



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



In the matter of:)
)
) ISCR Case No. 14-04282
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

03/10/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On September 30, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national

interest to grant Applicant a security clearance. On October 18, 2014, Applicant answered the SOR and requested a hearing. This case was assigned to me on November 17, 2014. On November 21, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for December 8, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 5, while Applicant testified, called a witness to testify in his behalf, and offered Applicant's Exhibits (AE) A through C. The record of the proceeding was left open until December 22, 2014, to provide Applicant an opportunity to present additional matters. He timely submitted documents that were marked as AE D through H. All proffered exhibits were admitted into evidence without objection. Department Counsel's email forwarding Applicant's post-hearing submission was marked as Hearing Exhibit (HE) 1. The transcript (Tr.) of the hearing was received on December 17, 2014.

Findings of Fact

Applicant is a 45-year-old prospective employee of a defense contractor. He submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance for that job in March 2013. He graduated from high school in 1988 and attended college for about three years without earning a degree. He has been married and divorced twice. He has three children, a daughter 20 years old and sons 10 and 12 years old. His daughter is from his first marriage and attends college. He has custody of his sons from his second marriage. This is the first time that he has sought to obtain a security clearance.¹

The SOR alleged that Applicant had 18 delinquent debts totaling \$63,053 and that he received a Chapter 7 bankruptcy discharge in May 2010. In his Answer to the SOR, Applicant admitted each allegation with comments. His admissions are incorporated as findings of fact.²

From January 2003 to March 2009, Applicant was employed by a law firm providing document control and processing services. He earned about \$101,000 annually with overtime and his wife was earning about \$40,000. In about February 2006, he was transferred to another state, but continued to perform the same job. In March 2009, he was laid off from his job. He received a \$9,000 severance package and used some of that money to pay rent in advance knowing he would have difficulty finding another job. While unemployed, he looked for jobs and was repeatedly told he was overqualified. In August 2009, he obtained another document processing job earning about \$18,000 annually. While working in that job, he received a number of

¹ Tr. 4-5, 27, 58; GE 1.

² Applicant's Answer to the SOR.

promotions, and eventually became the director of operations earning annually about \$40,000.³

In May 2009, Applicant's youngest child had emergency hip surgery. His son's recovery required about two months of hospitalization. Unbeknownst to him, his wife had discontinued the family's health insurance resulting in medical expenses that were not covered by insurance. In February 2010, Applicant filed Chapter 7 bankruptcy. His bankruptcy petition listed \$30,127 in assets and \$90,533 in liabilities. On May 27, 2010, Applicant was granted a Chapter 7 bankruptcy discharge. In December 2010, his wife left him and the children. At some later point, she requested to have visitation rights with their sons. Applicant agreed to her request, but they did not have a formal custody agreement.⁴

In August 2011, Applicant's wife moved to another state. He sent their sons to her for Thanksgiving 2011. Three days later his wife called and informed him that he would never see his sons again. After she hung up, he had no way to contact her. He contacted the police in the other state to locate his sons. The police agreed to go to the house where he believed his wife was living. The police advised that the house was vacant. He had no idea where his wife and sons were located. With the help of the National Center for Missing Children and an attorney, his wife and sons were located in a third state months later. He indicated that he sold and pawned personal items to pay for the costs of finding his sons. During these events, he also experienced asthma attacks, chest pains, and other health problems. On December 5, 2011, Applicant filed for divorce. On September 10, 2013, the divorce was granted. In the divorce decree, Applicant's ex-wife is to pay \$887 per month in child support for their two sons and \$40 per month for child support arrearages totaling \$11,205.⁵

At the hearing, Applicant testified that he owed about \$50,000 in child support arrearages for his daughter. Initially, he and his first wife had a verbal agreement on the payment of child support. He agreed to pay about \$260 to \$270 per month in child support. He also agreed to his daughter's private schooling, which cost him about \$320 per month. He also paid for her tutors and other expenses. He stated that he was paying about \$450 per month until 2009 when he lost his job. Around that time, his first wife moved and was also unemployed. She approached him for more money, but he could not provide it. His ex-wife did not believe that he could not afford to make the payments. In about 2011, court proceedings were instituted against him for child support payments. In those proceedings, his ex-wife claimed that he had never paid any child support, but he was able to prove that he paid for his daughter's private schooling. However, he was not able to prove that he provided other support. As a result of the legal proceedings, he was found to owe about \$60,000 in child support arrearages.

