



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 12-04293
)
 Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

08/21/2014

Decision on Reconsideration

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 December 21, 2011. On February 26, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on March 5, 2014; answered it on April 10, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 30, 2014, and the case was assigned to me on May 5, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 12, 2014, scheduling the hearing for June 17, 2014. At Applicant’s request, the hearing

was postponed. On May 14, 2014, DOHA issued an amended notice of hearing, rescheduling the hearing for July 15, 2014. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. I kept the record open until July 29, 2014, to enable Applicant to submit additional documentary evidence. I did not receive any additional evidence by the closing date. DOHA received the transcript (Tr.) on July 23, 2014.

Reconsideration

On August 8, 2014, I contacted Department Counsel by email to ensure that Applicant had not sent any additional evidence to her instead of me. (Hearing Exhibit (HX) I.) She responded that she had received nothing but that she had left a voicemail for Applicant inquiring about a post-hearing submission. (Hearing Exhibit II.) On August 19, 2014, Applicant submitted copies of previous emails dated July 28 and July 29, 2014, which I had not received because one letter had been omitted from my email user name. Applicant requested that I consider his additional evidence even though it was not timely received. (HX III.)

There is no express authority in Executive Order 10865 or the Directive for an administrative judge to reconsider a decision. However, the Appeal Board, relying on federal cases recognizing a federal agency's inherent authority to reconsider its decisions, has long held that it has inherent authority to reconsider its decisions. See ISCR Case No. 96-0785 (App. Bd. Feb. 24, 2009); ISCR Case No. 98-0521 (App. Bd. Nov. 23, 1999); ISCR Case No. 96-0785 (App. Bd. Oct. 5, 1998). In the absence of express authority or an express prohibition, I have relied on the Appeal Board's rationale to conclude that I have inherent authority to reconsider my decisions at any time until they become final under the provisions of Directive ¶ E3.1.36. Accordingly, I have withdrawn my decision of August 15, 2014, and substituted this decision on reconsideration. Department Counsel has not objected to my reconsideration and has not objected to Applicant's post-hearing submissions, which have been marked as AX G through M and received in evidence. (HX IV.)

Findings of Fact

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

Applicant is a 56-year-old safety manager employed by a federal contractor since September 2011. He has worked for federal contractors since May 2001. He served on active duty in the U.S. Air Force from February 1977 to December 1981 and was honorably discharged. He served in the Air Force Reserve from February 1983 to February 1985 and was honorably discharged. He received a security clearance in September 2004. In 2010, Applicant completed several training courses to prepare for his current position as a safety manager. (AX C, D, and E.) One of Applicant's

colleagues, a retired Air Force chief master sergeant, and his security manager, a retired Air Force master sergeant, submitted letters of recommendation, both describing Applicant as reliable, loyal, and a “great coworker.” (AX A and B.)

Applicant married in December 1992. He and his wife have no children, but his two adult stepsons and a 14-year-old step-grandson live with them.

Applicant and his wife purchased a time-share vacation home in the mid-1990s. The payments became delinquent about a year after they purchased it. (Tr. 42.) They did not make any efforts to resolve the debt, alleged in SOR ¶ 1.a, until Applicant received the SOR.

Around 2000, one of Applicant’s stepsons and his girlfriend had a son. When the girlfriend left the stepson and abandoned their three-month-old son, Applicant and his wife took custody of the infant and raised him. (Tr. 31-32.)

Applicant and his wife filed a joint Chapter 7 bankruptcy petition in October 2002 and received a discharge in January 2003. (GX 2 at 7-8; GX 4 at 4; GX 5.) Applicant testified that the additional expense of caring for his step-grandson was a major contributor to their inability to pay their bills. (Tr. 32.) The payments on the time-share were not included in their bankruptcy discharge.

