



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



In the matter of:)
)
) ISCR Case No. 11-10404
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

11/19/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits in this case, I conclude that Applicant mitigated security concerns under Guideline C, Foreign Preference, and Guideline F, Financial Considerations. His eligibility for a security clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 11, 2011. On October 19, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C, Foreign Preference, and Guideline F, Financial Considerations. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD for SORs issued after September 1, 2006.

On December 2, 2012, and December 19, 2012, Applicant answered the SOR in writing and elected to have his case adjudicated on the written record. In February

2013, the case was assigned to an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 3, 2013, Applicant elected to have a hearing, and the case was re-assigned to me on July 31, 2013. I convened a hearing on September 18, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced five exhibits, which were marked Ex. 1 through Ex. 5 and entered in the record without objection. The Government also provided for administrative notice a copy of a state unemployment compensation law, which I marked as Hearing Exhibit (HE) 1 and entered in the record without objection. The Applicant testified, called no witnesses, and introduced 11 exhibits, which were identified, marked, and entered without objection in the record as Applicant's Ex. A through Ex. K. At the conclusion of the hearing, I left the record open until October 2, 2013, so that Applicant could, if he wished, provide additional information.¹ Applicant timely filed five additional exhibits, which I marked as Ex. L through Ex. P and admitted to the record without objection. Applicant also requested that the record remain open to receive new evidence, to include a response from a state agency, for an indefinite period. The Government objected to Applicant's request, asserting that the state agency response was not necessary to a resolution of Applicant's case.² After reviewing the matter, I sustained the Government's objection. DOHA received the hearing transcript (Tr.) on September 26, 2013.

Findings of Fact

The SOR contains two allegations that raise security concerns under AG ¶ 9, Foreign Preference (SOR ¶¶ 1.a. and 1.b.), and one allegation that raises security concerns under AG ¶ 18, Financial Considerations (SOR ¶ 2.a.). In his Answer to the SOR, Applicant admitted all three allegations and provided additional information. Applicant's admissions are entered as findings of fact. (Answer to SOR.)

Applicant is 59 years old. He has been married since 1983, and he and his wife are the parents of two adult children. Applicant is a native-born United States citizen, as were both of his parents. His paternal and maternal grandparents were citizens of Greece who immigrated to the United States and became U.S. citizens. (Ex. 1; Tr. 68.)

Applicant has been employed in the same industry for over 30 years. When he was hired, Applicant was advised that the mandatory retirement age for individuals working in the industry was 60 years. As he grew closer to the mandatory retirement age, Applicant began to look for opportunities to continue his career. He learned that the retirement age in European countries for individuals working in the industry was 65 years. His U.S. employer did not offer a defined retirement plan, and Applicant

¹ The Government shutdown, which began on October 1, 2013, delayed the receipt and evaluation of Applicant's post-hearing submissions.

² The Government's response to Applicant's post-hearing submissions is marked as HE 2.

concluded that he needed to continue working after the mandatory retirement age. (Tr. 66-71.)

As a grandchild of Greek citizens, Applicant became a Greek citizen, under the laws of Greece, at birth. In 2006, in order to be employable in the industry in Greece and in other European Union countries, Applicant acquired a Greek passport. He renewed his Greek passport in 2012. His renewed passport had an expiration date of 2017. These facts are alleged under the foreign preference adjudicative guideline at SOR ¶¶ 1.a. and 1.b. (Tr. 68-70.)

After exploring the possibility of working in the industry as a trainer, Applicant concluded that the political situation in the European country precluded a role for him. At his hearing, Applicant explained that if he had affiliated with a foreign government to provide training, the program would have been overseen by a U.S. entity. However, the industry he hoped to work with in Greece went out of business. Moreover, the U.S. mandatory retirement for individuals in the industry was changed to age 65, and Applicant no longer had a need to seek employment outside of the United States. (Tr. 70-80.)

At his hearing, Applicant asserted his preference for the United States. He stated that he never took a citizenship oath of loyalty to Greece; he never served in the Greek military; he does not own property in Greece; and he has no financial ties to Greece. After consulting with DOHA and his facility security officer, Applicant destroyed his Greek passport by shredding it. He provided a portion of the shredded document as an exhibit.³ In his answer to the SOR, he explained that he destroyed and shredded his current Greek passport to demonstrate that he did not have a preference for any country over the United States. (Tr. 66-70; Ex. 3; Ex. A; Answer to SOR.)

On his e-QIP, Applicant reported that he was unemployed from September 2008 until March 2009. He characterized his unemployment as an extended voluntary leave of absence, which was offered to him, pursuant to a union contract, when his employing industry was in serious financial difficulty. Applicant explained that such extended leaves of absence were entitlements offered to individuals with seniority, with the expectation that if they accepted them, lay-offs of those employees with less seniority would be avoided. (Ex. 1; Ex. L; Ex. M; Tr. 83-85.)

As an employee on an extended voluntary leave of absence, Applicant was eligible for unemployment compensation under his union contract in the state where he was based. Applicant applied for the benefit. Soon after he began his extended leave of absence, the negotiated arrangement between Applicant's union and the state ceased to exist. Nevertheless, he received unemployment compensation under his entitlement for six months. Thereafter, when the time of his leave of absence expired, Applicant continued to receive unemployment compensation. Neither his employer nor the state

³ In his answer to the SOR and at his hearing, Applicant testified that he provided the remainder of his shredded Greek passport to his facility security officer. (Answer to SOR; Tr. 40-42.)

agency informed him that he had exhausted his eligibility for unemployment benefits. Moreover, the state agency created an electronic account which Applicant was directed to use to acquire his continuing payments. In October 2009, Applicant wrote to the agency and stated: "I no longer wish to receive unemployment compensation at this time. Thank you." Nevertheless, the agency continued to make payments to Applicant's account. When he was paid by check, he was advised not to return the check but to cash it. (Tr. 86-88, 90, 95-101; Ex. C; Ex. D.)

At Applicant's request, the agency investigated the overpayments to him and determined that he was a "non-fault overpayment recipient." In March and June 2010, the agency sent Applicant a notice which read, in pertinent part, as follows:

A nonfault overpayment was established against your account and a notice of overpayment was previously sent to you. Your current nonfault overpayment balance owed is \$14,144.⁴ It may be beneficial for you to repay this money now rather than wait for the [state] to seek recoupment. Section 804(B) of the [state] unemployment compensation law, which is printed on the other side of this letter, states that the [state] is empowered to recover any benefits improperly paid to you by taking up to one-third from future unemployment compensation benefit checks for three years after the end of the benefit year in which the overpayment occurred.

Your application for benefits was dated 09/07/08. Therefore, the period for recovering the money from your benefits will last until 09/06/2012. These automatic one-third deductions from your benefits will occur when you are unemployed and need the money most. Repayment in full now would ensure that no deductions are made from future claims you file.

If you are unable to repay the full amount at once, partial payments are acceptable. (Ex. D.)

Applicant testified that he repaid all of the excess payments he received. However, he received no documentation from the state to corroborate that he no longer owed a debt for overpayments. He reiterated his understanding, that, pursuant to section 804(b)(1) of the statute⁵, the overpayments would have been recouped by the state if he had sought unemployment compensation within three years after the end of the benefit year in which the overpayment occurred. At the Government's request, I left the record open so that Applicant could try to obtain information on whether he continued to owe a debt to the state for his non-fault receipt of excess unemployment compensation. (Tr. 102-126.)

⁴ The SOR alleges at ¶ 2.a. that Applicant is indebted to the state for approximately \$14,053 in excess unemployment compensation.

⁵ HE 1.

Applicant testified that he owned two homes with a combined value of \$1.5 million. He provided documentation showing investments and savings of approximately \$750,000. He stated that he had paid for his children's higher education and owed few debts. (Tr. 70-73; Ex. H.)