³ Tr. 22-27, 32; GE 1, 2; AE B, C.

⁴ Tr. 25-28, 49-52; GE 1, 2, 3.

⁵ Tr. 27-31; GE 1, 2; AE B, F.

Since then, his pay has been garnished about \$472 per month for those arrearages. His child support arrearages are not alleged in the SOR.⁶

Applicant also testified that he had a state tax lien of about \$8,000 for 2003 or 2004. He indicated that his state and federal tax returns were prepared for the year in question, but the company that prepared his tax returns did not file the state tax return as expected. The federal tax return for that year was filed. He believed that he probably owed the state about \$3,000 to \$4,000 for that tax year, but the amount owed grew due to penalties and interest. The company that prepared his tax returns went out of business, and Applicant disputed this debt. He testified that he settled the tax lien in May 2011 and it was released. During his Office of Personnel Management interview dated May 6, 2013, he reportedly stated this debt was paid through a garnishment of his bank account. The tax lien is not alleged in the SOR.⁷

Status of alleged debts is set forth in the following table:

SOR ¶	Amount	Information & Status	Evidence
1.a	\$3,507	Type of account: Automobile loan Date Opened: 10/12 Date of Last Activity: 3/13 Status: Vehicle repossessed in 2014. Applicant has not heard anything from the creditor about a deficiency owed. No proof was provided that this debt has been resolved.	Tr. 54-56; GE 1, 2, 5.
1.b	\$1,310	Type of account: Medical Date Opened: 7/09 Date of Last Activity: 7/09 Status: Most likely discharged in Applicant's 2010 Chapter 7 bankruptcy.	Tr. 49-52; GE 5.

⁶ Tr. 26-27, 38-43; GE 2. Conduct not alleged in the SOR will not be considering in applying the disqualifying conditions, but "may be considered (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular adjudicative guideline is applicable; or (e) to provide evidence for whole-person analysis under Directive Section 6.3 . . . ISCR Case No. 00-0633 at 3 (App. Bd. Oct 24, 2003)." ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

⁷ Tr. 43-45; GE 2, 4.

1.c	\$1,220	Type of account: Collection (original creditor unknown) Date Opened: 11/13 Date of Last Activity: 10/12 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 5.
1.d	\$1,201	Type of account: Medical Date Opened: 7/10 Date of Last Activity: 7/09 Status: Most likely discharged in Applicant's 2010 Chapter 7 bankruptcy.	Tr. 49-52; GE 5.
1.e	\$921	Type of account: Medical Date Opened: 7/09 Date of Last Activity: 7/09 Status: Most likely discharged in Applicant's 2010 Chapter 7 bankruptcy.	Tr. 49-52; GE 5.
1.f	\$903	Type of account: Medical Date Opened: 11/13 Date of Last Activity: 8/13 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 5.
1.g	\$860	Type of account: Medical Date Opened: 7/09 Date of Last Activity: 7/09 Status: Most likely discharged in Applicant's 2010 Chapter 7 bankruptcy.	Tr. 49-52; GE 5.
1.h	\$795	Type of account: Medical Date Opened: 6/11 Date of Last Activity: 3/11 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 5.
1.i	\$750	Type of account: Medical Date Opened: 4/13 Date of Last Activity: 12/12 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 5.

1.j	\$54	Type of account: Medical Date Opened: 3/13 Date of Last Activity: 12/12 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 5.
1.k	\$45	Type of account: Medical Date Opened: 6/09 Date of Last Activity: 5/09 Status: Most likely discharged in Applicant's 2010 Chapter 7 bankruptcy.	Tr. 49-52; GE 5.
1.l & 1.m	\$29,892 & \$16,638	Type of account: Student loans Date Opened: 6/12 Date of Last Activity: 3/13 Status: Applicant paid about \$480 per month on his student loans for about one year. Starting in about 5/14, approximately \$160 per month has been garnished from his pay for these loans.	Tr. 45-48; GE 1, 2, 4; AE E, G.
1.n	\$487	Type of account: Credit card Date Opened: 10/10 Date of Last Activity: 3/13 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 4.
1.o	\$2,879	Type of account: Medical Date Assigned: 11/10 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 4.
1.p	\$1,000	Type of account: Medical Date Assigned: 4/12 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 4.
1.q	\$496	Type of account: Telecommunications Service Date Assigned: 2/12 Status: No proof was provided that this debt has been resolved.	Tr. 63; GE 4.

1.r	\$95	Type of account: Medical Date Assigned: 8/11 Status: No proof was provided that this debt has been resolved.	Tr. 63 GE 4.
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Applicant obtained financial counseling when he filed bankruptcy. He testified that, with the exception of the garnishments noted above, he had not made any payments toward the alleged debts. He also noted, however, that he is making \$50 per month payments to the Internal Revenue Service for \$13,786 in past-due taxes owed on 401(k) withdrawals in 2009 and 2010. He provided documentation showing he made a \$55 payment in October 2014. The past-due taxes were not alleged in the SOR.⁸

In March 2013, Applicant left his job and moved to another state for his prospective employment with the defense contractor. His annual income with the defense contractor was to be \$65,000. Due to the alleged security clearance concerns, he was not able to start the new job. He was unemployed from March to May 2013 before obtaining another job earning about \$38,000 annually.⁹

In his post-hearing submission, Applicant provided a Personal Financial Statement (PFS). His PFS reflected that his net monthly income was \$2,562, that his total monthly expenses were \$2,164, and that his monthly debt payments were \$369, leaving him a net monthly remainder of \$29. His monthly debt payments included \$319 monthly payments for a vehicle (not a debt alleged in the SOR) and \$50 payments for overdue state taxes (which are probably the payments for his past-due federal taxes).¹⁰

A witness who knew Applicant when he was employed at a law firm from 2003 to 2009 testified that Applicant participated in the preparation and filing of Security and Exchange Commission and Federal Trade Commission documents that contained sensitive information. The witness indicated that Applicant was a person of integrity and was very trustworthy.¹¹

Policies

The President of the United States 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. *Department of the Navy v.*

⁸ Tr. 31-32, 35-37, 61-65; GE 3; AE A.

⁹ Tr. 32-37; GE 1, 2; AE D.

¹⁰ Tr. 52-61; AG H.

¹¹ Tr. 37, 67-75.

Egan, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the applicant has or 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No.

02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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 security concern for financial considerations is set out in AG ¶ 18 as follows:

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.

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

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

In 2010, Applicant was granted a Chapter 7 bankruptcy discharge. Since then, he accumulated a number of delinquent debts that he was unable or unwilling to satisfy for an extended period. This evidence is sufficient to raise the above disqualifying conditions.

Four 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 (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;
- (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; and

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

Applicant's financial problems are ongoing and significant. From the evidence presented, I am unable to find that similar problems are unlikely to recur. His financial problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

In March 2009, Applicant was laid off from a job in which he earned over \$100,000 annually. In August 2009, he obtained a job in which he initially earned about \$18,000, but he more than doubled that salary over the years. In 2009, his son underwent surgery. From 2009 to 2011, he went through a separation, custody battle, and divorce. He also encountered his own medical problems. From March to May 2013, he was unemployed when concerns about his security clearance eligibility precluded him from working for a defense contractor. The above events were conditions beyond his control that contributed to his financial problems. Nonetheless, he failed to establish that he has acted responsibly under the circumstances. With the exception of proof of garnishment of his pay,¹² he has not shown that he has taken actions to resolve the delinquent debts, including some relatively small debts, *i.e.*, those for \$54 and \$95. Beside the alleged debts, he also owes about \$50,000 in child support arrearages and about \$13,000 in past-due federal taxes. From the evidence presented, I am unable to find that his financial problems are being resolved or are under control. His financial problems remain a security concern. AG ¶ 20(b) partially applies. AG ¶¶ 20(c) and 20(d) do 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(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.

¹² An involuntary garnishment of pay does not equate to a good-faith initiation of repayment. See ISCR Case No. 02-10120 (App. Bd. Feb. 24, 2004).

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant worked in positions in which he was entrusted with sensitive information. He is a valued employee. Nevertheless, his financial problems are ongoing and he failed to present any realistic plan for resolving those problems. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant failed to mitigate the financial security concerns.

Formal Findings

Formal findings 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h-1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraphs 1.l-1.r:	Against Applicant
Subparagraph 1.s:	For Applicant

Decision

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

James F. Duffy
Administrative Judge