



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



In the matter of: )  
)  
) ISCR Case No. 15-03897  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

04/29/2016

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F (financial considerations). Clearance is denied.

**Statement of the Case**

On October 31, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (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; DOD 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 adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance. On November 17, 2015, Applicant answered the SOR and requested a hearing. The case was assigned to me on January 8, 2016. DOHA

issued a notice of hearing on February 1, 2016, and the hearing was convened as scheduled on February 23, 2016.

At the hearing, Department Counsel offered Government Exhibits (Gx) 1 through 7. Applicant testified, called one witness, and submitted Applicant Exhibit (Ax) A. The record of the proceeding was left open until March 8, 2016, to provide Applicant the opportunity to submit additional matters. Applicant timely submitted documents that have been marked as Ax B through E. All exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 2, 2016.

### **Findings of Fact**

Applicant is a 58-year-old owner of a company that is a federal contractor. He graduated from high school in 1975 and attended technical school without earning a degree. He has been married for almost 45 years and has three adult children. He has held a security clearance for about 30 years.<sup>1</sup>

The SOR alleged that Applicant filed Chapter 13 bankruptcies in 1993, 1995, 1998 (SOR ¶¶ 1.a-1.c) and that he had 12 delinquent debts totaling \$793,921 (SOR ¶¶ 1.d-1.o). In his Answer to the SOR (Ans.), Applicant admitted each allegation. His admissions are incorporated as findings of fact.<sup>2</sup>

Applicant worked in a naval shipyard for years. At some point, shipyard employees were informed the shipyard would be closing. Applicant looked for other financial opportunities. He started a trucking business with his brother-in-law while he continued to work at the shipyard. He later learned that his brother-in-law was involved in drugs and was stealing from the trucking business. His brother-in-law's mismanagement of the trucking business resulted in financial losses that prompted Applicant to file Chapter 13 bankruptcies.<sup>3</sup>

In 1993, Applicant filed Chapter 13 bankruptcy with reported assets of \$144,970 and liabilities of \$155,850. In 1994, this bankruptcy was dismissed. In 1995, he filed a second Chapter 13 bankruptcy with reported assets of \$119,970 and liabilities of \$134,609. In 1998, the second bankruptcy was dismissed. In 1998, he filed a third Chapter 13 bankruptcy with reported assets of \$150,710 and liabilities of \$136,744. The third bankruptcy resulted in a discharge of his debts in 2003. In 2005, he reported the bankruptcies on his Electronic Questionnaire for Investigations Processing (e-QIP) and was granted a security clearance.<sup>4</sup>

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<sup>1</sup> Tr. 5-7, 29-30; Gx 1.

<sup>2</sup> Tr. 38; Ans.

<sup>3</sup> Tr. 22, 28-29, 50-53; Gx 7.

<sup>4</sup> Tr. 49-53; Gx 4-6. The SOR incorrectly alleged that Applicant's 1993 and 1995 Chapter 13 bankruptcies resulted in discharges and that his 1998 Chapter 13 bankruptcy was dismissed.

Since 1999, Applicant owned and operated a company. It is a Subchapter C corporation. His wife owns 51% of the company and he owns the remaining 49%. Because it is a small company, Applicant and his wife signed personally for lines of credit to operate the business.<sup>5</sup>

In about 2009, Applicant's company was awarded a contract on a large construction project. His company was one of many contractors involved in this project. The value of his company's contract was over seven million dollars. His company spent about two years preparing for this project, which included purchasing a building with six acres of land, establishing lines of credit, and hiring over 100 employees. Applicant also expended about \$300,000 of his personal funds in support of this contract. As the project proceeded, the company that owned the project was late on its payments to the contractors and, at one point, owed Applicant's company three million dollars. These delays caused Applicant to miss payments on his financial obligations. The financial institution supporting Applicant's company indicated it could not continue to provide his company funding if it did not receive its payments. Applicant was eventually caught in a bind between these companies. The contract provided that if Applicant's company could not pay its bills then the owner had the right to cancel the contract. Construction delays occurred that were beyond Applicant's control. The project ran over budget. Applicant's company had completed about 75% of its work on the project when the owner canceled Applicant's contract in early 2010. Applicant claimed the owner was responsible for the default because their late payments precluded him from meeting his financial commitments. Applicant's company sued the owner. After about three years of litigation, a court ruled that Applicant's company was responsible for its losses.<sup>6</sup>

