



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 15-01418
)
 Applicant for Security Clearance)

Appearances

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

06/20/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 28, 2012. On September 27, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD 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 DOD on September 1, 2006.

Applicant answered the SOR on November 9, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 23, 2015, and the case was assigned to me on February 17, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on

February 26, 2016, scheduling the hearing for March 23, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 3-6 were admitted in evidence without objection. Applicant declined to waive the authentication of GX 2, and it was not admitted. He testified and submitted Applicant's Exhibits (AX) A-F, which were admitted without objection. I kept the record open until April 8, 2016, to enable him to submit additional evidence. He timely submitted AX G-L,¹ which were received without objection. Department Counsel's comments regarding AX G-L are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on April 1, 2016.

Findings of Fact²

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.c, 1.e-1.i, and 1.l-1.q. He denied SOR ¶¶ 1.d, 1.j, 1.k, and 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old senior software engineer. He is self-employed. His company was certified as a small business in 2005. (Tr. 47.) He has worked for defense contractors since at least March 2001, and he has worked as a sub-contractor since starting his own company. He received a security clearance in March 1999. Currently, he does not have an active security clearance. (Tr. 8.)

Applicant married in January 2005 and divorced in April 2007. He married his current wife in September 2008. He and his current wife have two children, ages six and four.

Applicant received an associate's degree from a technical school in September 1998. He has attended a community college and a university since March 2004, but he has not received a degree. His wife is a full-time student in a medical school, seeking to become a physician's assistant. (Tr. 48-49, 85.)

When Applicant submitted his SCA in June 2012, he answered "No" to all the questions about financial delinquencies. He did not disclose any of the debts alleged in the SOR. His credit bureau report (CBR) dated July 20, 2012, reflected the debts alleged in SOR ¶ 1.a, 1.l-1.n, and the federal tax liens alleged in SOR ¶¶ 1.g and 1.h. (GX 3.) At the hearing, he admitted knowing that he "had something going on" with his taxes. (Tr. 59.) He also knew that a hospital had filed a judgment against him, but he thought his wife was taking care of it. (Tr. 60.) He testified that he had difficulty with the electronic questionnaire, and some of the financial information he submitted did not appear on the form when he reviewed it, but that he thought it was "not that big of a deal." He testified that he did not believe that, "if you miss a letter . . . they are going to throw the book at you." He believed, "If I filled it out as complete as possible, you guys can pull [my] credit report at any time." (Tr. 86.) He testified that he did not intend to lie,

¹ AX G was submitted twice. Only one copy is included in the record.

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to other documents in the record.

and he disclosed everything when he was “prompted with the information” by a security investigator six months after he submitted his SCA. (Tr. 38-40, 87.)

Applicant’s CBRs from January 2015 and August 2015 reflect the debts alleged in SOR ¶¶ 1.a-1.i and 1.l-1.q. (GX 4; GX 5.) The unsatisfied judgments alleged in SOR ¶¶ 1.j and 1.k are reflected in court records. (GX 6.) The evidence concerning the debts alleged in the SOR is summarized below.

SOR ¶¶ 1.a and 1.b: two credit-card accounts, one charged off \$4,972 in September 2011; and one placed for collection of \$3,088 in August 2012. These debts were incurred for clothing and household furnishings. As of the date of the hearing, Applicant had not contacted the creditors or taken any action to resolve the debts. (Tr. 60-61; 64-65)

SOR ¶¶ 1.c and 1.d: student loans, one placed for collection of \$792 in November 2011; and one placed for collection of \$619 in February 2011. At the hearing, Applicant testified that he could not remember how these debts were incurred. (Tr. 69-70.) They are not resolved.

SOR ¶ 1.e: cell phone disconnection fee, placed for collection of \$277 in December 2014. Applicant testified that this debt was paid, but he submitted no documentation of payment. (Tr. 71; AX J.)

SOR ¶ 1.f: installment account for computer purchase, past due for \$184, last payment in April 2012. Applicant testified that the computer was a business debt. He thought the debt “might be gone,” but he was unsure. (Tr. 71.) In his post-hearing submission, he stated that the debt was paid in full, but he submitted no documentation. (AX J.)

SOR ¶ 1.g: federal tax lien entered in 2012 for \$32,731. Applicant testified that his tax debts were a high priority, in large part because they prevented him and his wife from obtaining student loans. (Tr. 61.) In October 2014, Applicant requested that the IRS release three liens, citing the adverse effect of the liens on his eligibility for a security clearance. (AX E.) On January 15, 2016, his request was denied. (AX D.) On January 20, 2016, the \$32,731 lien was released after Applicant’s wife and her father borrowed \$40,000 and satisfied the lien. (GX 1 at 17, 24.; AX C; AX H.) Applicant testified that he was unsure whether he and his wife were legally obligated to repay the debt, because it may have been connected to a \$50,000 gift that his father-in-law intended to give his wife and each of her siblings. (Tr. 93-94.) However, the promissory note lists Applicant’s wife and her father as co-borrowers, jointly and severally liable for payment of the debt. There is no evidence that her father has agreed to pay the entire amount of the loan or hold Applicant’s wife harmless for any default. To the contrary, Applicant’s wife has agreed to make monthly \$716 payments by automatic withdrawals from a bank account. The documentation does not reflect whether the bank account is a joint account with Applicant, his wife’s separate account, or a joint account with her father. (AX G.)

SOR ¶¶ 1.h and 1.i: federal tax liens entered in 2012 for \$9,325 and \$7,716. These liens were included in the October 2014 request for release of liens. The request for release was denied. In his post-hearing submission, Applicant stated that he has negotiated a payment plan for these two liens, but he was awaiting documentation from the IRS. (AX I.) No documentation was provided.

SOR ¶ 1.j and 1.k: judgments for hospital bills for \$902, entered in 2012; and \$302, entered in 2010. At the hearing, Applicant was unsure of the status of these two judgments. He believed that they may have been incurred during the births of his children. They are unsatisfied. (Tr. 77.)

SOR ¶ 1.l: retail-store debt charged off for \$281 in February 2011. Applicant submitted no documentation of any efforts to resolve the debt. (Tr. 77-78.) In his post-hearing submission, he stated that the debt was paid in full, but he submitted no documentation. (AX J.)

SOR ¶ 1.m: overdrawn checking account, placed for collection of \$545 in January 2010. Applicant testified that the account was a business account and he remembered that the overdraft occurred when the IRS began garnishing the account. He was unsure of the status of the account and produced no documentation regarding it. (Tr. 78.)

SOR ¶ 1.n: retail-store account charged off for \$792 in November 2011. Applicant was unable to provide any information about this debt. It is unresolved.

SOR ¶ 1.o-1.q, student loans past due for \$186, \$248, and \$262. Applicant testified that payments on these loans were current. (Tr. 79.) In his answer to the SOR, he stated that he owed a balance of about \$2,000 on his student loans. Applicant's account history reflects a payment in February 2000; multiple late fees in 2002; and payments in November 2002, February 2003, and March 2003, with late fees interspersed for months in which no payment was made. His history shows fairly regular payments in 2004-2009; one payment in 2010 and two payments in 2011, with multiple late fees; regular payments in 2012-2014; one payment in February 2015, and multiple late fees from March-October 2015. (AX H.) Three Stafford loans for \$921, \$775, and \$581 were in forbearance as of May 2016. (AX I.) Applicant submitted evidence that three student loans are paid in full. (AX F.) However, he did not present evidence that the paid-off student loans are the same as the student loans alleged in SOR ¶¶ 1.o-1.q.

State tax debt (not alleged in SOR).³ In his answer to the SOR, Applicant stated that he had satisfied a state tax debt of about \$12,000. Applicant submitted

³ Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence of Applicant's state tax debt for these limited purposes.

evidence of a \$30 payment of state income taxes. (AX K.) The evidence does not reflect whether the \$30 payment was a partial payment or the final payment.

Applicant is the sole owner of his company. He had a co-owner until around 2005-2006. He testified that he was “not the best business man.” He found that tax requirements and company financial documents did not make “a whole lot of sense” to him. He trusted an accounting firm to take care of his income taxes, gave the accountants his signature stamp, and did not verify that taxes were timely paid. (Tr. 50-53.) He testified that he was not able to deal with the tax liens until January 2016 because he was dealing with the failure of his company and demands for payment from multiple creditors. (Tr. 80.)

Applicant’s salary is about \$105,000 per year. His net pay is about \$5,600 per month. (Tr. 88.) He has a second job as a medical scribe, for which he earns about \$14,000 per year. (Tr. 48.) His net pay from his second job is about \$500 per month. (Tr. 89.) His wife is not employed outside the home. (Tr. 48-49, 85.)

Applicant owns two vehicles, a 2005 truck and a 2009 minivan, which are both paid off. His mortgage-loan payments on his home are current. He testified that his wife enrolled one of their two children in a private school at a cost of \$200 per month, over his objection. (Tr. 84.)

