



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



In the matter of:)
)
) ISCR Case No. 17-00966
)
Applicant for Security Clearance)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

05/22/2018

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns about his financial problems; however, personal conduct security concerns were mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On May 23, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations) and Guideline E (personal conduct).¹ Applicant responded to the SOR and requested a hearing. On October 30, 2017, a notice of hearing was issued,

¹ The action was taken under Executive Order (EO) 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 implemented by the DOD on September 1, 2006. Effective June 8, 2017, by Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position were established to supercede all previously-issued national security adjudicative criteria or guidelines. Application of the AGs that were in effect as of the issuance of the SOR would not change the decision in this case.

scheduling the hearing for November 13, 2017. The hearing proceeded as scheduled. Applicant testified and submitted 12 documents, which I admitted as Applicant Exhibits (AE) A through L, without objection. Department Counsel submitted five documents, which I admitted as Government Exhibits (GE) 1 through 5, without objection. After the hearing, Applicant timely submitted two emails with two sets of attachments, which I admitted as AE M through P. DOHA received the transcript on November 22, 2017.

Findings of Fact

The SOR alleges financial considerations security concerns, based on Applicant's 14 delinquent debts, and personal conduct security concerns, based upon Applicant's outside employment and debarment from U.S. Government contracting. In his response to the SOR, Applicant denied the debt in SOR ¶ 1.k., and he admitted the remaining alleged debts. He also denied the allegation in SOR ¶ 2.a., and he admitted the allegations in SOR ¶¶ 2.b. and 2.c. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 65 years old. He earned a bachelor's degree in 1976. From 1974 to November 2013, he was employed full time as an engineer for the Department of the Navy (DON). He retired in November 2013 following allegations that he committed a procurement integrity violation. Applicant was unemployed from November 2013 to January 2014. Since January 2014, he has been employed full time as an engineer by a DOD contractor. From August 2006 to September 2013, Applicant was also self-employed as a consultant providing engineering services to DOD contractors on subject matter identical to his DON duties. He has been married since 1976, and they have two adult children.²

Applicant's December 2014 and February 2017 credit reports establish the 14 debts, totaling approximately \$110,000. These debts became delinquent between June 2011 and October 2014. Applicant claimed to have been making monthly payments on SOR ¶ 1.c. since February 2014; however, he only provided documentary evidence of three payments totaling \$300. There is no documentary evidence of any other payments or payment arrangements on Applicant's non-mortgage debts.³

Beginning in about November 2011, Applicant struggled to afford the payments on his first and second mortgage-loan accounts. In 2012, Applicant consulted a real estate attorney, who recommended a short sale; however, Applicant chose to retain the home in hopes that the housing market would improve. Following a 2013 mortgage modification, Applicant's mortgage payments increased significantly. From November 2014 until January 2017, Applicant made no mortgage payments. In 2014 and 2015, Applicant consulted a financial counselor and a bankruptcy attorney, who recommended bankruptcy. In January 2017, Applicant's mortgage again was modified. Applicant claimed to have made monthly payments on his second mortgage (SOR ¶ 1.a.) for 18 months; however, the documentary evidence shows that he had been denied a

² GE 1; GE 5.

³ GE 2; GE 3.

modification in October 2016. Applicant provided documentary evidence of January 2017 modifications of his first and second mortgages and one payment on his second mortgage. There is no documentary evidence demonstrating his adherence to the modification agreements.⁴

As a DON engineer, Applicant frequently was assigned to generate a statement of work (SOW) for a specific project. During Applicant's career, his projects had exclusively been completed or constructed by the DON itself and not developed for solicitation and procurement. In 2012, Applicant was assigned a typical SOW. After the SOW was completed, Applicant was requested to identify about ten DOD contractors capable of completing the specific construction project. Applicant provided a list of DOD contractors, including two contractors for whom he had previously provided consulting services. Although he recused himself from the solicitation portion of the procurement, Applicant did not disclose to his supervisors or coworkers that he had previously worked with any of the listed contractors. Applicant's supervisor subsequently received a complaint from an unsuccessful bidder claiming Applicant's conflict of interest violated procurement integrity regulations. The complaint triggered an investigation, and Applicant retired from the DON prior to the conclusion of the investigation.⁵

The DON investigation found that (1) Applicant was listed as a director of the DOD contractor who was a prospective bidder; (2) Applicant's had performed consulting services (\$35,000) for the DOD contractor in 2010 and in 2012, with possible overlap with his work on the SOW in question; (3) Applicant was listed as a representative of the DOD contractor for a speaking engagement at an upcoming professional conference; and (4) Applicant had not adhered to proper DON procedures to report his outside employment. In October 2014, the DON concluded that Applicant was in an employment- or business-relationship with the DOD contractor at the time he worked on the SOW in question. He violated the Procurement Integrity Act, 41 U.S.C. §§ 2101 *et seq.*, by participating "personally and substantially" in the procurement and solicitation. Applicant was debarred from U.S. Government contracting for one year, including the solicitation of professional services to U.S. Government agencies. Applicant completed several business ethics trainings to shorten his debarment.⁶

During his debarment, Applicant sent an email to a former DON colleague who was still involved with the project related to Applicant's debarment. In addition to exchanging pleasantries, Applicant notified his former colleague of his new employment with a DOD contractor and offered his professional assistance. In March 2015, the DON issued a show cause letter based on this improper contact. In April 2015, the DON found that Applicant's email contact with his former colleague violated his debarment, but found that Applicant's contact was not intended to solicit business.⁷

⁴ AE A-D, N; Tr. 38-42.

⁵ Tr. 44-59, 95-98, 103-105.

⁶ GE 4; AE I; AE P.

⁷ GE 4; Tr. 113-15; AE F-K, P.

Applicant testified that he had informed his then-supervisor in 2006 about his outside consulting work. He further testified that he was not required to submit a financial disclosure form or disclose for whom he had performed consulting services. Applicant was aware of his listed affiliation as a director of one DOD contractor, and he was scheduled to speak at a professional conference as a representative of that DOD contractor.⁸

Applicant attributed his financial problems and delinquent debts to the confluence of several events. In about 2010, Applicant's spouse closed her real estate business following a business downturn. In 2011, Applicant's consulting business slowed and his spouse was again unemployed. In 2012, Applicant's son was in a serious car accident, triggering significant medical expenses. In 2013 and 2014, Applicant's spouse experienced medical problems. Applicant has financially supported his son since the 2012 car accident, and he has financially supported his mother-in-law since about 2015. He currently contributes approximately \$2,100 monthly towards their support.⁹

Applicant's wife is currently employed, and Applicant's income includes his salary from the DOD contractor and his DON retirement. Together, their monthly household take-home income is approximately \$12,000.¹⁰

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

⁸ Tr. 95-100.

⁹ Tr. 63-88.

¹⁰ Tr. 58. 86.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the S`OR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations 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 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 risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant’s 14 delinquent debts total approximately \$110,000. These debts became delinquent between June 2011 and October 2014, and they remain delinquent. AG ¶¶ 19(a) and 19(c) apply.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

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

Applicant bears the burdens of production and persuasion in mitigation. Applicant's delinquent debts remain, and he has not yet addressed most of these debts. Although he faced some circumstances that hindered his ability to address his debts, those circumstances abated in about 2015 with his spouse's employment and his son's recovery and employment. Applicant has not provided documentary evidence of sufficient debt-resolution efforts to remove doubts as to his reliability and judgment. AG ¶ 20(a) does not apply.

Several events and circumstances beyond Applicant's control contributed to his financial problems. Nonetheless, Applicant must also demonstrate that he acted responsibly under the circumstances to address his delinquent debts. Despite not paying his mortgage for over two years, there is no documentary evidence of any debt-resolution efforts on his non-mortgage debts until after the issuance of the SOR. Furthermore, given Applicant's significant household monthly income (\$12,000), only a few of Applicant's delinquent debts have been addressed. Applicant has not presented sufficient documentary evidence for me to conclude that he acted responsibly with respect to his delinquent debts. AG ¶ 20(b) does not apply.

Applicant sought professional advice from a financial counselor and multiple attorneys, although he did not pursue the recommendations to complete a short sale or bankruptcy. He has not provided a monthly budget, and most of the alleged debts remain unaddressed. Therefore, I cannot conclude that his financial problems are under control. AG ¶ 20(c) does not apply.

The concept of good faith requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.

Applicant provided documentary evidence of three payments on one debt (SOR ¶ 1.c.) and one payment on his mortgage loan (SOR ¶ 1.a.). Although he testified that he paid his second mortgage loan for 18 months, Applicant's testimony conflicts with his own documentary evidence. Applicant has not provided documentary evidence demonstrating adherence to any payment plans on the established debts. AG ¶ 20(d) does not apply.

Applicant encountered circumstances beyond his control that contributed to his financial problems. Nonetheless, he has not demonstrated that he acted responsibly in addressing his delinquent debts. Applicant did not mitigate the financial considerations security concerns.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying condition is potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . (3) a pattern of dishonesty or rule violations.

Applicant performed engineering services for DOD contractors in subject areas identical to his DON employment. His consulting work with one DOD contractor overlapped with his SOW assignment wherein he listed this contractor as a prospective bidder capable of completing the assigned project. While Applicant may not have been required to complete a financial disclosure statement, he was required to disclose his outside employment to his supervisor. There is no documentary evidence that Applicant informed his supervisor of his outside employment, and the DON findings concluded that no such report occurred. Furthermore, the DON concluded that Applicant violated the Procurement Integrity Act by his active participation in the solicitation while also in an employment relationship with the DOD contractor. Applicant then violated the debarment by contacting his former colleagues and offering his professional assistance. Even if Applicant's violations were not deliberate, his conduct reflects a series of poor judgment and a failure to comply with ethics regulations. AG ¶ 16(d)(3) applies.

The following mitigating conditions under AG ¶ 17 are potentially relevant:

(c) the offense is so minor, or such much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's procurement violation during his 40-year DON career was isolated, and there is no record evidence of other workplace violations. Applicant has acknowledged his mistakes and completed substantial remedial ethics training. Given his retirement and ethics training, these circumstances are unlikely to recur and do not cast doubt on his current reliability and judgment. AG ¶¶ 17(c) and (d) apply.

Applicant exercised poor judgment by failing to adequately disclose his outside employment with a DOD contractor and by then substantially participating in the procurement. He has acknowledged his behavior and completed substantial ethics training such that his missteps are unlikely to recur. I conclude that Applicant has mitigated the personal conduct security concerns.

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and E and the factors in AG ¶ 2(d) in this whole-person analysis.

Through extensive remedial ethics training, Applicant has mitigated the personal conduct security concerns associated with his poor judgment and procurement violations associated with his outside employment. Circumstances beyond Applicant's control contributed to his financial problems; however, he failed to demonstrate that he acted responsibly in addressing his delinquent debts. Given his burden to demonstrate financial responsibility, trustworthiness, and good judgment, I conclude Applicant did not mitigate the financial considerations security concerns.

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
Subparagraphs 1.a.-1.n.:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a.-2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge