



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



In the matter of:)
)
) ISCR Case No. 14-06731
)
Applicant for Security Clearance)

Appearances

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

03/31/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline E (personal conduct), but failed to mitigate security concerns pertaining to Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On April 29, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On May 16, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. The 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) promulgated by the President effective on September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 9, 2015, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated July 22, 2015, was provided to him by cover letter dated August 14, 2015. Applicant received his copy of the FORM on August 24, 2015. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. He did not submit additional information within the 30-day period. The case was assigned to me on December 28, 2015.

Findings of Fact

Applicant admitted allegations in SOR ¶¶ 1.a and 1.b with explanations, and denied the allegation in SOR ¶ 2.a with an explanation. (Item 2)

Background Information

Applicant is a 58-year-old information technology specialist employed by defense contractor since July 2013. On his SF-86, he listed past security clearance experience with a secret security clearance granted in November 1977, a secret security clearance granted in August 2010, and a top secret security clearance granted in November 2010. (Items 3, 4, 5)

Applicant was awarded a General Education Development Diploma in 1977, and was awarded a bachelor's degree in September 2004. (Item 5) He married in December 1987, and has a 27-year-old son. (Items 3, 4, 5) During his June 6, 2014 Office of Personnel Management Personal Subject Interview (OPM PSI), he stated that he has been separated since April 1997 and has no intention of going through a divorce as he sees it as unnecessary. (Item 5) Applicant served in the active Navy Reserve from November 1980 to August 1983. (Item 5)

Financial Considerations

Security concerns under this Guideline arise from two long-standing collection accounts in the respective amounts of \$36,457 and \$2,505, totaling \$38,962. By Applicant's admission, they "went delinquent and then into default before 2007." (SOR ¶¶ 1.a and 1.b; Item 2)

Applicant attributes these debts to the closing of a factory in 2002 and loss of a job that he held for 16 years. After losing that job, he went through a two-year retraining program followed by "three years of part-time and low paying jobs." (Items 2, 3, 4) Applicant stated that this five-year period was the only time he was unable to meet his

financial obligations. Applicant was confronted with these debts during his June 2014 OPM PSI. He discussed these two debts at length during this interview and stated that he “plans to save up enough money and have the debts paid off in the next five years.” In his June 2015 SOR answer, he basically reiterated what he said during his June OPM PSI, that he plans to repay these two large debts once he paid off his current debts. (Items 2, 3, 4)

Applicant did not submit any evidence of attempts to contact these two creditors or otherwise resolve these debts. He did not submit any evidence of financial counseling. Department Counsel also noted in her July 2015 FORM that Applicant provided no documentation of any attempts to pay these debts.

Personal Conduct

When Applicant completed his April 2014 SF-86, he failed to disclose the two debts alleged in SOR ¶¶ 1.a and 1.b when asked whether in the past seven years he had any bills or debts turned over to a collection agency, had any account or credit card suspended, charged off, or cancelled for failure to pay as agreed. Applicant denied that he deliberately failed to disclose those debts. He explained that they were old debts that went into default before 2007 and were “outside the seven-year timeframe.” (Item 2) He added that he has not tried to hide these debts stating that he has discussed them during his previous background investigations. (Item 2)

Applicant disclosed these debts when he completed his November 5, 2010 SF-86 adding credence to his assertion that he had put the Government on notice of these debts in the past. He also discussed these debts during his June 2014 OPM PSI. (Items 3, 5) Department Counsel correctly noted in her FORM that when Applicant completed his April 2014 SF-86, the debts were over 120 days delinquent.

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. 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

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations."

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations 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;

(d) the individual initiated 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.

Considering the record evidence as a whole,¹ I conclude none of the five financial considerations mitigating conditions above are applicable or partially applicable to explain, extenuate, or mitigate the security concern. The available information shows

¹ See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

that Applicant has taken no documented affirmative action to resolve his delinquent debts.

With that said, a security clearance case is not aimed at collecting debts or enforcing tax laws.² Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive. In evaluating F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.³

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on a brief explanation, financial considerations security concerns remain.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of the Executive Order 10865 specifically provides that industrial security 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." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be considered to suggest that I have based this decision, in whole or in part, on any express or implied decision as to an applicant's loyalty or patriotism.

² ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

³ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotations omitted).

Personal Conduct

Posing potential security concerns are Applicant's documented omissions of two long-standing delinquent debts on his April 2014 SF-86. His omissions are, however, attributable to his mistaken belief that at the time he completed his SF-86 he was not required to list the two debts in question because they were outside the seven-year timeframe. Applicant argued that he had never attempted to hide these debts during past investigations, which is corroborated by the fact that he listed these debts on his November 2010 SF-86. He discussed these debts at length during his June 2014 OPM PSI. While Applicant could reasonably have been expected to be more diligent about checking on the status of his debts, his judgment lapses are not enough to impute knowing and willful falsification under Guideline E.

Applicant's explanations of his omissions are persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, there is no need to discuss extenuation or mitigating conditions. *Cf.* ISCR Case No. 02-13568 (App. Bd. Feb. 13, 2004). While Applicant failed to exercise due diligence in inquiring into the state of his debts, his mistaken belief that he was not required to list them enable him to refute allegations of deliberate falsification of his SF-86.

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.

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).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial indebtedness as pertaining to these two debts has been ongoing since at least 2007. It is difficult to accept the notion that during the past nine years Applicant has been unable to make any progress in resolving these debts. Applicant was put on notice during his June 2014 OPM PSI that these debts were a concern and again when he received his May 2015 SOR. As such, I

have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated security concerns pertaining to financial considerations, but has mitigated security concerns pertaining to personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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: Subparagraphs 1.a – 1.b:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraph 2.a:	FOR APPLICANT 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 or continue eligibility for a security clearance for Applicant. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge