



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-03776

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: Priscilla Justiniano, Esq.

07/16/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not 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 August 11, 2016. On December 4, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The DOD CAF acted 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 (AGs) implemented by DOD on June 8, 2017.

Applicant answered the SOR on January 9, 2018, admitting all of the SOR allegations under Guideline F, with explanations. He stated that most of the debts were due to loss of employment due to economic downturn and putative mistakes made in assessing his child support and rehabilitative alimony obligations. Applicant requested a hearing before an administrative judge. The case was assigned to me on May 4, 2018.

On May 24, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 12, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 3 were admitted into evidence without objection. At the hearing, Applicant testified and his attorney submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on June 20, 2018.

Findings of Fact¹

Applicant is 41 years old. He obtained a bachelor's degree in mechanical engineering in 2006, and an MBA in 2009. Applicant has approximately \$75,000 in student loans that are in deferral status while he has been underemployed. (Tr. 51-53) Applicant has been pending employment with a defense contractor since August 2016. He served on active duty in the U.S. Navy from 1995 to 2001, attained the rank of E-5, and received an honorable discharge. (Tr. 56) Applicant had a security clearance during his time in the service. (Tr. 11) He was married in November 2005 and divorced in September 2013, and has three children, ages 9, 10, and 12. (Tr. 48)

Applicant was laid off from his engineer position by a federal contractor on March 31, 2016, after approximately one year on the job. (AE D) Before that, he was laid off by another federal contractor in 2013, around the time of his divorce. Since March 2016, he has been collecting unemployment compensation from the state and working part time at jobs such as home depot, maintenance worker, and as a bouncer while awaiting reemployment as an engineer. (Tr. 25-26) He provided an August 3, 2016 offer of employment from a federal contractor, pending procurement of his security clearance. (AE A)

Applicant was not represented by counsel in his divorce proceedings. Applicant filed a petition to modify his Final Judgment of Dissolution of Marriage in 2015, but had to wait three years for a hearing. (Tr. 30) Applicant provided a March 26, 2018 Report and Recommendations of the Magistrate in connection with his petition to modify the Final Judgment of Dissolution of Marriage. (AE A) It states "his current employment began on April 7, 2017 at \$12.50 an hour, and includes free daycare . . . the husband is voluntarily underemployed and his income should be established at his last pay rate from employment: \$155,000 per year, with insurance costs at \$121 per month."² The next paragraph, G, notes that since the entry of final judgment the wife has remarried and become employed. She testified that she could not go to school for nursing and use her rehabilitative alimony because her former husband was always in arrears in child support and alimony payments. She had to focus on employment that became available to her as opposed to seeking higher education. (AE A)

¹ Unless stated otherwise, the source of the information in this section is Applicant's August 11, 2016 Security Clearance Application (SCA) (GE 1).

² AE A, Report and Recommendations of the Magistrate, at p. 3.

Applicant also submitted a four page Final Judgment Modifying the Final Judgment of Dissolution of Marriage dated April 12, 2018. (AE C) It reflects that the Final Judgment entered on September 10, 2013, imputed wages of \$57,000 per year to Applicant although he was not earning those wages. It further required Applicant to pay \$15,680 in rehabilitative alimony at the rate of \$522 per month for 30 months, and child support at the rate of \$1,810 per month. Applicant's petition was granted and rehabilitative alimony was terminated on August 1, 2013, and his child support obligation was modified to \$1,183 per month commencing in February 2018, plus the sum of \$236 per month toward the established arrearages of \$23,941. (AE C) Applicant testified that his arrearage is just under \$40,000 on the date of the hearing. (Tr. 24)

The SOR alleged 14 delinquent debts totaling approximately \$72,000. The largest delinquency concerns the child support arrearage. The SOR alleges in ¶ 1.a that Applicant is indebted for a child support arrearage in the approximate amount of \$64,479. Applicant admitted this allegation except for the amount. He submitted an audit ordered by the court. (AE B) I find that he is indebted for a child support arrearage of \$39,783, consistent with the results of this audit. The SOR alleged in ¶ 1.b that Applicant was served with a writ of attachment for failure to pay child support in 2012. He admitted this and testified that he made a poor judgment call and served seven days in jail as a matter of principle, before paying on the arrearage. (Tr. 36) Also, SOR ¶¶ 1.c through 1.o allege that Applicant has numerous delinquent consumer debts that were charged off or placed for collection. Applicant admitted to these delinquent debts, but Department Counsel noted that SOR ¶ 1.f and SOR ¶ 1.j are duplicate debts. (Tr. 66) SOR ¶ 1.j is withdrawn and will not be considered.

