



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 17-01790
)
 Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2018

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.

History of the Case

Applicant submitted a security clearance application (SCA) on September 13, 2016. On June 15, 2017, 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on July 7, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 9, 2017,

and the case was assigned to an administrative judge on October 12, 2017. On October 27, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 15, 2017. Applicant requested that the hearing be postponed due to his scheduled work-related overseas travel. The hearing was cancelled and the case was reassigned to me on November 9, 2017.

On November 13, 2017, DOHA notified Applicant that the hearing was rescheduled for December 7, 2017. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified but did not call any other witnesses or present any documentary evidence. I kept the record open until December 21, 2017, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on December 20, 2017.

On March 14, 2018, I notified Applicant that two pages appeared to be missing from AX D, and I reopened the record to enable him to submit the missing pages. He did not submit the missing pages. However, he submitted AX F and G, which were untimely but admitted without objection. The email correspondence regarding his post-hearing submissions is included in the record as an appellate exhibit.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.i and denied the allegations in SOR ¶¶ 1.j and 1.k. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old employee of a defense contractor. He has worked for defense contractors since at least June 2001. He testified that he has been working on military ships for 25 years, but he has never held a security clearance. (Tr. 20.)

Applicant's SCA reflects that he married in December 2005 and divorced in October 2007. His SCA does not list any previous marriages. However, he testified that he was married and divorced twice before 1995. (Tr. 20.) He has two sons, ages 25 and 15. (Tr. 34.)

Applicant filed a Chapter 7 bankruptcy petition in March 1995 and received a discharge in July 1995. (GX 6.) He attributed this bankruptcy to his divorce. His wife left him because of his job-related travel, and he was responsible for all the marital debts. (Tr. 20.) This bankruptcy is alleged in SOR ¶ 1.a.

Applicant filed another Chapter 7 bankruptcy petition in December 2008 and received a discharge in April 2009. (GX 5.) He attributed this bankruptcy petition to a

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

failed business partnership. He used personal credit cards to finance the business, and found himself heavily in debt when the business failed. (Tr. 21.) This bankruptcy is alleged in SOR ¶ 1.b.

In 2010, Appellant was involved in an altercation. He believed he was a victim and was justifiably fighting off an assault, but he was convicted of malicious wounding, a felony. As a result, he lost his credentials for access to sensitive areas at his workplace for six months. His work hours were reduced from 60-70 hours per week to 40 hours per week with no travel and per diem. Applicant's credentials were restored in 2012. (Tr. 22.) He filed a Chapter 13 bankruptcy petition in April 2014. The petition was dismissed in July 2015, after Appellant's pay was reduced again due to decreased overtime, and he failed to make the required payments under the bankruptcy plan. (GX 4; Tr. 26.) This bankruptcy is alleged in SOR ¶ 1.c.

Applicant filed another Chapter 13 bankruptcy petition in January 2016. The bankruptcy petition listed unpaid federal income taxes of \$28,145 for tax years 2010-2013 and \$10,717 for tax years 2006-2009. Part of the tax debt was attributable to an early withdrawal from a retirement account in 2006. (Tr. 27.) The petition also listed \$114,527 in nonpriority unsecured debts. (GX 3, Schedules E and F.) His payment plan required monthly payments of \$2,400 to the bankruptcy trustee. (Tr. 22.) Appellant's bankruptcy attorney advised him to stop making the payments and then refile to obtain lower payments. (Tr. 23.) The petition was dismissed in April 2017. This bankruptcy is alleged in SOR ¶ 1.d.

Applicant refiled his Chapter 13 bankruptcy petition in May 2017. This bankruptcy petition is alleged in SOR ¶ 1.h. This petition listed priority unsecured claims of \$6,421 and nonpriority unsecured claims totaling \$127,287. (GX 10 at 1.) The debts listed in the bankruptcy petition are alleged in SOR ¶¶ 1.e-1.g.

