



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



In the matter of:)
)
) ISCR Case No. 14-05443
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

02/03/2016

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on August 23, 2012. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on February 18, 2015, detailing security concerns under Guideline F, financial considerations. The action was taken 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 for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on March 20, 2015. He submitted a notarized, written response to the SOR allegations dated March 23, 2015, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on September 15, 2015. Applicant received the FORM. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a response dated October 24, 2015. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on January 21, 2016. The Government submitted eight exhibits, which have been marked as Items 1-8. Items 1 through 5, Item 7 and Item 8 are admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant Exhibit A (AE A).

Ruling on Evidence

Item 6 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The six-page document is a summary of Applicant's interview with an Office of Personnel Management investigator, which occurred on October 30, 2012 in conjunction with his background investigation. DoD Directive 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is attempting to act in good-faith, having highlighted the issue in a footnote in the FORM, Item 6 is not authenticated. (See Government's FORM, p.2, footnote 2) Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule. Waiver requires "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, 9th ed., West 2009).

Applicant was not expressly informed of the requirement in ¶ E3.1.20 of the Directive. I cannot conclude he expressly or knowingly waived this rule. He did not mention Item 6 in his response to the FORM. He may not have read the footnote advising him to review Item 6 for accuracy. The record does not establish that Applicant's failure to address the accuracy of Item 6 in his response to the FORM was a knowing waiver of the rules outlined in the Directive, enclosure 2, ¶ E3.1.20. Item 6 is not admissible and will not be considered in this Decision.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 54 years old, works as a mechanic and inspector for a DOD contractor. He began his employment with his current employer in January 1986. His supervisor describes him as a valuable asset to the company. Applicant has a good attendance record, is a man of outstanding character, goes above and beyond his usual duties, and is reliable, responsible, and dependable. His manager similarly described him and opined that he was a "great asset" to the organization. His pastor and a friend from his church wrote favorable letters of recommendation. None indicated any knowledge of the issues in the SOR.¹

Applicant graduated from high school. He received an a & p certificate in May 1982 after completing a two-year technical program.²

Applicant married his first wife in 1989, and they divorced in 2000. He married his present wife in 2007. He has two stepsons, ages 41 and 36, from his first marriage and a stepdaughter, age 24, from his second marriage.³

Doctors diagnosed Applicant with lung cancer around September 2006. His medical insurance did not cover all his medical bills. He chose to use his personal income to pay his medical bills over the payment of other bills. He fell behind in his payments on this mortgage and personal credit cards.⁴

The SOR identified the following six unpaid debts: 1.a - store credit card (\$14,814); 1.b - credit card (\$4,830); 1.c - credit card (\$1,756); 1.d - collection company for a bank card (\$26,689); 1.e - second mortgage (\$22,952); and 1.f - collection company for a bank card (\$34,307). His past-due debts total \$105,348. The September 2012 credit report reflected that the debts in 1.a through 1.d and 1.f became past due between February 2007 and December 2007. Applicant stopped paying his mortgage debt in January 2011. This credit report also reflects that he paid two non-SOR debts, which became past-due in 2007 and 2009, and closed the accounts.⁵

¹AE A.

²Item 4.

³Item 4.

⁴Item 4.

⁵Item 1; Item 5.

In addition to the 2012 credit report, the record includes two credit reports dated January 29, 2014 and June 10, 2015. SOR allegations 1. a, 1.b, and 1.c are listed on the 2014 credit report. None of the SOR debts are listed on the 2015 credit report. Applicant has not indicated that he paid any of these debts. In his e-QIP, Applicant advised that when he began to experience financial problems, he contacted the creditors to work out a payment plan, but none of the creditors would work with him. He also advised the he tried to obtain a modification of his mortgage, but the mortgage lender did not provide any assistance with his request.⁶

Applicant has not submitted any documentation showing his current monthly income or his current monthly expenses. The 2014 and 2015 credit reports reflect that Applicant has not acquired new delinquent debts and that he timely pays his bills. There is no evidence of credit or financial counseling.⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An

⁶Item 4; Item 7, Item 8.

⁷Item 7; Item 8.

applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for financial considerations 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

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

Applicant developed significant financial problems following a diagnosis of lung cancer. He used his income to pay for his medical treatment, and not his credit accounts. Most of the debts have not been resolved. These two disqualifying conditions apply.

The financial considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following 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; and

(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.

More than nine years ago, doctors diagnosed Applicant with lung cancer. His medical insurance did not cover all his medical bills. Under difficult circumstances, he made a decision nine years ago to use his income to pay for the cost of his medical treatments over the payment of other bills, which resulted these debts. Applicant has remained healthy, making his diagnosis an infrequent event, which does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

A diagnosis of cancer and concurrent costly treatment was a circumstance beyond Applicant's control. Once he completed his treatments and related payments, Applicant contacted his creditors with a goal of developing payment plans to resolve his outstanding debts. Two non-SOR creditors agreed to a payment plan, and he paid these debts. The remaining five creditors as set out in SOR allegations 1.a - 1.d and 1.f refused to work with him. He acted reasonably at the time. Given the creditors refusal to work with him to resolve his debts, it is understandable that he has not made further contact with the creditors as he would most likely not be successful. AG ¶ 20(b) applies.

Applicant has not had credit or financial counseling. He manages his current income and expenses as shown by the absence of new, unpaid bills. He resolved two non-SOR debts, but no more. AG ¶ 20(c) partially applies.

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.⁸

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The record in this FORM lacks evidence about Applicant's current income and expenses. Despite this lack of information, the 2014 and 2015 credit reports indicate that Applicant did not continue to acquire debt that he could not pay. After he paid his medical bills, Applicant tried to work with his creditors, including his mortgage lender, to develop payment plans for the resolution of his debts. Only two of his creditors agreed. He paid these debts some time ago. The credit reports reflect a track record for paying his current expenses and for the payment of some past-due debts. Applicant's SOR debts are old and

⁸In assessing whether an applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). 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. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). 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." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). 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. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") 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 payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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.

occurred because he chose to pay for his cancer treatment over some of his debts. Under state law, the creditors have no legal right to seek repayment through the court system. The debts are no longer on his credit reports, making it difficult for him to locate and work with creditors on the resolution of these debts now. Applicant is well-respected at work. He has worked for his employer for 30 years and is viewed as a valuable employee. In reviewing the entirety of record, there is little likelihood that Applicant would compromise or mishandle classified information. He can be trusted to protect classified information.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is denied.

MARY E. HENRY
Administrative Judge