Applicant provided several letters of character reference. An individual who worked with Applicant on a government contract praised Applicant's subject matter expertise and observed that Applicant possessed personal integrity, judgment, loyalty to the United States, and commitment to the national security that was beyond reproach. (Ex. N.)

An industry professional who has known Applicant for 25 years stated that he believed Applicant "to be of the highest moral character, a man of honor, and a true professional," and "his loyalty to his family, his country, and his profession are beyond reproach." The individual further stated :

[Applicant] is the consummate professional who enjoys an excellent professional reputation, commanding the highest regard from his colleagues and the [industry] in general. His contributions to [the industry] have been both meaningful and significant and he is widely recognized and credited with helping many young people interested in the various aspects of this industry realize their goals and ultimate successes. (Ex. N.)

A friend and former colleague, who had worked and studied with Applicant, also praised Applicant's academic ability and accomplishments. He stated: "With his background in [industry] safety and a tremendous work ethic, [Applicant] proved to be an invaluable member of the team." (Ex. N.)

As a post-hearing submission, Applicant provided a copy of a letter he wrote, dated September 19, 2013, to the state unemployment commission. In the letter, Applicant requested that the state agency advise him as soon as possible of the disposition of his case. He stated that it was his belief that he was in good standing with the state agency regarding his unemployment compensation status. He reiterated that he had complied with all instructions from the agency regarding payment of the financial obligation identified in correspondence sent to him. (Ex. P.)

Applicant also enclosed a personal check for \$14,144, dated September 19, 2013, made payable to the state agency. He asked the state agency to return his check if he was not required or obligated to make the payment.⁶ Department Counsel did not object to Applicant's post-hearing submission. (Ex. P.)

⁶ Applicant provided documentation showing that the letter and the accompanying check had been sent by express mail to the state agency, and an authorized agent for the state had signed and accepted delivery of Applicant's letter enclosing the payment. (Ex. P.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no 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 an applicant’s 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 and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider and apply the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of

the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9, the security concern involving foreign preference arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes several conditions that could raise a security concern and may be disqualifying. The relevant potential disqualifying conditions in this case are as follows:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport . . .[, and]

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

Applicant, a native-born U.S. citizen, acquired Greek citizenship at birth through his grandparents’ Greek citizenship. In 2006, he took action to acquire a Greek passport through his Greek citizenship, and he renewed his Greek passport in 2012. He planned to use his Greek passport to obtain employment in the Greek or European Union counterparts of his industry when he reached age 60 and was subject to mandatory retirement. Applicant’s acquisition of a Greek passport as a U.S. citizen raises a concern that he actively exercises dual citizenship with Greece. His actions raise security concerns under AG ¶¶ 10(a)(1) and 10(b).

Under AG ¶ 11(a), dual citizenship might be mitigated if “it is based solely on [an applicant’s] parents’ citizenship or birth in a foreign country.” Under AG ¶ 11(b), an individual’s dual citizenship might be mitigated if he or she “has expressed a willingness to renounce dual citizenship.” Under AG ¶ 11(c), an individual’s “exercise of the rights, privileges, or obligations of foreign citizenship might be mitigated if it occurred before

becoming a U.S. citizen or when the individual was a minor.” Under AG ¶ 11(d), an individual’s use of a foreign passport might be mitigated if it were “approved by the cognizant security authority.” Under AG ¶ 11(e), an individual’s use of a foreign passport might be mitigated if he or she presents credible evidence that “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

Initially, Applicant’s Greek citizenship was a passive condition: he acquired it at birth as the grandchild of Greek citizens. However, when he took action, as a U.S. citizen, to obtain a Greek passport, he acted in a manner indicating a preference for Greece over the United States. Moreover, his decision to acquire a Greek passport was not approved by his cognizant security authority. His dual citizenship with Greece, as expressed in his passport choice, therefore became a security concern. Accordingly, the mitigating conditions at AG ¶¶ 11(a), 11(c), and 11(d) do not apply to the facts of this case.

However, at his hearing and in his answer to the SOR, Applicant explained that while he appreciated his Greek heritage, he surrendered and destroyed his Greek passport to demonstrate his preference for his U.S. citizenship. He provided a portion of his shredded Greek passport as a demonstrative exhibit. I conclude that AG ¶¶ 11(b) and 11(e) apply in mitigation to the facts of Applicant’s case.

Guideline F, Financial Considerations

The security concern relating to the guideline for financial considerations 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns.

During a voluntary extended leave of absence in 2008, which was a part of his union contract, Applicant received unemployment compensation, also a benefit under his union contract. While Applicant was authorized to receive unemployment compensation for six months, the state unemployment agency continued to pay him after his entitlement expired. Applicant was no longer represented by the union which had negotiated the entitlement. While he requested that the payments cease, he was

unable to obtain clarification that might persuade the state agency to stop his payments. Nevertheless, the state agency later sent Applicant notices that he was responsible for over \$14,000 in unemployment compensation overpayments. As of the date of the SOR, those payments had not been satisfied. This evidence is sufficient to raise the disqualifying conditions under AG ¶¶ 19(a) and 19(c).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's financial delinquencies. Unresolved financial delinquency might be mitigated if it "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)) Additionally, unresolved financial delinquency might be mitigated if "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)) Still other mitigating circumstances that might be applicable include evidence 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)) or "the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." (AG ¶ 20(d)) Finally, if "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 options to resolve the issue," then AG ¶ 20(e) might apply.

In a post-hearing submission, Applicant provided documentation establishing that he wrote to the state unemployment agency on September 19, 2013, and requested that the state agency advise him, as soon as possible, of the disposition of his case. In his letter, Applicant asserted his belief that he was in good standing regarding his unemployment compensation status. He reiterated that he had complied with all instructions from the agency regarding payment of the financial obligation identified in correspondence sent to him.

With his letter to the state unemployment agency, Applicant also enclosed a personal check for \$14,144, made payable to the state agency. He asked the state agency to return his check if he was not required or obligated to make the payment.

Applicant's indebtedness was the result of an overpayment of unemployment compensation that he did not seek. He requested that the payments be stopped, but they continued. He attempted to obtain clarification from the agency, and he testified that he made repayments as directed. However, he also acknowledged that the agency provided him with notice that he was responsible for over \$14,000 in overpayments of unemployment compensation.

Applicant's post-hearing submission demonstrated a good-faith effort to resolve the debt and to comply with the requirements of the state unemployment compensation

agency. His letter to the state agency outlined his understanding of the dispute, and his check for the amount of the debt, offered in full payment should the agency conclude that he owed the debt, was an attempt to bring the matter to full resolution.

Applicant presented a financial record that was comprehensive and responsible. The debt alleged on the SOR arose five years ago, in 2008, under circumstances that are unlikely to recur, and it does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. I conclude that AG ¶¶ 20(a), 20(d), and 20(e) apply in mitigation to the facts of Applicant's case.

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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature person of 59 years. He is employed in an industry that is heavily regulated and has an unstable history. He attempted to organize his professional life to meet his financial obligations, and obtained a foreign passport in order to obtain work in the industry after mandatory retirement at age 60 in the United States. When the mandatory retirement age was raised in the United States, Applicant no longer needed to seek employment by using a foreign passport.

Applicant provided documentation showing that he systematically and responsibly addressed a debt for which he may or may not be responsible under an agreement by his employer, a union that represented him, and the controlling state unemployment agency. He demonstrated his good faith in addressing the debt, proffering full payment, and agreeing to abide by a determination by the state agency.

Overall, the record evidence persuades me that Applicant is mature, trustworthy, and capable of being entrusted with access to classified information. I conclude Applicant mitigated the security concerns arising under the foreign preference and financial delinquency adjudicative guidelines.

Formal Findings

Formal findings for or against Applicant 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 C:	FOR APPLICANT
Subparagraphs 1.a. and 1.b.:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Joan Caton Anthony
Administrative Judge