All of the alleged debts arose from the large construction project. The debts in SOR ¶¶ 1.d through 1.g, which total over \$86,000, are reflected in Applicant's credit reports. These include judgments against Applicant for \$43,945 (SOR ¶ 1.d) and \$8,279 (SOR ¶ 1.e). Applicant disclosed the debts in SOR ¶¶ 1.h through 1.o in his latest e-QIP, but they are not listed on his credit reports. He indicated that, while either his wife or his company was responsible for those debts, he disclosed them to be forthcoming and to ensure there was no misunderstanding.<sup>7</sup>

Applicant did not provide any proof of payments or payment arrangements for the alleged debts. He testified that none of the debts were resolved, but he intended to pay them in the future. His company is still operating and is down to three employees. He hoped to obtain some shipyard contracts in the near future. Once his business becomes profitable again, he will pay the debts. He stated the creditors are aware of his situation and are working with him.<sup>8</sup>

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<sup>5</sup> Tr. 29-32, 38, 64; Gx 7; Ax A.

<sup>6</sup> Tr. 23-38, 65-71, 74-76; Gx 7; Ax A.

<sup>7</sup> Tr. 39, 54-59, 65-66; Gx 2, 3, 7. The debt in SOR ¶ 1.f was a small medical debt.

<sup>8</sup> Tr. 27-29, 38-44, 71-73; Gx 7.

Applicant's wife works full-time for a school district. He submitted a personal financial statement that reflected their net monthly income was \$3,328, their total monthly expenses were \$1,588, their monthly debt payments were \$1,378, which left them a net monthly remainder of \$362. In June 2015, his company had a certificate of deposit in a financial institution totaling \$23,772. In August 2015, his company received a purchase order from a major defense contractor for \$500,000 of services and was pursuing bids on major defense contracts. His most recent credit report reflected seven debts in a past-due status totaling about \$1,576 that were not alleged in the SOR. He also testified that he was behind on his mortgage payments.<sup>9</sup>

Applicant is a well-respected businessman. He has received a number of awards for his business and other achievements. As part of the large construction contract discussed above, he hired over 100 employees in a rural area and assisted in obtaining a sewer system for the local community. His company has also hosted holiday events and outreach programs for local communities.<sup>10</sup>

### **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, in reaching a 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

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<sup>9</sup> Tr. 22-23, 29-32, 39-49, 59, 71-74, 85-87. Debts not alleged in the SOR will not be considered in applying the disqualifying conditions.

<sup>10</sup> Tr. 22-23, 26-27, 41-46, 48-50, 60-63, 71, 74; Ax A.

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 (4<sup>th</sup> 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**

AG ¶ 18 sets forth the security concern for financial considerations:

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.

Applicant accumulated delinquent debts that he was unable to pay for an extended period. AG ¶¶ 19(a) and 19(c) apply.

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.

Applicant encountered conditions beyond his control that contributed to his financial problems. Specifically, the owner of a construction project failed to make payments to Applicant's company in a timely manner. Those delays caused Applicant to default on his financial obligations. Applicant sued the owner, but a court ruled against him. He indicated that he plans to pay the delinquent debts when he obtains future contracts. At this point, however, he has not taken any meaningful steps to resolve his financial problems.

Applicant's credit reports only reflect four of the alleged debts (SOR ¶¶ 1.d through 1.g). The remaining debts (SOR ¶¶ 1.h through 1.o) were either his wife's or his company's debts. I find for Applicant on those remaining debts even though he listed them in his e-QIP and admitted responsibility for them in his Answer to the SOR. AG ¶ 20(e) applies to SOR ¶¶ 1.h through 1.o.

Applicant's delinquent debts are ongoing and significant. He has a history of financial problems and had debts discharged in a bankruptcy in 2003. From the evidence presented, I am unable to find that his current delinquent debts are being resolved or that his financial problems are under control. Those problems continue to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 20(b) partially applies. AG ¶¶ 20(a), 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.

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.

My comments under Guideline F are incorporated in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant is a hard-working and respected businessman. He stated that he intends to resolve his financial problems. However, a promise to pay in the future is not a substitute for a track record of paying debts in a responsible manner. From the evidence presented, it is unclear when Applicant's financial situation will permit him to resolve his delinquent debts. Despite the presence of some mitigation, financial security concerns remain in this case.

Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant failed to mitigate the security concern under the financial considerations guideline.

### **Formal Findings**

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

|                           |                   |
|---------------------------|-------------------|
| Paragraph 1, Guideline F: | Against Applicant |
| Subparagraphs 1.a-1.g:    | Against Applicant |
| Subparagraphs 1.h-1.o:    | 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's eligibility for a security clearance. Clearance is denied.

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James F. Duffy  
Administrative Judge