



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



In the matter of:)
)
) ISCR Case No. 17-01505
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

08/08/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has significant unresolved state tax debt. He did not provide sufficient evidence to mitigate the security concerns under Guideline F, financial considerations. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 9, 2015. On May 26, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations.¹

¹ The action was taken 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 effective within the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.²

Applicant answered the SOR on June 23, 2017, and requested a hearing. The case was assigned to me on February 16, 2018. On March 23, 2018, a notice of hearing was issued scheduling the hearing for April 25, 2018. The hearing convened as scheduled.

At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 through 7. GE 1, and GE 3 through 7 were admitted without objection. Applicant objected to GE 2, an unauthenticated summary of his background interview, and it was not admitted.³ Two documents attached to Applicant's answer were marked as Applicant's Exhibits (AE) A and B, and admitted without objection. Applicant also testified. I held the record open to allow Applicant the opportunity to submit additional documentation. He timely submitted AE C through AE G, which were admitted without objection.⁴ The record closed on May 11, 2018. DOHA received the transcript (Tr.) on May 7, 2018.

Findings of Fact

Applicant admitted SOR ¶¶ 1.c, 1.d, 1.e, 1.h and 1.i. He denied SOR ¶¶ 1.a, 1.b, 1.f, and 1.g. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 52 years old. He is a high school graduate. He was married to his first wife from 2003 until they divorced in September 2014. He remarried in July 2017. Applicant has two grown children from a prior relationship. His second wife has a 20-year-old son who lives with them. Applicant and his wife separated in 2012. He lived with friends and relatives for a time, until moving to his current home, in the geographic area where he works, in September 2014. (Tr. 27-29, 63-64; GE 1)

Applicant has been employed in his current position in maintenance with a defense contractor since September 2015. For several previous years, he had sporadic employment and periods of unemployment. He was employed from April 2007 to July

² Applicant received a copy of the new AGs with the Government's discovery package, and I explained their applicability to him at the start of the hearing. (Tr. 7-8; Hearing Exhibit I)

³ Tr. 19-22.

⁴ AE A is Applicant's September 2014 divorce decree. AE C is a letter detailing Applicant's post-hearing submissions. AE D is Applicant's payment history on SOR ¶ 1.h, and AE B shows one payment toward that debt. AE E shows an October 2015 payment of about \$653 towards a debt. AE F concerns SOR ¶ 1.b. AE G is a recommendation letter.

2009, when he lost his job after his employer lost the contract that employed him. He was unemployed from July 2009 to February 2012 after he had two surgeries, and had to be medically cleared to return to work. Another job, which Applicant held from February 2012 to October 2013, ended when the plant where he was working closed down. Applicant was then unemployed again until August 2014. (GE 1)

Applicant incurred additional hardship when his grandmother passed away in September 2014 (the day of his divorce). His mother passed away a year-and-a-half later. (Tr. 29) He moved to the area where he now lives in September 2014, to be closer to his family. He took a temporary position until he was hired in January 2015 to work in maintenance for an apartment complex. He worked there until July 2015, when he began the temporary position which led to his current job with his clearance sponsor, in September 2015. (GE 1) He has never held a security clearance. (Tr. 12)

On his December 2015 SCA, Applicant disclosed significant tax debts, which he attributed to his former wife. He also disclosed several small medical debts. (GE 1 at 33-38)

Applicant and his first wife purchased their home in December 2005. SOR ¶ 1.a (\$8,822 past due) is the primary mortgage for the home (with a total balance due of \$358,714). (GE 4; GE 3 at 4) SOR ¶ 1.b is the second mortgage on the home. It was charged off in the amount of \$92,154. (Tr. 35-38, 51-56; 68; GE 3; GE 4)

Applicant denied both mortgage accounts and provided his divorce decree with his Answer. (AE A) Under the terms of the decree, Applicant's wife (the plaintiff) was awarded the marital home, "which is jointly titled to both parties. . . . Said award is subject to, and specifically conditioned on, the Plaintiff refinancing the mortgages on the marital property into her sole name." (AE A at 2) Both mortgages are referenced, and the creditor for SOR ¶ 1.a is specifically identified. (The holder of the second mortgage is a different, earlier creditor than the one named in SOR ¶ 1.b) (AE A at 2) Applicant's wife was to secure refinancing with 24 months of the divorce, otherwise the property was to be sold, with proceeds divided equally. (AE A at 2)

Applicant testified that this did not happen. Applicant said his former wife took no steps to either refinance or to sell the property. (Tr. 55) Both accounts remain listed on his credit report. (GE 4) After the hearing, Applicant provided documentation that the second mortgage (SOR ¶ 1.b) had been paid in full. (AE F)

SOR ¶¶ 1.c (\$836), 1.d (\$455), 1.e (\$126) and 1.i (\$648) are all medical debts that Applicant admits. SOR ¶ 1.i has been paid. (AE E) Applicant testified that the debts related to knee surgeries and treatments he had that were not covered by insurance. (Tr. 34, 56, 69)

SOR ¶ 1.h (\$10,180) is a judgment filed against Applicant in 2011 by a creditor bank. (GE 7) The amount alleged is the principal on the judgment. Credit reports in the record show a higher amount (\$11,500). Applicant provided documentation that since

2015, he has been making regular monthly payments of \$25 towards the debt, through April 2018. The debt is now managed by a debt collector law firm, which charges 10% annual interest. Despite Applicant's regular, consistent payments, the balance owed, including interest, is now almost \$16,500. (Tr. 41-46; AE D)

SOR ¶¶ 1.f (\$29,479) and 1.g (\$8,295) are two state tax liens issued against Applicant and his first wife by the state where they lived when they were married. Lien ¶ 1.g was issued in 2008, and lien ¶ 1.f was issued in 2015, the year after they divorced. (GE 5, GE 6)

Applicant denied both liens in his Answer, citing the divorce decree. The portion of the divorce decree relating to the liens states that, by agreement, the parties:

shall cooperate with each other to resolve and pay all claims for taxes, interest, additions to taxes, penalties, and expenses incurred in connection with their [State] tax debts owed for any years during the marriage[.]⁵

Applicant listed multiple tax liens on his SCA (including ¶ 1.f), though he asserted that he was not responsible for them due to his 2014 divorce. (GE 1 at 33-35) He asserted a similar defense in his Answer, as he referenced his divorce decree, though without specificity. (Answer; AE A)

At hearing, Applicant initially asserted that the tax liens had been "taken care of" and were no longer listed on his credit report. (Tr. 39-40) He also claimed that his wife had set up a payment plan out of her pay. (Tr. 39)

Applicant acknowledged that he failed to file his 2014 state income tax return by the April 2015 deadline. He said he never received his W-2 tax form from his employer, perhaps because they mailed it to his marital home and his wife never forwarded it. (Tr. 46-50) This is not alleged in the SOR, and I have not considered it as disqualifying conduct. Applicant indicated that all of his state and federal income tax returns have now been filed. (Tr. 49)

Applicant had no explanation for the 2008 tax lien. (Tr. 49-50) That lien significantly predated his 2014 divorce, and a 2008 tax return would have been due in April 2009, before his lengthy period of unemployment began, in July 2009.

After the hearing, Applicant indicated that he spoke to the state comptroller's office, and was told that the tax debts were being paid by his former wife. He said they were unable to provide him any other information, even though the liens were joint accounts. Beyond his own letter (AE C), he provided no corroborating documentation of the status of the liens. SOR ¶¶ 1.f and 1.g are unresolved.

⁵ AE A at 6.

Applicant's supervisor for the last three years provided a recommendation letter. Applicant is regarded as trustworthy and highly professional. He is self-motivated, punctual, and reliable, as well as a good citizen and asset to the workplace. (AE G)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials."⁶

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 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, these guidelines are applied 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(a), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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

⁶ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations 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. . . .

The financial considerations guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) . . . failure to pay annual Federal, state, or local income tax as required.

Applicant's credit reports reflect that he has incurred numerous unresolved delinquent debts over the last several years. "It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under ¶ E3.1.14 [of the Directive] for pertinent allegations."⁷ Notwithstanding Applicant's denials, the Government has met its burden, and AG ¶¶ 19(a), 19(c), and 19(g) apply.

Conditions that could mitigate 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

⁷ ISCR Case No. 11-00046 at 2 (App. Bd. Feb. 10, 2012).

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;

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

(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.

(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.

Applicant relies on the divorce decree, AE A, in denying the mortgage debts, (SOR ¶¶ 1.a and 1.b) The divorce decree establishes that his former wife is responsible for them, and had two years from the date of the divorce to either refinance the mortgage and remove Applicant from the deed, or to sell the property, with proceeds shared jointly. Neither option occurred. However, both mortgage debts are mitigated under AG ¶ 20(e) as they are his former wife's responsibility under the divorce decree. The second mortgage, ¶ 1.g, has also been paid.

AG ¶ 20(b) applies to the medical debts, which occurred because they were not covered by Applicant's insurance. He also had significant medical expenses following surgeries several years ago. The medical debts are small, and are due to conditions beyond Applicant's control. Medical debt ¶ 1.i has been paid. AG ¶ 20(b) applies to the medical debts.

Applicant has been making \$25 monthly payments on SOR ¶ 1.h since mid-2015. Because of the high interest rate, that amount is not enough to pay the debt down; indeed, he now owes over \$16,000, far more than the initial amount of about \$10,000. Nonetheless, he has been making a good-faith effort to resolve the debt, and AG ¶ 20(d) applies mitigate it.

The tax debts (SOR ¶¶ 1.f and 1.g) are unresolved. No mitigating conditions apply to those debts. Applicant did not establish that the debts occurred due to conditions beyond his control. He did not establish that they are his wife's responsibility. The divorce decree states that Applicant and his former wife are equally responsible for resolving them. Applicant claimed after the hearing that he was told by authorities that his former wife is paying down the tax debts through withholdings from her wages. This may be so, but Applicant provided no corroborating documentation to establish it. The Appeal Board has held that it is reasonable to expect applicants to present

documentation about the satisfaction of specific debts.⁸ Applicant did not show that either the 2008 lien (which predates the divorce) or the 2015 lien are being paid, otherwise resolved, or are under control. He did not show that he undertook responsible action in dealing with them. AG ¶¶ 20(c) and 20(d) do not apply to mitigate the tax liens.

Applicant's outstanding delinquencies are a "continuing course of conduct."⁹ Applicant did not provide sufficient evidence to establish that the behavior which led to his financial problems happened so long ago, were so infrequent, or occurred under such circumstances that they are unlikely to recur and do not continue to cast doubt on his current judgment, trustworthiness and reliability. AG ¶ 20(a) does not apply.

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 Guideline F in my whole-person analysis. Applicant has not accepted full responsibility for his tax debts, and has not taken sufficient steps to resolve them. His unresolved state income tax liens remain a security concern. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information.

⁸ ISCR Case No. 09-07091 at 2 (App. Bd. Aug. 11, 2010)

⁹ ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017).

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.e: | For Applicant |
| Subparagraphs 1.f-1.g: | Against Applicant |
| Subparagraph 1.h-1.i: | For Applicant |

Conclusion

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

Braden M. Murphy
Administrative Judge