Applicant testified that several of the delinquent medical debts alleged in the SOR resulted from a 2013 motorcycle accident and a subsequent automobile wreck where he was injured. Applicant did not have medical insurance in either instance. (Tr. 63) Applicant testified that most of these delinquent debts at SOR ¶¶ 1.c through 1.o were from the time when he was married and his wife was unemployed as a stay-at-home mother. (Tr. 39, 73-75) In 2013, around the time of his divorce, he reached out to his numerous creditors, but they insisted on minimum payments toward any settlement. (Tr. 65) He could not afford to make payments since 71% of his wages were going to combined child support and alimony payments that were garnished from his pay. (Tr. 35, 45)

Applicant ascribed his periods of unemployment and expensive divorce as the source of his financial problems. (Tr. 36) He fell behind on child support because he was supposed to be paying it based upon imputed income as an engineer. The state court computer system allocated a large portion of his combined alimony – child support payments to alimony. (Tr. 72) Applicant claims he unwittingly went into arrears on the child support portion, and that his wife should not have been receiving the alimony because she did not attend nursing courses. He had credit counseling on May 25, 2018, and produced a budget. The budget does not countenance student loan payments that will have to be made eventually. (AE E, Tr. 44) Applicant has been living with his mother

to minimize costs for the last 18 months. (Tr. 46) He attached a letter from his mother to his budget, which purports that he pays rent in the amount of \$550 per month. (AE E) However, he testified that his budget was prospective based on assumption that he would get the engineer job. (Tr. 50) So, he is not actually paying the amounts listed as expenses on his budget.

Through counsel, Applicant submitted numerous documents at the hearing, AE A-F. His DD-214 reflects that Applicant served honorably in the Navy from 1995 – 2001 as a fire control systems technician. (AE A) He earned numerous awards including two good conduct medals and a Navy Achievement Medal. He also submitted three character reference letters from a colleague, fellow coach, and his best friend. (AE A) All attest to his work ethic, volunteerism, character and integrity. Applicant presently earns approximately \$12.50 per hour in his maintenance job at a ranch. (AE F) He was represented pro bono by his attorney at the hearing. (Tr. 37)

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, 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, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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, Appendix A, ¶ 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 avoided drawing 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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.”

Analysis

Guideline F, Financial Considerations

The security concern relating to 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. 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 abuse, 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...

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

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

Applicant's delinquent debts alleged in the SOR are confirmed by his credit reports, and Answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(a) and 19(c), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.³ Applicant has not met that burden. Although, he recently engaged an attorney who valiantly attempted to mitigate the delinquencies, the damage was done long ago. The lion's share of the financial concern is the child support arrearage. While Applicant claims that the alimony portion of his garnished wages was wrongfully paid to his former wife, she testified that she couldn't use it for nursing courses to advance her education because Applicant was routinely in arrears on payments, and she had the three children. Arguably, Applicant had unclean hands in this conundrum. The state court found that he was voluntarily underemployed. He remains underemployed in a maintenance job earning \$12.50 an hour.

Applicant admits to an error in judgment when he elected to go to jail for seven days in response to the writ of attachment for child support arrearage in 2012. That the state jailed him should have been a clear message to Applicant six years ago that this is a serious concern to the government. Applicant is a highly educated veteran. He possessed a security clearance previously and can not claim ignorance about the government's concern with financial delinquencies. Yet, he continues to have a child support arrearage of almost \$40,000. The divorce court made it clear that he was responsible for child support in 2013, and reaffirmed Applicant's responsibility, albeit at a reduced amount, in 2018. Applicant has done little or nothing to resolve his many other delinquent consumer debts at SOR ¶¶ 1.c – 1.o in the last five years. His counsel has now produced a budget and payment plan, but it is too little, too late. No track record of payments pursuant to the plan has yet been established. A promise to pay is not a substitute for a track record of payments.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 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 . . . , 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 non-profit credit

³ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

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

To his credit, Applicant has now engaged an attorney and obtained financial counseling and produced a budget. However, the budget is prospective and based on an assumption that Applicant will receive a security clearance. His child support arrearage is ongoing and he has not demonstrated a track record of payments pursuant to a repayment plan. Arguably, his periods of unemployment and expensive divorce were conditions beyond Applicant's control, but he has not demonstrated that he acted responsibly under the circumstances. Thus, AG ¶ 20 (b) is only partially applicable and none of the other mitigating conditions apply. His child support arrearage and other delinquent debts remain outstanding and unresolved.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG, Appendix A, ¶ 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, Appendix A, ¶ 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's finances remain a security concern. He has large outstanding balance for student loans (not alleged in the SOR) on top of the delinquencies alleged in the SOR. There is insufficient evidence to conclude that Applicant's financial problems are under control. The record evidence leaves me with questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline F, financial considerations.

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 through 1.o: Against 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 a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge