



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-04718
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

10/28/2016

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 February 20, 2014. On January 15, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 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 the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on May 16, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 13, 2016.

In addition, Department Counsel amended the SOR on April 13, 2016 by adding SOR ¶¶ 1.s-1.w under Guideline F, and Applicant answered the amendment to the SOR on April 25, 2016. The case was assigned to me on May 2, 2016.

On May 12, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 8, 2016. On June 8, 2016, the hearing was postponed at Applicant's request. On July 28, 2016, DOHA notified Applicant that the hearing was rescheduled for August 19, 2016. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and presented the testimony of one other witness, but he did not submit any documentary evidence. I kept the record open until September 9, 2016, to enable him to submit documentary evidence. He did not submit any additional evidence. DOHA received the transcript (Tr.) on August 31, 2016.

Amendment of SOR

At the hearing, I granted Department Counsel's motion to amend SOR ¶ 1.a by deleting the ambiguous description of the governmental entity to whom taxes were owed and substituting an allegation that the tax debt was to a state. I also granted Department Counsel's motion to amend SOR ¶ 1.u to allege delinquent taxes through tax year 2012 instead of 2102. (Tr. 16-17, 20-21.)

Findings of Fact¹

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

Applicant is a 49-year-old machinist employed by a defense contractor since November 2013. He was previously employed in the private sector. He has never held a security clearance.

Applicant attended a community college from April 1987 to June 1988 and a technical institute from September 2003 to September 2004. He received an associate's degree in September 2004.

Applicant and his wife have been married for about 28 years. They have three adult children. The youngest, age 21, still lives at home. (Tr. 32.)

Applicant's wife is a licensed practical nurse (LPN). She was employed from 2006 until December 2013, when she became unable to work due to serious medical problems. She was able to resume working as an LPN in January 2016. Her medical condition still exists, but it is stable. (Tr. 36-39.)

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

In 2009, Applicant was laid off and unemployed for about two to four weeks. He found another job in the private sector, where he remained until he began his current job with a defense contractor. He found it difficult to find jobs because he suffered from a blood disease that caused fainting. After a series of expensive tests, he was able to control his condition with medication, and it is no longer an impediment to his employment. (Tr. 79-81.)

The SOR alleges three bankruptcies and various tax debts, tax liens, and consumer debts, which are reflected in bankruptcy court records (GX 4-6) and Applicant's credit bureau reports (CBRs) from March 2014 and April 2016 (GX 2 and 3). The evidence regarding the three bankruptcies is summarized below.

SOR ¶ 1.t: Chapter 7 bankruptcy filed in May 2001 and a discharge granted in September 2001. In about 2001, Applicant and his wife purchased a second larger home and moved into it without selling their first home. They entered into a land contract for the first home, but the buyers reneged on the land contract after living in the home for several months and seriously damaging it. Applicant and his wife were then left with two mortgage loans. (Tr. 51-52, 72.) Applicant had been making the payments on his student loans, but he stopped payments after the land contract fell through. (Tr. 72.) He and his wife filed a bankruptcy petition based on advice from a family member. They had family income of about \$20,000 per year, Applicant was earning only about \$200 per week, his wife was not employed, they had two small children, they had numerous delinquent debts, and their creditors threatened to garnish Applicant's pay. (Tr. 45-46.) They relinquished both homes as part of the bankruptcy. (Tr. 74.)

SOR ¶ 1.r: Chapter 13 bankruptcy filed in November 2008 and dismissed at Applicant's request in September 2009. Applicant's wife testified that this bankruptcy was filed after some unexpected medical expenses and a federal income tax debt. They dismissed this bankruptcy petition after the bankruptcy court included the income of a disabled family member living with them and increased the monthly payments to a level that they could not afford. (Tr. 48-49.)

SOR ¶ 1.s: Chapter 7 bankruptcy filed in December 2015 and discharge granted in March 2016. The debts in SOR ¶¶ 1.e, 1.f, 1.l, 1.m, and 1.p (discussed below) were specifically listed in this bankruptcy petition. Applicant testified that he and his wife paid off some smaller debts before filing the bankruptcy petition, but they did not try to resolve any of the debts included in the bankruptcy petition. (Tr. 76-77.)

In addition to the three bankruptcies, the SOR also alleged three state tax liens, four delinquent student loans, a federal tax debt, state tax debts to two states, five delinquent medical debts, and four consumer debts. The evidence concerning these debts is summarized below.

SOR ¶¶ 1.a-1.c: state tax liens filed in July 2012 for \$9,888; filed in May 2010 for \$4,296; and filed in April 2010 for \$5,710. Applicant's wife testified that these tax

liens were released and that she could provide documentation of their release. (Tr. 59-60.) No documentation was submitted by the time the record closed.

SOR ¶1.d: debt to tax preparation service charged off for \$648. Applicant presented no evidence concerning this debt. It was not listed in the December 2015 bankruptcy petition.

SOR ¶¶ 1.e and 1.f: deficiency after a vehicle repossession placed for collection of \$13,009 and a debt to finance company placed for collection of \$13,463. These two allegations pertain to the same debt. It was listed in the December 2015 bankruptcy petition. (GX 6 at 34, 38.)

SOR ¶¶ 1.g-1.k: student loans placed for collection of \$2,042; \$2,333; \$2,625; and \$4,000. These student loans were not specifically listed in the December 2015 bankruptcy petition, but other student loans were listed. (GX 6 at 30, 35, 37-39, 51.) Applicant and his wife are paying \$100 per month on their student loans. (Tr. 64.)

SOR ¶ 1.l: debt to finance company charged off for \$5,678. This debt was listed in the December 2015 bankruptcy petition. (GX 6 at 40.)

SOR ¶¶ 1.m-1.p: medical debts placed for collection of \$311, \$189, 185, 118, and \$51. These debts, as well as other medical debts, were listed in the December 2015 bankruptcy petition. (GX 6 at 40-46.)

SOR ¶ 1.u: delinquent federal income taxes for tax years 2008 through 2012 totaling about \$42,000. Starting in the early 2000s Applicant and his wife maximized their number of exemptions to reduce the amount of taxes withheld and increase their net pay. As a result of insufficient withholding of federal taxes, they owed federal income taxes. Applicant submitted evidence that he and his wife owed no federal income taxes for tax years 2011 and 2012. (Answer to Amended SOR, Attachments 1 and 2.) The delinquent federal income taxes for tax years 2008 through 2010 are not resolved. The December 2015 bankruptcy petition for listed a \$42,000 federal income tax debt. (GX 6 at 24.)

SOR ¶ 1.v: delinquent state taxes for tax years 2008 through 2013 totaling about \$5,000. This tax debt also was incurred because of inadequate withholding from Applicant's and his wife's pay. (Tr. 54.) It was listed in the December 2015 bankruptcy petition. (GX 6 at 25.)

SOR ¶ 1.w: delinquent state taxes (a different state from SOR ¶ 1.v) for tax year 2014 of about \$250. This debt was listed in the December 2015 bankruptcy petition. (GX 6 at 25.)

Applicant and his wife estimate that their net monthly income is about \$5,000, and their monthly expenses are about \$3,637, which would leave a net monthly remainder of about \$1,363. (Tr. 60-65.) Their monthly expenses include payments of

\$100 per month on their student loans and \$462 per month for a new 2016 automobile. Their estimated expenses do not include any payments on their federal and state tax debts. Their December 2015 bankruptcy petition calculated their monthly disposal income to be \$61.49. (GX 6 at 81.) Applicant's wife testified that they live paycheck to paycheck. (Tr. 67.)

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 § 2.

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." 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 a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person 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, the CBRs, and the bankruptcy court records establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). AG ¶ 19(d) ("deceptive or illegal financial practices such as . . . income tax evasion") would be potentially applicable in light of Applicant's admission that he and his wife intentionally claimed too many exemptions to reduce their tax withholding. However, tax evasion was not alleged in the SOR and may not be an independent basis for denying Applicant a security clearance.

The following mitigating conditions under this guideline 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, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant encountered several conditions beyond his control: his medical problems, a brief period of unemployment, his wife's medical problems that caused a substantial period of unemployment, and a potential homebuyer who reneged on a land contract. Their largest debt, however, is the federal tax debt that was caused by their manipulation of the exemptions they claimed on their federal and state income tax returns. Applicant's multiple bankruptcies were lawful and arguably prudent actions, but they do not mitigate the irresponsible acts which caused their financial problems.

AG ¶ 20(c) is not established. While Applicant would have been required to obtain financial counseling as part of each bankruptcy proceeding, his financial problems are not under control. He is living paycheck to paycheck and has not resolved his federal and state tax debts. He recently incurred additional debt by purchasing a new automobile, which will make it difficult for him to carry out any payment plan for his federal and state tax debts.

AG ¶ 20(d) is established for the student loans alleged in SOR ¶¶ 1.g-1.k. It is not established for the other debts alleged in the SOR and included in the December 2015 bankruptcy. While bankruptcy is a legal and sometimes prudent course of action,

a bankruptcy discharge does not constitute a “good-faith effort” to resolve debts. ISCR Case No. 07-06841 at 4. Bd. Dec. 19, 2008).

AG ¶ 20(e) is not applicable. Applicant 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 and I have considered the factors in AG ¶ 2(a). 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 raised by his delinquent debts. 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.f:	Against Applicant
Subparagraphs 1.g-1.k:	For Applicant
Subparagraphs 1.l-1.w:	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