



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 15-00780
)
 Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

04/11/2016

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.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 30, 2014. On August 22, 2015, 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 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on September 23, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 2, 2015, and the case was assigned to me on January 6, 2016. On January 13, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that

the hearing was scheduled for February 3, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection.¹ I kept the record open until March 3, 2016, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through I, which were admitted without objection. DOHA received the transcript (Tr.) on February 11, 2016.

Amendment of SOR

The SOR alleges that Applicant deliberately failed to file federal and state income tax returns as required by law for tax years 2012 and 2013 (SOR ¶¶ 1.a and 1.b). It also alleges two delinquent collection accounts for \$687 and \$114 (SOR ¶¶ 1.c and 1.d).

Department Counsel moved to amend the SOR by adding SOR ¶ 1.e, alleging that Applicant was indebted to his mother-in-law for delinquent child-support payments totaling approximately \$3,600. Applicant did not object to the amendment, and I granted Department Counsel's motion. (Tr. 54-55.)

Department Counsel also moved to amend the SOR to allege that Applicant deliberately failed to file federal and state income tax returns for tax year 2014. I denied the motion. (Tr. 56.)

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a and 1.b and denied SOR ¶¶ 1.c and 1.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 32-year-old laborer employed by a federal contractor since May 2014. He graduated from high school in May 2002 and worked at various private-sector jobs until he began his current job. He was unemployed from October 2012 to July 2013. He held a part-time job as a surveyor from July 2013 to May 2014. He has never held a security clearance.

Applicant married in April 2007 and separated in August 2010. He has resided with a cohabitant since May 2014. He has a ten-year-old daughter for whom he is obligated to pay child support. He and his wife have not divorced because they cannot afford the legal fees. (Tr. 31-32.)

¹ Applicant also proffered a bundle of receipts related to his unfiled income tax returns. The documents were originals and he had not made copies for the record. I marked the bundle of documents as AX C but did not admit them. I instructed Applicant to make copies of whatever documents he wanted me to consider and send them to me by March 3, 2016. (Tr. 20, 62-63.) He did not resubmit the documents. Consequently, there is no AX C in the record.

When Applicant submitted his SCA, he disclosed that he had not filed income tax returns or paid the taxes due for tax years 2012 and 2013. He estimated that he owed \$500 in taxes but had been unable to pay them due to lack of funds. He also disclosed a delinquent cellphone bill for about \$600 that had been referred for collection. (GX 1 at 34-36.) His June 2014 credit bureau report (CBR) reflected the cellphone debt and an insurance debt. (GX 2 at 4.)

Applicant testified that he, his wife, and his mother-in-law have joint custody of his daughter and that he agreed to pay child support of \$200 per month to his mother-in-law, with whom his daughter resides. The custody arrangement was signed by all three parties and filed with the local juvenile and domestic relations court. (AX H.) The written agreement does not specify the amount of child support. Applicant testified that he agreed to pay \$200 per month, but that he had not made the agreed payments for about 18 months. (Tr. 32-33, 42-43, 48-51.)

In his post-hearing submission, Applicant submitted documentary evidence that the debt alleged in SOR ¶ 1.c had been settled for less than the full amount. (AX E at 2.) He also submitted documentary evidence that his account with the insurance company alleged in SOR ¶ 1.d was current. (AX G.) He submitted evidence that he had made one \$200 child-support payment to his mother-in-law on February 29, 2016. (AX I.) He had not filed his overdue tax returns by the time the record closed on March 3, 2016. (AX D.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

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.

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. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and his June 2014 CBR establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"), AG ¶ 19(c) ("a history of not meeting financial obligations"), and AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same"). The following mitigating conditions under this guideline 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

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.

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

AG ¶ 20(b) is not fully established. Applicant's marital breakup and periods of unemployment and underemployment were circumstances beyond his control. He acted responsibly by settling the debts in SOR ¶¶ 1.c and 1.d. However, he still has not filed his overdue tax returns, and he failed to pay child support for 18 months. He made one belated child-support payment after the hearing, realizing that his arrearage was an impediment to obtaining a security clearance.

AG ¶ 20(c) is not established. Applicant has not received financial counseling and his child-support arrearage is unresolved. He has obtained tax advice but has not yet filed his overdue returns.

AG ¶ 20(d) is established for the debts in SOR ¶¶ 1.c and 1.d. His belated \$200 child-support payment is insufficient to show a good-faith effort to carry out his obligation.

AG ¶ 20(e) is not relevant. Applicant has not disputed any of the debts alleged in the SOR.

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. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors AG ¶ 2(a). 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 child-support arrearage and unfiled tax returns. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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 and 1.b:

Against Applicant

Subparagraphs 1.c and 1.d:

For Applicant

Subparagraph 1.e:

Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge