



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-06454
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: Joseph M. Owens, Esq.

11/02/2016

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 June 19, 2014. On March 24, 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 April 29, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 11, 2016, and the case was assigned to me on July 20, 2016. On July 28, 2016, the Defense

Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for August 18, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 17 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until September 2, 2016, to enable him to submit documentary evidence. At his request, I extended the deadline for submitting evidence to September 15, 2016. He timely submitted Applicant's Exhibits (AX) A through M, which were admitted without objection.¹ Department Counsel's comments regarding AX A through M are attached to the record as Hearing Exhibit II.² DOHA received the transcript (Tr.) on August 30, 2016.

Findings of Fact³

In his answer to the SOR, Applicant admitted all the allegations except SOR ¶ 1.o, which he denied. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old ground support equipment technician employed by a defense contractor. He served on active duty in the U.S. Navy from June 1986 to September 1988 and received an honorable discharge. He has worked for defense contractors since his discharge from the Navy. He attended a technical institute from September 1983 to June 1985 and received an associate's degree.

Applicant held a security clearance while in the Navy and while working for a defense contractor for about five years after his Navy service. (Tr. 28.) He does not have an active security clearance.

Applicant married in June 1986. He and his wife have three adult children, a son and two daughters. All three children live with him. His son suffers from muscular dystrophy, is disabled, and is unable to work. Applicant financially supports his son and pays whatever medical expenses are not covered by insurance. His son receives disability compensation of \$400 per month. His daughters are school teachers, live with him, and each pays monthly rent of \$400. (Tr. 26.)

Applicant filed Chapter 13 bankruptcy petitions in June 2004, October 2004, March 2005, July 2005, March 2006, and June 2006. Each petition was dismissed for

¹ Applicant's exhibits were submitted electronically. His submission included 10 blank pages between AX D and AX E and between the pages of AX E through M. The blank pages have been removed. I reopened the record to enable Applicant's attorney to verify that I had received complete copies of AX E through M. (Hearing Exhibit III.) The record closed on October 28, 2016.

² Hearing Exhibit I is the cover letter from Department Counsel providing Applicant with copies of the documents intended to be presented at the hearing, in compliance with the Directive ¶ E3.1.13.

³ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

failures to obtain confirmation of a payment plan, comply with a confirmed plan, submit required documents, or appear at show-cause hearings. (GX 9 through 13.) Applicant filed a motion to reconsider the dismissal of his June 2006 petition and then withdrew it, declaring: "I, [Applicant], wish to withdraw my pending motion to reconsider the dismissal and other issues pertaining to my case. I have seen the error in filing without an attorney and do not wish to cause further problems. I will not be filing any more cases." (GX 14.)

In addition to his employment by defense contractors, Applicant owned and operated a pizza business from 1998 to 2003, when the business failed and he found himself in financial distress. He was charged with felony issuance of two or more bad checks within 90 days in April 1998, and the charges were dismissed in November 1998.⁴ (GX 7.) He was convicted of passing a worthless check for \$66 in October 1999 and passing a worthless check for \$62 in October 2000. (GX 8.)

Applicant's first six bankruptcy petitions were an effort to save his business and to prevent foreclosure on the family home. He testified that he was advised by a "home-saving" company and an attorney to file bankruptcy, fail to make the payments, let the petition be dismissed, and then file again to prevent the mortgage lender from foreclosing. (Tr. 33-37.)

In 2010, Applicant signed a rent-to-buy contract on a house. After he had made about \$20,000 in payments to the seller, a building contractor, the seller filed a petition for bankruptcy. Applicant was forced to move out of the house, and he lost the money he had paid. (Tr. 38-39.)

Applicant purchased another house, missed one mortgage loan payment in 2011, and was unable to catch up. (Tr. 39-43.) He filed his seventh Chapter 13 bankruptcy petition in July 2013, after the lender threatened to foreclose. He stopped making payments to the bankruptcy trustee when the lender offered to modify the loan. The loan was not modified. By January 2015, Applicant had failed to make payments totaling about \$17,439. The bankruptcy court ordered him to cure the arrearage and resume making payments. The bankruptcy petition was dismissed in March 2015 for failure to make the required payments. (GX 15.)

In September 2012, Applicant filed an identity theft complaint with the local sheriff. He suspected identity theft because he was contacted by the Internal Revenue Service (IRS) after he filed his tax return, and the IRS informed him that a return had already been filed in his name. (AX C; Tr. 49.) He also discovered unauthorized withdrawals from his bank account, checks written on his account, and several credit cards opened in his name. The credit cards were cancelled with no detriment to

⁴ The bad checks were not alleged in the SOR. 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 unalleged conduct for these limited purposes.

Applicant, but he lost about \$500 from his bank account. (Tr. 62-63.) The identity theft issue has not been resolved.

Applicant filed his eighth Chapter 13 petition in May 2015, when the lender again promised to negotiate a modification but reneged on the promise. The petition included a state tax debt of \$38,219 and a federal tax debt of \$6,812. (GX 17, plan at 3.) The May 2015 petition was dismissed in December 2015 for failure to make payments. (GX 16.)

In October 2015, Applicant received a check for \$1,798 as a result of a settlement by his mortgage lender, after a federal agency determined that the lender mishandled borrowers' requests for loss mitigation assistance. The lender misled borrowers into believing that they would be approved for loan modifications and then gave borrowers the "run around" regarding the required supporting documentation, resulting in delinquent payments and foreclosures. (AX A; AX D.)

Applicant filed his ninth Chapter 13 petition in February 2016, and he is making payments of \$3,700 per month. The mortgage lender, notwithstanding its previous mishandling of Applicant's mortgage loan, is among the secured creditors being paid by the trustee. Applicant did not submit documentary evidence of the creditors included in his current bankruptcy petition. However, his bankruptcy attorney submitted a letter stating that all debts reflected in Applicant's CBRs were included in the February 2016 bankruptcy petition. (AX A.)

In addition to alleging Applicant's first eight bankruptcy filings (SOR ¶¶ 1.a-1.h), SOR alleges 13 delinquent debts. The status of these debts is set out below.

SOR ¶¶ 1.i and 1.j: state tax lien filed in December 2011 for \$38,219; and federal tax lien filed in August 2010 for \$6,812. Applicant listed these liens in his May 2015 bankruptcy petition. He did not explain how the delinquent taxes were incurred or present any documentation of their status. The liens were filed before Applicant filed his identity theft complaint. In October 2010, Applicant hired a tax attorney and paid a retainer of \$525 plus fees of \$555. (AX B.) He testified that the tax attorney did not resolve his tax problems. He hired another tax attorney about two years ago, but his tax debts are not resolved. The state and federal tax liens were included in Applicant's bankruptcy May 2015 petition. (GX 17, Proposed Plan at 3.) The record does not include a listing of the debts listed in the February 2016 bankruptcy petition.

SOR ¶ 1.k: judgment for water treatment system entered in July 2011 for \$786. Applicant testified that the system was installed by the builder of his rent-to-buy home, but Applicant was sued for the cost of the system after the builder filed for bankruptcy. This debt was included in Applicant's May 2015 bankruptcy petition. (GX 17 at 5.) The bankruptcy court granted Applicant's motion to avoid the judgment lien and declared the judgment lien to be unenforceable. (GX 17, court order and Schedule E.)

SOR ¶ 1.l: unspecified charged-off debt to a bank (the lender for Applicant's home mortgages) for an unspecified amount incurred on an unspecified date. This allegation did not comply with the specificity requirement of Directive ¶ E3.1.3, and it did not provide adequate information to enable Applicant to respond to it. This allegation is resolved for Applicant.

SOR ¶ 1.m: debt to a credit union past due for \$20,229. Applicant purchased a new vehicle in 2011. His July 2015 credit bureau report (CBR) reflected that his payments were past due in the amount alleged in the SOR as of the date of the CBR. The debt was included in his May 2015 bankruptcy petition. (GX 17, Schedule D.) He testified that he was not behind on his payments when he filed his bankruptcy petition, but the debt was included so that it could be consolidated with other debts to be handled by the bankruptcy trustee. (Tr. 58.)

SOR ¶ 1.n. debt to a bank placed for collection of \$644. Applicant testified that this debt was incurred when he deposited a check from someone for whom he had done work, and the check was dishonored for insufficient funds. (Tr. 58-59.) The debt was paid in January 2013. (AX E.)

SOR ¶¶ 1.o, 1.p, 1.q, and 1.r: debt to a collection agency for \$619; debt to a furniture store charged off for \$2,353; debt to a collection agency for \$417; medical debt placed for collection of \$89. Applicant testified that he did not recognize these debts. He made no effort to identify the creditors or the nature of the debts. (Tr. 59-61.) In his answer to the SOR, he attributed the debt in SOR ¶ 1.o, which was referred for collection in June 2011, to identity theft. The debts in SOR ¶¶ 1.o, 1.p, and 1.q were included in his May 2015 bankruptcy petition, but the medical debt in SOR ¶ 1.r was not included. (GX 17, Schedule F.)

SOR ¶ 1.s: debt to municipal government placed for collection of \$60. Applicant testified that this debt was for a stop-sign violation and that it was paid. (Tr. 61-62.) He submitted no proof of payment. The debt was included in his May 2015 bankruptcy petition. (GX 17, Schedule F.)

SOR ¶¶ 1.t and 1.u: insufficient-funds checks \$383 and \$739. Applicant testified that he did not recognize these debts, but he surmised that they must have been resolved because the financial institution on which the checks were drawn approved him for a car loan. (Tr. 62.) The debts were included in his May 2015 bankruptcy petition. (GX 17, Schedule F.) They are not reflected in his CBRs from January 2014 (GX 4), February 2015 (GX 5), or July 2015 (GX 6), indicating that they were resolved.

Applicant's net monthly pay is about \$3,200. In addition, he receives \$700 in monthly disability benefits. He also works as an umpire for various sports, earning about \$7,000 per year. (Tr. 30-33.) His wife's net monthly pay is about \$2,100. His daughters each pay him \$400 per month for rent. He pays the bankruptcy trustee \$3,900 per month. He estimates that his net monthly remainder is about \$2,500. (Tr. 63-67.) His

federal income tax returns reflect that his total income was \$61,364 in 2013; \$66,420 in 2014; and \$82,086 in 2015. He claimed federal income tax refunds of \$1,980 in 2013; \$1,750 in 2014; and \$1,142 in 2015. The record does not reflect whether those refunds were applied to his federal tax debt.

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, his testimony at the hearing, and the documentary evidence submitted by both sides establish two disqualifying conditions under this guideline: AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) and AG ¶ 19(c) (“a history of not meeting financial obligations”).

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 recurrence unlikely.

AG ¶ 20(b) is not fully established. Applicant has encountered conditions largely beyond his control: the failure of his business in 2003; his wife's period of unemployment due to medical conditions; the disability of his son; the bankruptcy of his home builder; and the mishandling of his mortgage loan by the lender. While resort to Chapter 13 bankruptcy would be reasonable in most cases, Applicant has used it as a delaying tactic rather than a structured method for repaying debts, and his track record does not inspire confidence that he will carry out the payment plan for his most recent bankruptcy.

AG ¶ 20(c) is not fully established. Financial counseling is a part of the Chapter 13 bankruptcy process, but there are not yet "clear indications" that his financial problems are being resolved.

AG ¶ 20(d) is not established. Applicant has not yet demonstrated a track record of compliance with his most recent Chapter 13 payment plan.

AG ¶ 20(e) is established for the debt alleged in SOR ¶ 1.j. Applicant successfully disputed this debt before the bankruptcy court. AG ¶ 20(e) is not established for the other debts alleged in the SOR, because he has not connected his identity theft problem to the other debts or established any other basis for disputing them.

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 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 delinquent debts. 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.j:	Against Applicant
Subparagraphs 1.k and 1.l:	For Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	For Applicant
Subparagraphs 1.o-1.s:	Against Applicant
Subparagraphs 1.t-1.u:	For 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