



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



In the matter of:)
)
) ISCR Case No. 15-04604
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

10/16/2017

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On September 23, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 1, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a*

Sensitive Position (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs, as required.¹

The SOR alleged security concerns under Guideline F. The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant.

On March 24, 2014, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated January 18, 2017, was provided to him by letter dated January 24, 2017. Applicant received the FORM on February 8, 2017. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any additional information within the 30-day period. On October 1, 2017, the case was assigned to me.

Findings of Fact

Applicant denied all of the SOR allegations with explanations. Additional findings of fact follow.

Background Information²

Applicant is a 61-year-old manager employed by a defense contractor since July 1997. He seeks a security clearance in conjunction with his current employment.

Applicant received his high school diploma in April 2004. He was awarded a bachelor’s degree in July 2007. Applicant served in the U.S. Navy from February 1974 to March 1996, and received an honorable discharge. He was married from April 1976 to December 1981, and that marriage ended by divorce. Applicant remarried in April 1985. He has four adult children.

Financial Considerations

Applicant’s SOR lists three allegations under this concern: 1.a. - a credit card collection account for \$4,759; 1.b – a medical collection account for \$707; and 1.c. – he failed to file his Federal income tax returns for tax years 2010, 2011, 2012, and 2013. These allegations are established through the Government’s exhibits (Items 1 – 6)

¹ The new AGs are available at http://ogc.osd.mil/doha/SEAD4_20170608.pdf.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

In Applicant's October 28, 2014 Office of Personnel Management Personal Subject Interview (OPM PSI), Applicant stated the \$4,759 credit card collection account was his wife's business account, and he was not aware that his name was associated with that account. He stated that he intended to satisfy that debt in full by December 2014. (Item 3) In Applicant's SOR answer, he stated that he believed the creditor provided his wife a FORM 1099-C to file with their tax return. (Item 1)

Applicant stated in his OPM PSI that the \$707 medical collection account came about because of an insurance coordination issue. He was disputing this bill, but if it was determined that he owed the money, he would "satisfy the amount immediately." (Item 3) In Applicant's SOR answer, he stated that the hospital bill was not filed correctly and that the "[h]ospital was notified." (Item 1)

Applicant stated in his OPM PSI that his wife had a hard time keeping the financial books of her DVD business in order. Because of her books being in a "mess," his wife was unable to gather the necessary records to file their taxes for tax years 2010 through 2013. Applicant hired a tax preparer in 2014 to address his wife's bookkeeping problems and file their taxes. He stated in that interview that he intended to satisfy any tax liability by mid-2015. (Item 3) In Applicant's SOR answer, he stated, "all years have been filed."

Applicant did not provide documentation to corroborate the claims made in his SOR answer. On May 13, 2016, Department Counsel initiated an e-mail exchange with Applicant following a telephone conversation seeking documentation that would mitigate his tax situation and two debts. In particular, Department Counsel requested that Applicant provide tax transcripts for tax years 2010 through 2015 or additional proof of filing and a copy of FORM 1099-C that he referred to in his SOR answer. Applicant did not provide the requested documentation as of August 3, 2016 in response to Department Counsel's e-mails nor did he provide the requested documentation in response to Department Counsel's FORM. (Item 6)

In short, the file lacks sufficient evidence that Applicant paid, arranged to pay, settled, compromised, disputed, or otherwise resolved his SOR allegations. He did not describe financial counseling or present a budget. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for his financial problems and other mitigating information. The FORM noted that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. As noted, Applicant did not submit evidence responsive to the FORM.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “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. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No.

02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides four disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(b) unwillingness to satisfy debts regardless of the ability to do so”; “(c) a history of not meeting financial obligations”; and “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” Based on the information in the SOR, the record established the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists six potential mitigating conditions:

(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;

(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;

(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;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

In summary, no mitigating conditions fully apply. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant has been gainfully employed for the majority of his adult life, and he is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his long-standing financial problems are being addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against the Applicant.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on an explanation lacking sufficient supporting

documentation to fully establish mitigation, financial considerations security concerns remain.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
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Subparagraphs 1.a – 1.c:	Against Applicant
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Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT TUIDER
Administrative Judge