Applicant demonstrated during the hearing that he does not understand the nexus between delinquent debts and his eligibility for a security clearance. His testimony included the following comments:

[Y]ou can sit there and grill me all day long, but what you are trying to do, is you are trying to push one of its best employees away. . . . If you guys would just say, hey look, you know? He is a good guy, he does the right thing, he is responsible with what we need to be responsible, with our information, [sic] we trust him with our information. What is the problem? That is the way I look at it. But you will grill me over these things and it is, you know, I think that you guys are pushing away one of the good guys, you know?

(Tr. 81-83.) In Applicant’s closing statement he commented that his financial problems are unrelated to how he will treat classified information, and he referred to the Department Counsel’s closing statement as “arguing apples and oranges.” (Tr. 107.)

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 in his answer to the SOR, his testimony at the hearing, and the documentary evidence submitted at and after the hearing establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing") is not established by Applicant's tax debts, because the evidence reflects that the tax debts were incurred by miscalculation of the taxes due and failure to pay them rather than a failure to timely file returns.

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 established. Applicant's delinquent debts are numerous, ongoing, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. The failure of Applicant's business, the substandard performance by his business accountants, and the medical debts incurred by his wife were circumstances beyond his control. However, he has not acted responsibly. His business was failing when he submitted his SCA in June 2012, but he did not begin to address his tax debts until October 2014, and he was motivated to take action largely because the tax debts prevented him and his wife from obtaining student loans. He neglected his consumer debts and medical bills and had not taken any action to resolve them as of the date of the hearing.

AG ¶ 20(c) is not established. Applicant presented no evidence of financial counseling, and his financial problems are not yet under control.

AG ¶ 20(d) is not established for the debts alleged in SOR ¶¶ 1.a, 1.b, 1.e, 1.f, and 1.j-1.n, which are unresolved. Although Applicant claimed to have paid the debts in SOR ¶¶ 1.e, 1.f, and 1.l, he submitted no documentation to support his claim.

AG ¶ 20(d) is not established for the student loans alleged in SOR ¶¶ 1.c and 1.d. It is established for the student loans in SOR ¶¶ 1.o-1.q, for which Applicant has been making frequent payments, albeit somewhat sporadically.

AG ¶ 20(d) is not established for the \$32,731 federal tax lien in SOR ¶ 1.g. The mitigating value of the payment of the \$32,731 lien is diminished by the fact that he and his wife exchanged one debt for another. Although Applicant is not personally obligated to repay the loan, it adversely affects the family finances. Furthermore, Applicant's motivation for resolving the lien was based in large part on removing a hindrance to obtaining student loans rather than a sense of duty or obligation. In this respect, his conduct falls short of the "good faith" required by this mitigating condition.

AG ¶ 20(d) is not established for the federal tax liens alleged in SOR ¶¶ 1.h and 1.i. Applicant has not provided documentation to support his assertion that he has negotiated a payment plan for these debts. Furthermore, he took no action to satisfy these liens until after the hearing. Payment of debts motivated by pressure to obtain a security clearance does not constitute "good faith" within the meaning of this mitigating condition.

AG ¶ 20(e) is not established. Applicant was unable to provide any information about several debts alleged in the SOR, but he has not disputed any of them.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant admitted that he knew about his tax problems and a judgment entered against him when he submitted his SCA, but he did not take the omissions from his SCA seriously. While he may not have fully understood the implications of an intentional omission of relevant information from his SCA, he knew that he had not fully disclosed his financial situation. AG ¶ 16(a) is established.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 17(a) is not established. Applicant did not attempt to correct his omissions from his SCA until he was "prompted with the information" six months after he submitted his SCA.

AG ¶ 17(c) is not established. Applicant's intentional omissions were arguably infrequent and not recent, but they did not occur under unique circumstances and were not minor. Falsification of a security clearance application is serious misconduct that "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) Furthermore, Applicant testified that he regarded his lack of candor as "not that big of a deal." His casual attitude about his lack of candor precludes a finding that it is unlikely to recur.

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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) An applicant is not required to establish resolution of every debt alleged in the SOR, to make payments on all delinquent debts simultaneously, or to pay the debts alleged in the SOR first. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has no coherent plan. His approach to his financial problems has been haphazard, reactive, and motivated by self-interest rather than a sense of obligation.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his financial delinquencies and lack of candor in his SCA. 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-1.n: Against Applicant

Subparagraphs 1.o-1.q: For Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: 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