



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 15-03995
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: Crystina M. O'Brien, Esq.

02/01/2017

**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 August 28, 2014, seeking to continue a clearance he received in 2004. On January 17, 2016, 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 February 11, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on

September 7, 2016, and the case was assigned to me on September 14, 2016. On the same day, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 29, 2016. On September 20, 2016, Applicant retained counsel, who requested that the hearing be postponed. I granted the request on September 21, 2016. On October 21, 2016, DOHA notified Applicant's counsel that the hearing was rescheduled for November 16, 2016. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on November 29, 2016.

### **Findings of Fact<sup>1</sup>**

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 59-year-old chemist employed by a defense contractor since June 1979. He was hired shortly after he received a bachelor's degree in May 1979. He has held a security clearance since April 2004.

Applicant married in February 1983 and divorced in January 2004. He has two adult children, who were born during the marriage.

When Applicant submitted his SCA in August 2014, he disclosed that he failed to file his federal income tax returns for tax years 2009 and 2010. His failure to file federal and state tax returns is alleged in SOR ¶ 1.a. He also disclosed a delinquent credit-card account and a delinquent student loan incurred for his daughter's college education. (GX 1 at 25-29; GX 2 at 4-5.) The delinquent student loan is alleged in SOR ¶ 1.b and reflected in his credit bureau report (CBR) from September 2014. (GX 3 at 5.) A collection account for telephone service is alleged in SOR ¶ 1.c and reflected in the same CBR. (GX 3 at 7.)

In 2004, Applicant's wife left him for another woman, leaving him responsible for a number of marital debts. When Applicant divorced, he and his wife had more than \$20,000 in credit-card debt, which they split. Applicant refinanced the mortgage loan on the marital home and used some of the equity to pay his share of the marital debts and to buy his wife's share of the equity in the home, so that he and his children would have a place to live. (Tr. 58-59.) Applicant is required to pay spousal support of \$1,600 per month. (Tr. 61, 69.)

At about the same time, Applicant's daughter was diagnosed with lupus and dropped out of school. His father was killed in a car accident in 2005, and his mother died from cancer a year later. Applicant was appointed as executor of his mother's

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

estate. The estate is still not settled, due to an overpayment to his mother from a state retirement plan. (Tr. 62-64.)

Shortly after their mother's death, Applicant's brother suffered serious health issues, spending six months in an emergency defibrillator vest, and Applicant took care of his brother until he recovered. His brother testified at the hearing and corroborated Applicant's testimony about the multiple stressful events that occurred from 2004 until about 2007 or 2008. (Tr. 44-50.)

Applicant testified that the stressful events in his personal life caused him to delay filing his federal and state tax returns for tax years 2007 through 2015.<sup>2</sup> (Tr. 29.) He was interviewed by a security investigator in November 2014, and he told the investigator that he knew that he needed to resolve his tax issues. (Tr. 53-55.)

In August 2016, Applicant hired a certified public accountant (CPA) to assist him in filing his federal and state income tax returns. The CPA filed the past-due returns in October 2016. Applicant did not owe any federal or state taxes for any of the tax years between 2007 and 2015, but he forfeited refunds by failing to timely file. Because he owed no taxes, he was not required to pay any penalties. (Tr. 26-31; AX D; AX E.)

Applicant obtained several student loans for his daughter in 2002. He fell behind on the loan alleged in SOR ¶ 1.b around 2006. He testified that he knew that the loan probably would be referred for collection, but he was focused more on his tax issues. He paid off the student loan alleged in SOR ¶ 1.b as well as his daughter's other student loans in early November 2016, shortly before the hearing. (Tr. 57; AX B; AX C.) He used some of the proceeds from his mother's estate as well as his own savings to pay off the student loans. (Tr. 65.)

Applicant's November 2014 CBR reflected a \$145 debt for cellphone service, referred for collection in December 2009. Applicant testified that he had several telephone conversations with the creditor, in which the creditor agreed that he did not owe the debt. Applicant asked the creditor for proof that he owed the debt, but he received nothing. He has not paid the debt or filed a dispute with the credit bureau. (Tr. 60-61.) However, the debt does not appear on his October 2016 CBR. (AX A.) Since less than seven years have elapsed since the debt was referred for collection, the absence of the debt on the current CBR indicates that it probably was resolved.<sup>3</sup>

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<sup>2</sup> The SOR does not allege failure to file for tax years 2007, 2008, and 2011 through 2015. 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 the evidence of his failure to file for the unalleged tax years for these limited purposes.

<sup>3</sup> Under the Fair Credit Reporting Act, a credit report may not list accounts placed for collection or charged off that antedate the credit report by more than seven years, or until the statute of limitations has run, whichever is longer. The exceptions to this prohibition do not apply to this debt. 10 U.S.C. § 1681c.

Applicant's annual pay is about \$105,000, and he has a net monthly remainder of about \$1,000 after paying all bills and expenses. He lives frugally and drives a ten-year-old car. He has about \$17,000 in savings. All his debts are current. His most recent CBR reflects no adverse entries. (Tr. 71-73; AX A.)

The supervisor for the laboratory in which Applicant works has known Applicant since 1979. He testified that there is no one in the laboratory who is qualified to replace Applicant. He considers Applicant "very professional," and he has never had any reason to believe that Applicant is a threat to national security. (Tr. 36-39.)

Applicant's manager, who has known him for about eight years and interacted with him daily, submitted a letter indicating that he was aware of Applicant's financial issues in general, and he believed that Applicant "did not handle that situation well." He stated that Applicant has never seemed to live beyond his means or exhibit any type of irresponsible behavior. He described Applicant as an "extraordinarily hard worker" and "very dedicated." He stated that the other chemists working with Applicant in the laboratory could eventually replace him, but they are several years away from stepping into his shoes. (AX F.)

### **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 credit bureau report 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. Although Applicant encountered several conditions largely beyond his control, he has not acted responsibly. His last major crisis was around 2006, but he had done nothing to resolve his tax issues when he was interviewed by a security investigator six years later, and he did not hire a CPA until almost two years after his interview with the security investigator. His delay in taking action to resolve his tax problem for many years and then taking action only after his security clearance was in jeopardy show that he lacks the good judgment and reliability required of persons who are granted access to classified information. ISCR Case No. 14-04159 (App. Bd. Aug. 1, 2016); See also ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016). Similarly, he knew the

student loan was delinquent in 2006, but he did take any action to resolve it until October 2016, ten years later. He testified that he initially disputed the cellphone debt, but he presented no documentary evidence of the basis for the dispute. However, the evidence indicates that the debt is resolved.

AG ¶ 20(c) is partially established. Applicant has not received financial counseling within the meaning of this mitigating condition, but his financial and tax problems have been resolved.

AG ¶ 20(d) is not established. This mitigating condition requires a showing of good faith, which 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. A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Even if an individual has paid the delinquent debts, the circumstances underlying the debts and their eventual resolution are relevant to determining the individual's eligibility for a clearance. ISCR Case No. 15-00216 (App. Bd. Oct. 24, 2016.)

AG ¶ 20(e) is not established. Applicant did not dispute the allegations in SOR ¶¶ 1.a and 1.b. He testified that he telephonically disputed the debt in SOR ¶ 1.c, but he provided no documentary evidence showing a dispute or its basis.

### **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 failure to timely file his federal and state tax returns and his failure to timely resolve the delinquent student loan. 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.b:	Against Applicant
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Subparagraphs 1.c:	For Applicant
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### **Conclusion**

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

LeRoy F. Foreman  
Administrative Judge