



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



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| In the matter of: |) | |
| |) | |
| [Redacted] |) | ISCR Case No. 15-04162 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

10/04/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 19, 2012. On December 4, 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, 2006.¹

¹ Security Executive Agent Directive 4 (SEAD 4) was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant answered the SOR on February 9, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 24, 2016, and the case was assigned to me on July 19, 2017. On August 10, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 8, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 3 were admitted in evidence without objection. Government Exhibit 2, an unauthenticated summary of a personal subject interview conducted on December 2012, was not admitted. (Tr. 8-9.) Applicant testified and submitted Applicant's Exhibits (AX) A through Q, which were admitted without objection. I kept the record open to enable Applicant to submit additional documentary evidence. He timely submitted AX R through V, which were admitted without objection. DOHA received the transcript (Tr.) on September 18, 2017.

Findings of Fact²

The SOR alleges two delinquent debts: a judgment for \$26,596 entered against Applicant in 2008 (SOR ¶ 1.a); and a judgment for \$8,923 entered against him in 2007 (SOR ¶ 1.b). In his answer to the SOR, he denied both allegations. Applicant disputes the judgment alleged in SOR ¶ 1.a. He satisfied the judgment in SOR ¶ 1.b in April 2014.

Applicant is a 59-year-old employee of a defense contractor who conducts background investigations for the U.S. Government. He received a bachelor of science degree in August 1995 and a master of business administration degree in August 1999. (AX N.) He received a security clearance in December 1976 and has maintained it until the present. (GX 1 at 32; Tr. 19.)

Applicant served in the U.S. Marine Corps from May 1975 to February 1982. In October 1977, he was awarded a medal for heroism after coming to the aid of an American civilian in a foreign country who was being attacked by several assailants armed with knives. Applicant was seriously injured, left for dead in the street, and rescued by local civilians. (AX H.)

Applicant served in the Army National Guard from September 1982 to January 1983, and on active duty in the Marine Corps from February 1983 to December 1984. He received the Navy Achievement Medal in June 1983. He served as a civilian police officer and retired from the police force in June 1995. (AX M.) He received a direct commission and served in the Army National Guard from April to August 1998 and in the U.S. Army Reserve from August 1998 to February 2002. He received the Army Commendation Medal in October 2001, and received an Honorable Discharge from the Army Reserve in February 2002. He has a 70% service-connected disability as a result of his military service. (AX S.) He suffers from post-traumatic stress disorder and a

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

traumatic brain injury that causes him to have problems with walking and balance. (Tr. 44-45.)

Applicant worked for a federal contractor as an investigator from October 1998 to October 2007. He was a full-time federal employee until February 2008. He left federal employment to care for his mother, a Holocaust survivor, who had been assaulted while living in a home. His mother passed away in August 2008. (AX R.) He was a full-time federal investigator until April 2009. He has been self-employed since April 2009 and working as a part-time investigator for a federal contractor since July 2009. Because of his part-time status, he has been unemployed for a total of three to six months each year since 2009. (Tr. 42.)

Applicant married in March 1978, divorced in June 1981, married in June 1984, and divorced in September 2006. He has three children, ages 21, 27, and 25. The judgment alleged in SOR ¶ 1.a was obtained by the attorney who represented him in the September 2006 divorce proceedings. He paid the attorney about \$23,267 for services rendered from March 2004 through September 2006. (AX B.) When the attorney informed him that he had an outstanding balance of \$26,713 for legal fees, Applicant disputed it. The record contains no documentary evidence of Applicant's fee agreement with the attorney, either in terms of a flat rate or hourly rate.

In December 2006, Applicant signed an "Irrevocable Assignment and Transfer," in which he agreed that the attorney would receive the lesser of the first \$20,000 of the proceeds from the sale of the marital home or the balance due for attorney's fees at the time of the sale. (AX C.) In April 2008, Applicant signed a confession of judgment for \$26,713, listing the attorney as the creditor. (GX 3; AX D.) Applicant testified that he did not understand the confession of judgment and was pressured to sign it on the steps of the courthouse as they were about to attend a hearing related to the divorce. He testified that the attorney told him he would not represent him at the hearing if he did not sign the document immediately. Applicant testified that there was no notary present when he signed it, but that his signature was later notarized by a member of the attorney's office. (Tr. 25, 49.)

When the marital home was sold in June 2009, the attorney agreed to release the lien on the property. (AX E.) According to Applicant, the attorney received \$15,033, which was the total profit on the sale. (Answer to SOR at 2.) The HUD-1 Settlement Statement reflects that the attorney was paid \$7,949.83 at settlement and \$7,102.87 was paid to Applicant. (AX T.) However, there is no documentation showing whether the \$7,102.87 paid to Applicant was conveyed to the attorney. Applicant testified that he believed the debt was settled by the sale of the property and release of the lien. (Tr. 24-25; Answer to SOR at 2.)