In 2006, as a result of a down-sizing by Applicant’s employer, he was transferred to a new location far distant from his old location. At his old location, he and his wife managed their apartment complex in return for a rent-free apartment. After his transfer, he incurred additional living expenses and could not afford the lease payments on his car. He surrendered the car, incurring a penalty for early termination of the lease, alleged in SOR ¶ 1.d. The leasing company obtained a judgment against him. In November 2010, he negotiated an agreement to pay \$100 per month. (GX 2 at 34; GX 3 at 2; Tr. 34; Enclosure to Answer.) He has been making regular payments in accordance with his agreement. (GX 2 at 35; AX G.)

In late 2006 or early 2007, Applicant purchased a computer for his step-grandson, who was then six or seven years old. He stopped making payments shortly after the purchase, because he could not afford them. (Tr. 49-50.) The debt, alleged in SOR ¶ 1.c, was charged off and referred for collection in October 2006. (GX 3 at 2; GX 4 at 11.)

In early 2007, Applicant and his wife purchased another time-share for about \$8,300, with a 10% down payment. (Tr. 42, 60.) Applicant failed to make the monthly payments beginning in February 2007. In March 2014, he settled the debt, alleged in SOR ¶ 1.b, for about \$1,892. (AX F; Tr. 48.) When asked why he purchased a second time-share at a time when he was in financial distress, he attributed the purchase to a “pressure sale.” (Tr. 58.)

In 2008, one of Applicant's stepsons moved in with them. A year later, the second stepson moved in. (Tr. 35.) Neither of his stepsons finished high school, making it difficult for them to find steady employment. (Tr. 33-37.) His two stepsons pay rent totaling about \$400 per month. (GX 2 at 15; Tr. 41.) In 2010, Applicant's wife was laid off from her job and has been unable to find new employment. (Tr. 36.)

In response to DOHA financial interrogatories in October 2013, Applicant submitted a personal financial statement (PFS) reflecting net monthly income of about \$5,662; expenses of about \$3,981; debt payments of about \$255; and a net monthly remainder of about \$1,426.¹ (GX 2 at 15.) The PFS reflects spousal income of \$570, which is her Social Security retirement pension. The PFS also reflects monthly \$114.50 payments to the Internal Revenue Service (IRS) on a tax debt of \$1,825. Applicant testified that the debt was incurred for tax year 2009 because insufficient taxes were withheld from his pay. He also testified that he owes taxes for tax years 2011 and 2012 because of insufficient withholding. (Tr. 55-56, 61-62.) He has continued to make regular monthly payments on his tax debt. (AX H through M.) The tax debts are not alleged in the SOR.²

When Applicant submitted his SCA, he disclosed numerous delinquent debts, including his federal tax debt for 2009, the computer-purchase debt in SOR ¶ 1.c, and the car-lease debt alleged in SOR ¶ 1.d. During a personal subject interview (PSI) in January 2012, he disclosed his Chapter 7 bankruptcy and the more recent time-share loan. He did not recognize 11 debts reflected on his December 2011 credit report. (GX 2 at 7-9.) In response to October 2013 financial interrogatories, he provided evidence that he had resolved several debts and successfully disputed several debts that are not alleged in the SOR. (GX 2 at 17-41.)

At the hearing, Applicant testified that in March 2014, after receiving the SOR, he borrowed about \$3,500 from his 401(k) retirement account and used it to resolve the debts alleged in SOR ¶¶ 1.a-1.c. (Tr. 37, 43.) Payments on the 401(k) loan are about \$336 per month. (Tr. 44.) In his answer to the SOR, Applicant submitted documentary evidence that he resolved the time-share debt alleged in SOR ¶ 1.a on March 15, 2014. At the hearing, he submitted documentary evidence that he resolved the time-share debt alleged in SOR ¶ 1.b on March 19, 2014. (AX F; Tr. 48.) In his response to the SOR and at the hearing, he claimed that he settled the computer debt, alleged in SOR ¶ 1.c with a collection company on March 19, 2014. (Enclosure to Answer; Tr. 50-51.)

¹ Applicant's PFS reflected a net monthly remainder of \$457, but that number is inconsistent with the amounts reflected for net income, monthly expenses, and debt payments.

² Applicant's Chapter 7 bankruptcy discharge and his current federal income tax debt were not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered his bankruptcy discharge and federal income tax debt for these limited purposes.

