



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-03025
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

08/12/2016

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 August 22, 2014. On November 2, 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 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 December 4, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 12, 2016, and the case was assigned to me on April 13, 2016. On April 26, 2016, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 26, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I kept the record open until July 8, 2016, to enable him to submit additional evidence. He timely submitted AX E through H, which were admitted without objection. (Hearing Exhibit I.) DOHA received the transcript (Tr.) on June 3, 2016. The record closed on July 8, 2016.

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 55-year-old flight line supervisor employed by a defense contractor since March 1987. He graduated from high school in 1979. He served on active duty in the U.S. Navy from March 1981 to January 1987 and received a general discharge.² He has held a security clearance for about 29 years. (Tr. 31.)

Applicant married in February 1998. He and his spouse have no children. His wife has two adult children from a previous relationship.

Applicant's credit bureau reports (CBRs) from August 2014 and February 2015 reflect the debts alleged in the SOR. The evidence pertaining to the debts is summarized below.

SOR ¶ 1.a, mortgage loan in foreclosure with a balance of \$284,047. In 2008, Applicant withdrew \$124,000 from his 401(k) account to purchase a home, not realizing that the money withdrawn would be earned income. As a result, he owed \$42,000 in federal income taxes that he could not afford to pay. At about the same time, his wife was injured and became unable to work. (Tr. 26.) She is a registered nurse and was earning about \$65,000 per year. (Tr. 62.) His tax records show that he and his wife had taxable income of \$81,304 in 2007. It increased to \$202,024 in 2008 due to the 401(k) withdrawal, and dropped to \$20,344 after his wife stopped working. (AX C; Tr. 28.) Applicant was unable to make the payments on his mortgage loan, and the mortgagor foreclosed on the loan. Applicant and his wife were evicted from the home in the fall of 2012. The balance due is the deficiency after the foreclosure sale. Applicant testified that he intends to resolve this debt through a Chapter 13 bankruptcy. (Tr. 44-46.)

SOR ¶ 1.b, deficiency after repossession of a boat, referred for collection of \$8,135 in May 2010. Applicant testified that he bought a boat in 2006, before

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

² He did not receive an honorable discharge because he failed to meet Navy body-weight standards and was arrested in 1986 for driving under the influence, for which he received probation before judgment.

purchasing his home in 2008. After he purchased the home, he could not afford the payments on the boat, and it was repossessed in May 2011. (Tr. 49.) He settled this debt in November 2015 by withdrawing funds from his 401(k) account. (AX B at 1; Tr. 27.) He testified that his receipt of the SOR motivated him to settle this debt. (Tr. 48.)

SOR ¶ 1.c, medical bill referred for collection \$113 in June 2012. Applicant initially disputed this debt on the ground that it was covered by his insurance. He paid it in December 2015, after receiving the SOR. (AX B at 3; Tr. 27, 50-51.)

SOR ¶ 1.d, federal income taxes of \$28,000 for tax year 2008. Applicant incurred this debt when he withdrew \$124,000 from his 401(k) account to purchase the home in SOR ¶ 1.a. He was making payments of \$400 under a payment agreement until about June 2010. (Tr. 52.) He resolved this debt and several others in December 2015 by borrowing \$41,000 from his 401(k) account. (AX B at 2; Tr. 27.)

SOR ¶¶ 1.e and 1.f, failure to file federal and state income tax returns for tax year 2013. Applicant attributed his failure to file his federal and state returns to financial inability to hire a professional tax preparer. (Tr. 57.) He filed his federal and state tax returns for 2013 in August 2014 and his federal and state tax returns for 2014 in December 2015. (AX E-H.) In April 2015, he was notified by the IRS that he owes \$390 in federal income taxes for 2014 and 2015. (Tr. 55-56.)

SOR ¶ 1.g, Chapter 7 bankruptcy. Applicant filed a Chapter 7 bankruptcy in September 2002 and received a discharge in December 2002. He and his wife purchased a home in 1998, but they could not afford the payments when she became ill in 2000. (Tr. 58.) His petition listed assets of \$191,815 and liabilities of \$222,416. His assets included a home worth \$181,800 and his liabilities included a loan of \$184,600, secured by a mortgage on the home. (GX 5; GX 6.)

Applicant's monthly net pay is about \$2,800. His wife is not employed outside the home, but she receives Social Security benefits of about \$600 per month. (Tr. 34.) He pays rent of \$1,300 and utilities of about \$800. He spends about \$450 per month for groceries. He has paid off the loans on two vehicles. He and his wife spend about \$500 per month for medical prescriptions. Both Applicant and his wife are diabetic and have high blood pressure. He recently had a heart attack. After paying all their expenses, they have a monthly shortfall of about \$110. They do not have a written budget. They usually make up for the shortfall by not filling all their prescriptions. (Tr. 34-37.) After recently borrowing \$41,000 from his 401(k) account to pay several debts, Applicant still has about \$133,000 in the account. However, he has no other savings. (Tr. 39.)

In May 2016, Applicant retained an attorney to file a Chapter 13 bankruptcy petition. He expected to file the petition within 60 days. (AX A; Tr. 18.) Applicant has not determined whether he can afford the payments under a Chapter 13 plan. (Tr. 64.) He still owes his attorney \$400, which must be paid before the attorney will file the bankruptcy petition. (Tr. 64-65.)

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.” 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).

Applicant’s admissions in his answer to the SOR and at the hearing, his CBRs, and the documentary evidence submitted at and after the hearing 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;

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.

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 recent, numerous, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant has encountered conditions largely beyond his control: his medical problems, the uninsured medical expenses associated with them, his wife's medical problems, and her loss of employment related to her medical problems. However, he has not acted responsibly. He filed his state income tax returns late, even though he was entitled to refunds. He did not take significant action to address his delinquent debts until he received the SOR.

AG ¶ 20(c) is not established. Applicant would have been required to obtain credit counseling as a condition of filing his Chapter 7 bankruptcy in 2002. However, his financial problems are not under control.

AG ¶ 20(d) is not established. This mitigating condition requires a showing of good faith. "Good faith" 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). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. Applicant admitted that he did not take significant action to resolve his delinquent debts until he received the SOR. While Applicant's Chapter 7 bankruptcy in 2002 was a lawful means of resolving his debts, an applicant must do more than merely show that he or

she relied on a legally available option, such as bankruptcy, in order to claim the benefit of this mitigating condition. ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006). Applicant did not learn from his first bankruptcy. Instead, he continued to live on a financial margin with no provisions for unexpected financial setbacks. He has resolved most of the debts in the SOR by borrowing money from his 401(k) account. He is again seeking bankruptcy protection, but he has not yet paid his attorney to file a bankruptcy petition, and his current negative cash flow makes raises doubt about his ability to comply with a Chapter 13 payment plan.

AG ¶ 20(e) is not established. While Applicant initially disputed the medical debt in SOR ¶ 1.c, he did not document the basis for his dispute, and he ultimately paid it, motivated by his receipt of 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). Applicant was candid and sincere at the hearing, but he does not have a good grasp on his financial situation. He has a long history of overextending himself financially. His response to indebtedness has been reactive rather than proactive. He resolved his debts by incurring other debts.

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 long history of financial problems. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his 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.g:

Against 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