It is not clear whether the lien was actually released. In December 2009, Applicant filed a motion to release the lien, which was denied. In January 2010, the attorney filed a notice of lien to enforce the April 2008 judgment. (AX F.) Applicant filed motions for reconsideration in March 2010 and July 2010, which were denied. (GX 3 at

2; Tr. 33-34.) At the hearing, Applicant was unable to explain the legal basis for the litigation about the lien. He has not made any further attempts to have the lien released. (Tr. 40.)

Applicant disclosed the judgment for a delinquent personal loan, alleged in SOR ¶ 1.b, in his SCA. He stated that the loan became delinquent because he fell behind on his payments during a period of unemployment, and that he was making monthly \$200 payments to satisfy it. (GX 1 at 37.) At the hearing, he testified that the debt was incurred through a personal loan for expenses related to his divorce. (Tr. 39, 43.) He submitted evidence showing that it was satisfied in April 2014. (AX G.)

In November 2010, Applicant filed a complaint against the attorney regarding the fee dispute. (AX V.) The state attorney grievance commission informed him that his complaint raised civil matters that should be addressed by a civil court, not in the grievance commission. (AX U.) Applicant testified that he sent emails and made telephone calls to the attorney's office in an effort to resolve the dispute, but he received no responses. His last email was in December 2016. (Tr. 36.)

Applicant earns \$4,000-\$5,000 per month as an investigator, when he is working. His police retirement pay is about \$1,100 per month, half of which has been awarded to his ex-wife. His disability pay is about \$1,300 per month. He testified that he is current on all his bills. (Tr. 21-23.) He submitted a personal financial statement reflecting monthly net income of about \$5,000, expenses of \$702, and debt payments of about \$3,067, leaving a net remainder of about \$1,231. (AX Q.)

Applicant has received numerous letters and certificates of appreciation from various veterans' organizations. (AX O.) Four professional colleagues and friends submitted letters attesting to his honesty, integrity, reliability, dedication, and hard work. (AX P.)

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 adjudicative guidelines. 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.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable 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 disclosures in his SCA, answer to the SOR, testimony at the hearing, and the documentary evidence submitted by Department Counsel establish the disqualifying conditions in AG ¶ 19(a) ("inability to satisfy debts") and AG ¶ 19(b) ("unwillingness to satisfy debts regardless of the ability to do so"). The following mitigating conditions are potentially relevant:

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to 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 partially established. The judgment alleged in SOR ¶ 1.a was filed nine years ago, but it is not yet resolved. The judgment alleged in SOR ¶ 1.b was filed ten years ago and satisfied more than three years ago. Both judgments were related to Applicant's divorce. The circumstances make them unlikely to recur, because Applicant is not likely to go through another divorce and not likely to hire the same attorney for any purpose.

AG ¶ 20(b) is established. Both debts were caused by Applicant's marital breakup. If he was coerced into signing the confession of judgment on the courthouse steps, as he claims, that fact also would be a condition beyond his control. He acted responsibly by resolving the judgment alleged in SOR ¶ 1.b and taking multiple steps to resolve the judgment alleged in SOR ¶ 1.a, albeit unsuccessfully.

AG ¶ 20(c) is not established. Applicant has received legal services, but not the type of financial counseling contemplated by this mitigating condition.

AG ¶ 20(d) is established for the judgment alleged in SOR ¶ 1.b. It is partially established for the judgment alleged in SOR ¶ 1.a. Applicant's testimony that he did not understand the legal implications of the confession of judgment was plausible and credible. He took significant and reasonable steps to resolve the judgment, including assigning his profits on the sale of the marital home to the attorney and making repeated efforts to resolve the dispute about the amount, if any, required to satisfy the judgment.

AG ¶ 20(e) is established for the judgment alleged in SOR ¶ 1.a. Applicant has documented the basis for his dispute and made significant efforts to resolve it, but it is not yet resolved. It is clear from the documentary evidence that the attorney was willing to accept \$20,000 as full settlement when Applicant signed the "Irrevocable Assignment and Transfer in December 2006." It is not clear why the confession of judgment increased the amount due to \$26,713 in April 2008. It also is not clear why the attorney agreed to release the lien on the marital property in June 2009 but then filed a lien to enforce the full amount of the judgment in January 2010. Applicant's belief that the debt was resolved when the property was sold and the lien was released in June 2009 is plausible and reasonable. It is clear that the attorney received at least \$7,949.83 at settlement, but it is not clear whether the payment of \$7,102.87 paid to Applicant was conveyed to the attorney. It is clear, however, that Applicant has a reasonable basis to dispute the debt.

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(d).³

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

Applicant was sincere, candid, and credible at the hearing. He has held a security clearance for almost 41 years, apparently without incident. He has a remarkable record of public service and heroism. His dispute of the debt in SOR ¶ 1.a is sincere and is not an attempt to avoid a legitimate debt. His naïveté in legal matters was a major contributing factor. His unsuccessful attempts to resolve the debt do not raise any issues regarding his current trustworthiness, reliability, and good judgment.

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 mitigated the security concerns raised by his delinquent debts.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a and 1.b:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge

³ The factors are: (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.