However, the account numbers and the amount due reflected on the credit report for on the collection company do not match the account number and amount due for the original creditor. The evidence does not establish that the debt in SOR ¶ 1.c is settled.

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 SOR alleges four delinquent debts: a time-share debt for \$900 (SOR ¶ 1.a); a second time-share debt for \$5,661 (SOR ¶ 1.b); a debt for a computer for \$2,746 (SOR ¶ 1.c); and a car-lease termination penalty of \$2,898 (SOR ¶ 1.d). 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).

Applicant’s admissions, testimony at the hearing, and credit reports establish the following disqualifying conditions under this guideline:

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

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

AG ¶ 19(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.

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 did not resolve the debts in SOR ¶¶ 1.a and 1.b until after he received the SOR. The computer debt in SOR 1.c is not resolved, and the judgment for the car-lease debt in SOR ¶ 1.d is not yet satisfied. His delinquent debts were numerous and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's involuntary transfer to a new location and the expenses associated with the transfer were circumstances beyond his control. However, his decision to allow his two adult stepsons to live with him and to assume responsibility for his step-grandson, while compassionate and generous, was a voluntary decision. His purchases of two time-share properties and his purchase of an expensive computer for a young boy were voluntary acts. Furthermore, he has not acted responsibly. The debts alleged in SOR ¶¶ 1.a-1.c became delinquent around 2006 or 2007, but he took no meaningful actions to resolve them until he realized after his January 2012 PSI that his delinquent debts were an impediment to continuing his security clearance. The debt in SOR ¶ 1.c is still unresolved.

AG ¶ 20(c) is not fully established. It is likely that Applicant was required to obtain financial counseling in connection with his Chapter 7 bankruptcy petition in 2002. He has not received counseling regarding the debts he accumulated after his bankruptcy discharge. He has resolved the debts in SOR ¶¶ 1.a and 1.b, but he did so by borrowing money and incurring another debt. He settled a third debt with a collection company, but

he did not produce evidence showing that the collection company with whom he settled held the debt alleged in SOR ¶ 1.c. In November 2010, he negotiated a payment plan for the car-lease debt in SOR ¶ 1.d, and he has submitted documentary evidence of compliance with his agreement up to the present.

AG ¶ 20(d) is not established. “Good faith” within the meaning of this mitigating condition means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Payment of debts motivated by the pressure of qualifying for a security clearance is not a “good-faith effort.” Furthermore, a security clearance adjudication is not a debt-collection procedure; it is an evaluation of an individual’s judgment, reliability, and trustworthiness. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). This mitigating condition is established for the car-lease debt in SOR ¶ 1.d, because he negotiated a payment plan and began making payments well before his PSI in January 2012, his responses to DOHA interrogatories in October 2013, or his receipt of the SOR in March 2014. However, his efforts to resolve the remaining debts in the SOR were motivated by pressure to retain his security clearance, and those belated efforts do not mitigate the security concerns raised by his history of financial irresponsibility.

AG ¶ 20(e) has limited applicability. Applicant successfully disputed several debts after being confronted with them during his January 2012 PSI. However, he has not disputed any of the debts alleged in the SOR.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has served his country for many years, in uniform and as an employee of federal contractors. He has held a security clearance since September 2004. He has been exceptionally generous to his stepsons and step-grandson. On the other hand, he has repeatedly demonstrated bad financial judgment. He bought a time-share in the 1990s, allowed the payments to become delinquent within a year, and ignored the debt until he realized that his security clearance was in jeopardy. He bought an expensive computer for a young boy in 2006 or 2007, shortly after surrendering his leased car because he could not afford the payments. He bought a second time-share in 2007, notwithstanding his precarious financial situation, and started defaulting on his payments almost immediately. To his credit, he is making payments on the car-lease judgment and his federal income tax debt. He has resolved the debts in SOR ¶¶ 1.a and 1.b by incurring a new debt. Overall, his financial history and present financial situation leave me with doubts about his reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, 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.c:

Against Applicant

Subparagraph 1.d:

For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge