



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-12776
)
 Applicant for Security Clearance)

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

03/12/2013

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 (SCA) on July 7, 2011. On December 7, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. DOD 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 DOD on September 1, 2006.

Applicant received the SOR on December 13, 2012; answered it on December 27, 2012; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 18, 2013, and the case was assigned to me on January 23, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 28, 2013, scheduling it for February 25, 2013. I convened the

hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and presented the testimony of one witness. I kept the record open until March 4, 2013, to enable him to submit documentary evidence. He timely submitted AX A and B, which were admitted without objection. DOHA received the transcript (Tr.) on March 5, 2013.

Amendment of SOR

On my own motion, I amended SOR ¶ 1.z by changing the amount alleged from \$4,283 to \$2,322, to conform to the evidence in GX 3. (Tr. 91.)

Findings of Fact

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

Applicant is a 41-year-old pipefitter employed by a defense contractor at a naval shipyard since March 2011. He served in the U.S. Navy from June 1990 to November 1995 and received an honorable discharge. He held a security clearance in the Navy but it was administratively terminated upon his discharge. He served in the Army National Guard from June 1989 to June 1990 and was honorably discharged.

Applicant was employed by a defense contractor and enrolled in an apprenticeship at a naval shipyard from February 1998 to March 1999, but he did not complete it. (GX 2 at 5.) He was readmitted to the apprenticeship program in January 2012, and he expects to complete it in October 2015. (Tr. 80.)

Applicant testified that he was unemployed for various periods totaling about two years after he was discharged from the Navy. He testified he was unemployed in 2000, and "several other times" and that his unemployment caused him to fall behind on his child support payments. However, his SCA reflects continuous employment from October 2003 to the present. It reflects that he was a route manager for a commercial cleaning service from October 2003 to November 2005, and left for a better job. He was employed by the U.S. Postal Service from November 2005 to March 2009, but left this job because he wanted more time with his family. (GX 2 at 6.) He worked as a route service representative for a food service from March 2009 to March 2011, and left this job to work for his current employer. He testified that he was unemployed from January to March 2011, but this period of unemployment was not reflected on his SCA. (GX 1 at 11-14; Tr. 51-52.)

Applicant married in August 1992 and divorced in April 1997. He married again September 1998 and divorced in July 2002. He married his current spouse in November 2002. They separated in 2007, reconciled, separated again in 2011, reconciled, and separated for the third time in January 2013. (GX 2 at 6; Tr. 41-42, 66.) They intend to divorce. Each time they separated, Applicant incurred the additional expense of maintaining a separate household. (Tr. 63.)

After Applicant married his current spouse, they decided to buy a house and “do a lot of other things” that did not seem to be beyond their means at the time. Applicant and his spouse filed a Chapter 13 bankruptcy petition in February 2007, because they were unable to keep up with the house payments, credit card payments, and living expenses, and they had several debts that were more than 180 days delinquent. The petition was dismissed in September 2009, because they were unable to make the required payments after his wife lost her job. The Chapter 13 bankruptcy is alleged in SOR ¶ 1.a. Recently, they decided to file a Chapter 7 bankruptcy petition, but they abandoned that course of action when they separated. (GX 2 at 8; Tr. 41-43.)

Applicant received financial counseling as part of his Chapter 13 bankruptcy petition. He also contacted a debt consolidation firm in November 2012 but decided that it was too expensive. (Tr. 71-72.)

The evidence concerning the delinquent debts alleged in the SOR is summarized below.

Home Mortgage Foreclosure (SOR ¶ 1.s – payments on second mortgage loan past due for \$10,239). Applicant and his third wife decided to buy a home shortly after they married. They purchased the home for \$203,000, with a \$10,000 down payment. They had an adjustable rate mortgage, with initial payments of \$1,200 per month. (Tr. 81-82.) After three years, the interest rate adjusted upward, increasing their payments to \$1,850, in addition to the \$250 per month they were paying on a second mortgage loan. They also were paying for furniture for the house and had several credit cards. (Tr. 45.)

In an effort to avoid foreclosure on their home, Applicant and his wife enrolled in a “home affordable” plan with another bank and made \$1,300 monthly payments for six months. At the end of the six months, the bank wanted \$23,000, which they could not afford. (Tr. 71-72.) The first mortgage was foreclosed and the home was sold for \$143,000 in August 2012, which was less than the \$165,933 they owed. The debt was cancelled and Applicant received an IRS Form 1099-C documenting the transaction. (AX B.) The first mortgage was not alleged in the SOR. The delinquent second mortgage is unresolved. (GX 4 at 3.)

Home Furnishings (SOR ¶ 1.b – judgment for \$1,355; SOR ¶ 1.c – judgment for \$1,926; SOR ¶ 1.n – charged off for \$711; SOR ¶ 1.t – charged off for \$1,310). Applicant and his third wife bought home furnishings on installment plans but were unable to make the payments after their adjustable home mortgage payments increased. The \$711 debt for furniture alleged in SOR ¶ 1.n is being collected by garnishment of Applicant’s credit union account. (Tr. 53-54.) The other debts for home furnishings are unresolved.

Delinquent Federal Income Taxes (SOR ¶ 1.d – tax lien for \$6,583; SOR ¶ 1.e – tax lien for \$3,642; SOR ¶ 1.q – government debt for \$5,504.). The two federal income tax liens were filed in 2011, because Applicant could not afford to pay the taxes

that were due. In 2011, he negotiated a payment agreement with the IRS for \$200 per month, but he did not make any payments under the agreement. He has not had any contact with the IRS for about a year. (Tr. 56-59; GX 2 at 8.)

Delinquent State Income Taxes (SOR ¶ 1.z (as amended) – state tax lien for \$2,322.). This tax lien was filed in March 2003. (GX 3 at 5.) Applicant has taken no action to resolve this debt.

Child Support Arrearage (SOR ¶ 1.r – arrearage of \$15,396). Applicant testified that he began having difficulty with his child support obligations between 1996 and 2002. (Tr. 41.) He was required to pay child support for his three children, and he accumulated an arrearage of about \$15,396. His pay is being garnished to collect the child support arrearage, at the rate of \$307.46 per week. (AX A at 6.) Three separate garnishments are applied to his pay, one for \$72.12, one for \$152.03, and one for \$83.31. The first two are applied to the arrearage alleged in the SOR ¶ 1.r. (AX A at 2-4.)

Car Repossession (SOR ¶ 1.u – collection account for deficiency of \$3,909). Applicant's credit report indicates that this debt was disputed. (GX 3 at 8.) However, there is no evidence of the basis for the dispute. The date of last activity on this account is September 2008. The debt is unresolved.

Delinquent Utility Bill (SOR ¶ 1.f – collection account for \$240). This debt was referred for collection in March 2012. It is unresolved.

Medical Debts (SOR ¶¶ 1.g-1.m, six debts totaling \$1,128 referred for collection). Applicant testified that he has medical insurance and these debts are copayments for his children's medical care. The amounts range from \$31 to \$313 and date back to May 2006. (GX 4 at 1-2.) Applicant testified that he contacted the doctor who provided the care, but he was referred to the collection agency. (Tr. 68.) He took no further action. The debts are unresolved.

Delinquent Credit Card Accounts (SOR ¶¶ 1.o, 1.p, 1.v-1.y, totaling about \$5,982). These accounts were referred for collection between February and July 2009. (GX 3; GX 4.) Applicant testified that he contacted the creditors alleged in SOR ¶¶ 1.o and 1.v, but that they required that payments be deducted directly from his checking account. He was unable to negotiate an agreement because he does not have a checking account. (Tr. 66-67.) The debts are unresolved.

Applicant has shared a household with his current cohabitant since April 2012. They are renting with an option to purchase, and they share household expenses. His cohabitant is employed as the registrar of the apprentice school. They met when Applicant was readmitted to the apprentice school in January 2012. She and Applicant worked together on several committees at the apprentice school, and they became personal friends around March or April of 2012. She testified that Applicant has kept current with his household financial obligations, even though the child-support

garnishment has diminished his income dramatically. She also testified that Applicant had been in contact with his creditors in an effort to resolve his delinquent debts. (Tr. 27-33.)

Applicant's gross income in 2011 was about \$20,000 per year. His pay has increased to about \$36,000 per year. (Tr. 48-50.) His gross weekly pay is \$776. After deductions, including the \$307 child-support garnishment, his net pay is about \$232. He testified that his net monthly remainder is about \$50. (Tr. 55.) He drives a 15-year-old car and has no savings or retirement funds. His pay is deposited to a prepaid debit card account. (Tr. 54-56, 81.)

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 and 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 individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’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 potentially applicable:

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

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

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; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

AG ¶¶ 19(a) and (c) are established by Applicant's admissions, corroborated by his credit reports. Applicant and his wife overextended themselves when they bought and furnished a home, thereby establishing AG ¶ 19(e). AG ¶ 19(g) is not established, because there is no evidence that he failed to timely file his tax returns.

The following mitigating conditions are potentially applicable:

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; and

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.

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

The first prong of AG ¶ 20(b) (conditions beyond his control) is established by evidence of his multiple marital breakups, the upward adjustment of his home mortgage, medical expenses incurred by his children, his short periods of unemployment, and his wife's loss of employment. However, the second prong (responsible conduct) is not fully established. Applicant and his wife initially acted responsibly when they could not afford their mortgage payments. They kept in contact with the lender and attempted to rehabilitate their delinquent loan payments. However, Applicant took no action to

determine his financial liability after the foreclosure and has done nothing to resolve the second mortgage. He contacted his medical provider regarding the medical debts and he contacted some of the collection agencies for his delinquent credit card accounts, but he has not followed up on his initial efforts.

AG ¶ 20(c) is not fully established. Applicant has received counseling, but his financial situation is not under control.

AG ¶ 20(d) is not established. Applicant receives some credit for his efforts to prevent foreclosure of his home and his initial efforts to negotiate payment agreements with his creditors. However, the only payments he is making on his debts are involuntary garnishments. Payment by involuntary garnishment “is not the same as, or similar to, a good-faith initiation of repayment by the debtor.” ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011), citing ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009).

AG ¶ 20(e) is not established. Although Applicant’s credit report reflects that the car repossession deficiency alleged in SOR ¶ 1.u is disputed, he admitted the debt in his answer to the SOR and he submitted no evidence showing the basis for a dispute.

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.

A security clearance adjudication is aimed at evaluating an individual’s judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) A person is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. He or she need only establish a

plan to resolve financial problems and take significant actions to implement the plan. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant was sincere and candid at the hearing, but he has no coherent, plausible, and credible plan to resolve his financial problems, in spite of being gainfully employed for more than nine years.

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.z: 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