The financial statements in Applicant's most recent Chapter 13 petition reflect that his net monthly income is \$5,570, his monthly expenses total \$3,475, leaving a net monthly income of \$2,095. His financial statement also recites that he expects to receive a \$10,000 raise in his annual pay. The basis for his expected pay raise is not reflected in the record.

Applicant's revised bankruptcy plan was confirmed in July 2017. The plan provided for payments of \$425 for 3 months, then \$1,400 for 6 months, then \$2,095 for 45 months, and finally \$2,411 for 6 months. (AX G.) A bankruptcy trustee's report reflected that Applicant paid \$425 per month in June, July, and August 2017; and \$1,400 per month in September, October, and November 2017. The trustee's report reflected payments to Applicant's attorney, the bankruptcy trustee, and a credit union, but no payments to the IRS. (AX D.)

In December 2017, the bankruptcy trustee moved to dismiss the plan for underfunding after the IRS filed a claim. (AX F.) Applicant's attorney agreed to file a modified plan to satisfy the IRS claim. The bankruptcy court set a deadline of February

16, 2018, to file a modified plan. The modified plan provides for paying an IRS claim for \$11,675 in ten monthly installments. (AX G.) The plan was awaiting confirmation when the record closed.

Applicant's credit report from September 2016 reflected an unreleased federal tax lien for \$24,305 filed in January 2016; a judgment in favor of a credit union for \$9,370 filed in December 2014; and a judgment in favor of the same credit union for \$21,205 filed in November 2014. (GX 8 at 3.) The two unsatisfied judgments are alleged in SOR ¶ 1.j and 1.k.

Applicant testified that he has never had an account with the credit union, and the accounts were opened by his son, who has the same name, but with "Jr." as a suffix. His bankruptcy lawyer disputed the two judgments, and they were deleted from his credit record. (Tr. 37.) Applicant's credit report from April 2017 reflects the federal tax lien but does not reflect the two judgments. (GX 7.) His son's December 2017 credit report now reflects the two accounts with this credit union. (AX E.)

Applicant's program manager, who has known him for 17 years, submitted a letter attesting to Applicant's skills and leadership. He states that Applicant is highly regarded and a role model for his peers and supervisors. (AX A.)

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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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. . . . 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 admissions and the evidence submitted at the hearing establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts"); AG ¶ 19(b) ("unwillingness to satisfy debts regardless of the ability to do so"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(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"). The following mitigating conditions 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, 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;

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; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are recent, numerous, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant encountered several conditions that were largely beyond his control: his marital breakup, the business failure in 2008, and his fluctuating pay after his credentials were restored in 2012. His pay reduction after his felony conviction in 2010 was not a condition beyond his control, but rather a result

of his misconduct. His two Chapter 7 bankruptcies were reasonable measures to attain a fresh start after incurring overwhelming debts because of conditions beyond his control. His multiple Chapter 13 bankruptcy filings were reasonable means of gaining control of his finances, but he has not complied with any of the payment plans, and his track record of dismissed Chapter 13 bankruptcies raises doubt about whether he will comply with the payment plan for his most recent bankruptcy.

AG ¶ 20(c) is not fully established. Financial counseling is a prerequisite for a bankruptcy petition, but Applicant's financial situation is not yet under control.

AG ¶ 20(d) is not established. Applicant has not yet established a track record of adhering to a Chapter 13 payment plan.

AG ¶ 20(e) is established for the two debts to a credit union alleged in SOR ¶ 1.j and 1.k. Applicant articulated a credible basis for disputing the debts and referred the problem to his bankruptcy attorney. The debts have been deleted from his credit record and were reflected on his son's credit report from December 2017.

AG ¶ 20(g) is not established. Applicant included unsecured priority claims for federal income taxes in his Chapter 13 bankruptcy petitions, but there is no evidence that any payments have been made on his federal income tax 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 and applying the adjudicative factors in AG ¶ 2(d).²

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). 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 history of delinquent debts.

² 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.

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.b, 1.j, and 1.k: For Applicant

Subparagraphs 1.c-1.i: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge