



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-01823
)	
Applicant for Security Clearance)	

Appearances

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

08/31/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 22, 2012. On August 29, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under 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 November 4, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 14,

2016, and 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 6, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or documentary evidence. I kept the record open until July 11, 2016, to enable him to submit documentary evidence. He did not submit any additional evidence. DOHA received the transcript (Tr.) on June 14, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted all the allegations, except SOR ¶ 1.k. In his response to the allegations in SOR ¶¶ 2.a and 2.b that he falsified his SCA, he claimed that he was unaware of his delinquent debts when he submitted the SCA. I have treated his responses to SOR ¶¶ 2.a and 2.b as denials. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 48-year-old long-haul truck driver employed by a defense contractor since September 2010. He worked for various private-sector companies until he was hired for his current job. He served on active duty in the U.S. Army from March 1987 to June 1988 and received an honorable discharge. (Tr. 15.) He held a security clearance while in the Army. He underwent a background investigation conducted by another government agency, but he does not have a DOD security clearance. (Tr. 7.)

Applicant married in November 2006. He and his wife have two sons, ages 12 and 10. He and his wife have been separated since 2012. (Tr. 27.) He voluntarily pays \$500 per month in child support. (Tr. 29-30.) He lives with his sister because he cannot afford to have his own home. (Tr. 31.)

Applicant testified that his annual earnings were recently reduced from \$36,000 to \$28,000 because he and his co-driver cannot haul government freight unless they both have security clearances. With a clearance, he could earn \$50,000 or \$60,000, depending on how long he is willing to stay on the road. (Tr. 33-38.)

Applicant testified that his financial problems began with the terrorist attack on September 11, 2001 (9-11). He was working as an airport skycap at the time and earning between \$200 and \$400 a day. After the terrorist attack, curbside check-in was reduced, and his income fell to around \$450 per week. (Tr. 39-41.) Applicant filed a petition for Chapter 13 bankruptcy shortly after 9-11, but his petition was dismissed after about a year, because he could not afford the monthly payments to the bankruptcy trustee. (Tr. 44-46.) He did not submit any documentation to corroborate his testimony about his reductions in income or bankruptcy filing.

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

When Applicant submitted his SCA, he answered “no” to questions whether, in the past seven years, he had failed to file or pay federal, state, or other taxes as required; had bills or debts turned over to a collection agency; had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; and whether he was currently delinquent on any federal debt. In his answer to SOR ¶ 1.a, Applicant admitted that he failed to file his federal tax returns for tax years 2010 and 2011 as required. His July 2012 credit bureau report (CBR) reflected the federal tax lien alleged in SOR ¶ 1.b, the charged-off car loan in SOR ¶ 1.c, and the collection accounts alleged in SOR ¶¶ 1.e-1.i. (GX 2.) The delinquent utility bill alleged in SOR ¶ 1.d was not reflected in the July 2012 CBR but was reflected in his February 2015 CBR (GX 3.)

At the hearing, Applicant admitted that he did not timely file his federal income tax returns for 2010 through 2014. He testified that he did not file his federal tax return for 2010 because he believed that he was not required to file a return if he was entitled to a refund. He did not file his 2011 return because he was on the road, had moved, and could not reach an agreement with his wife about who would claim the children as dependents. He did not explain why he did not file returns for 2012 through 2014.² He testified that he filed all his past-due returns in February 2016, and he forfeited about \$4,600 in refunds by failing to timely file. (Tr. 47-50.) He did not submit any documentation reflecting that he filed his past-due returns.

In his answer to the SOR, Applicant stated that he was unaware of what was in his CBR when he submitted his SCA. At the hearing, he testified that he knew he was financially struggling, but he was not sure what debts were reflected in his CBRs. He was unsure whether any debts had been resolved by his bankruptcy before it was dismissed. (Tr. 80-82.) He testified that he must have overlooked the question in the SCA about failing to file tax returns. (Tr. 52.) He also testified that he admitted his failures to timely file tax returns when he was interviewed by a security investigator in November 2012. (Tr. 53-54.)

The evidence concerning the delinquent debts alleged in SOR ¶¶ 1.b-1.i is summarized below.

SOR ¶ 1.b, federal tax lien filed in 2011 for \$4,569. Applicant testified that he made a payment agreement with the IRS in February 2016 and had made the required payments for March, April, and May 2016. He testified that his agreement provides for monthly \$50 payments for the first year, \$100 payments for the second year, and \$258 payments for the third year. (Tr. 56.) He testified that he did not try to settle his tax debt

² Applicant's failures to timely file his federal income tax returns for 2012 through 2014 were not alleged in the SOR, and they may not be an independent basis for denying Applicant's application for a security clearance. However, 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 Applicant's failure to timely file his returns for 2012 through 2014 for these limited purposes.

sooner because he did not want to make an agreement until he could afford the payments. (Tr. 57.) He did not submit any documentation of a payment agreement or payments from March through May 2016.

SOR ¶ 1.c, deficiency on vehicle repossession, charged off for \$15,786. Applicant and his wife jointly purchased a minivan around 2006. They could not make the payments, and the minivan was repossessed. Applicant testified that he did not contact the lender because his wife said she would handle it, but she apparently did not. Applicant has made no payments on the debt, and it is not resolved. (Tr. 60-61.)

SOR ¶ 1.d, utility bill, placed for collection of \$265. Applicant testified that the debt arose when the house they were renting was foreclosed, and they were forced to move out. He testified that he closed the account and paid the amount due when he moved out of the rental house. He provided no documentation of payment and has not disputed the debt. (Tr. 62-63.)

SOR ¶ 1.e, cable bill, placed for collection of \$107. In his answer to the SOR and at the hearing, Applicant stated that he contacted the cable provider and was informed that they no longer had an account in his name. He has not contacted the collection agency or disputed the debt. (Tr. 64, 67-68.) The debt is not resolved.

SOR ¶ 1.f, tuition for commercial driver's license training, placed for collection of \$6,690. Applicant testified that he was unable to pay this debt because he did not make enough money after he finished the training. (Tr. 69-70.) The debt is not resolved.

SOR ¶ 1.g, bank overdraft, placed for collection of \$457. Applicant testified that he contacted the bank and requested a payment plan, but the bank insisted on payment of the full amount. (Tr. 71.) The debt is not resolved.

SOR ¶ 1.h, satellite television service, placed for collection of \$269. Applicant admitted having satellite television service. He testified that he called the collection agency and was informed that the agency was unaware of the debt. He has not disputed or otherwise resolved the debt. (Tr. 73-74.)

SOR ¶ 1.i, utility bill, placed for collection of \$85. Applicant testified that he paid this bill, but he submitted no documentation of payment. (Tr. 77-78.)

SOR ¶ 1.j, utility bill, placed for collection of \$250. Applicant testified that he paid the bill in full when he and his wife moved out of a rental property, but the utility company charged him for a full billing cycle because he could not produce a document advising the utility company of his intent to terminate service. (Tr. 76-77.) The debt is not resolved.

SOR ¶¶ 1.k and 1.l, collection accounts for \$157 and \$76. Applicant testified that he was unable to identify these debts, but he has done nothing to resolve them. (Tr. 78-79.)

At the time of the hearing, Applicant was not driving under any federal contracts, because he was unable to negotiate a good rate per mile without a security clearance. He can earn only about \$1.35 per mile without a clearance but up to \$4.00 per mile with a clearance. He is temporarily working for a concrete company, earning an average net pay of \$1,800 to \$2,000 per month. He estimates that his monthly expenses are child support (\$500), cell phone (\$48), car insurance (\$200), rent (\$600), gasoline (\$320), food (\$240), and utilities (\$50). He has no car payments. (Tr. 89.)

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 and his CBRs establish three 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(g) (“failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same”).

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 established. Applicant testified that he encountered several conditions largely beyond his control: his loss of employment and subsequent underemployment after 9-11, his inability to compete for favorable contracts because he does not have a security clearance, and his marital breakup. However, he did not submit any documentation to corroborate his testimony. Furthermore, he has not acted responsibly. He admitted that he bought a minivan that he could not afford and forfeited federal income tax refunds of about \$4,600 by failing to timely file his returns. He claimed that he had paid several delinquent debts and was making payments on his federal tax debt, but he submitted no supporting documentation.

AG ¶ 20(c) is not established. Except for the mandatory counseling required for a Chapter 13 bankruptcy, he has not sought financial counseling, and his financial situation is not under control.

AG ¶ 20(d) is not established. Applicant testified that he has filed all his overdue federal tax returns, is making regular payments on his federal tax debt, had paid the utility bills alleged in SOR ¶¶ 1.d, 1.e, 1.i, and 1.j, but he has submitted no documentation of tax returns filed, payment agreements negotiated, or payments made,

even though he was given an additional month after the hearing to obtain and submit documentation.

AG ¶ 20(e) is not established. Although Applicant testified that he had paid several delinquent debts and questioned whether some debts were valid, he has not documented any of his claims and has not filed any disputes with the creditors or the credit reporting agencies.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is AG ¶ 16(a). "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

When Applicant submitted his SCA, he knew that he was financially struggling, and he knew that he had not filed his federal income tax returns. I found his explanations for answering "no" to all the questions about financial delinquencies unconvincing. AG ¶ 16(a) is established.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 17(a) is not established. Applicant submitted his SCA in June 2012, but he did not attempt to correct his omissions until he was contacted by a security investigator in November 2012 and confronted with his omissions.

AG ¶ 17(c) is not established. Applicant's omissions were not minor, because they undermined the integrity of the security clearance process. They were recent, because they affected his current SCA. They did not occur under circumstances making them unlikely to recur.

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 Guidelines F and E in my whole-person analysis and I have considered the factors in AG ¶ 2(a). Applicant is struggling financially, but his problems are largely attributable to his inattention. He forfeited income tax refunds and incurred penalties and interest by ignoring his obligations to file income tax returns. He took virtually no action to investigate and resolve his delinquent debts until he received the SOR. He arrived at the hearing unprepared to document any of his claims. He failed to provide documentation of his efforts to resolve his debts, even though he was given an additional month to obtain and submit it.

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 raised by his financial problems and falsification of his SCA. 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.l: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 2.a-2.b: 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