a secured debt of \$16,038 for a four-year-old car, and no unsecured claims. As of the date the record closed, the bankruptcy plan had not been confirmed. (AX A.)

After the hearing, Applicant submitted a credit report dated August 9, 2012. This credit report reflects that the debts alleged in SOR ¶¶ 1.a-1.i are still unresolved. It does not reflect the debts alleged in SOR ¶¶ 1.j-1.m, which Applicant denied in his answer to the SOR. (AX C.) He also submitted a financial analysis and debt management plan, which is undated and reflects only three debts to be managed. (AX E.) He estimates

that his monthly remainder after paying his living expenses and bankruptcy payment will be between \$1,000 and \$1,300. (Tr. 50.)

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

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.

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 following disqualifying conditions under this guideline are established by Applicant’s credit reports, his responses to DOHA interrogatories, and his admissions in his answer to the SOR and at the hearing;

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

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

AG ¶ 19(e): consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

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;

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; or

AG ¶ 20(f): the affluence resulted from a legal source of income.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and not the product of circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. The breakup of Applicant's first marriage and the legal expenses of defending against a frivolous criminal charge by his first wife were beyond his control. The expenses relating to the birth, care, and immigration of two children born as a result of an extramarital affair were not due to conditions beyond his control. In spite of his dire financial situation, he spent about \$1,200 to take a vacation with his mother in April 2008. His congestive heart failure and related medical expenses were beyond his control, but they occurred long after most of the debts alleged in the SOR were already delinquent. He generously provided for his first wife, but he has neglected most of his delinquent debts for at least three years.

AG ¶ 20(c) is not fully established. Applicant received financial counseling at some time, but the record does not reflect when or under what circumstances the counseling occurred, and his financial situation is not yet under control.

AG ¶ 20(d) is not fully established. A Chapter 13 bankruptcy plan is a legal, orderly way to resolve delinquent debts, but Applicant's bankruptcy has not yet been confirmed, and it is unclear what delinquent debts were included. Even if the bankruptcy includes all his delinquent debts, he has not yet established a track record of compliance with the payment plan.

AG ¶ 20(e) is not established. Applicant denied the debts alleged in SOR ¶ 1.i, 1.l, and 1.m, but he has not documented the basis for denying them or provided documentary evidence that he has disputed them with the creditors or the credit reporting agencies. He testified that he believes the debt alleged in SOR ¶ 1.l duplicates SOR ¶ 1.f, but he presented no evidenced supporting his belief.

AG ¶ 20(f) is not relevant. There is no evidence of unexplained affluence in this case.

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 has been in financial distress since 2006, and his response to his financial problems has been reactive rather than proactive. His recent Chapter 13 bankruptcy filing is a step in the right direction, but his record of financial mismanagement does not inspire confidence that he will comply with the terms of his bankruptcy payment plan. His health problems and the losses he suffered from Hurricane Sandy were unfortunate and deserving of sympathy, but they occurred long after he was in serious financial trouble.

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 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 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): AGAINST APPLICANT

Subparagraphs 1.a-1.m:

Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge