



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 15-00231 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Candace L. Garcia, 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 June 25, 2014. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on July 25, 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. He submitted a notarized, written response to the SOR allegations dated August 5, 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 October 27, 2015. Applicant received the FORM on November 3, 2015. 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 November 25, 2015. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on January 21, 2016. The Government submitted five exhibits, which have been marked as Items 1-5. Items 1 through 3 and item 5 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 4 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The seven-page document is a summary of an interview with an Office of Personnel Management (OPM) investigator of Applicant, which occurred on September 9, 2014, 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 4 is not authenticated. (See Government's FORM, p.2, footnote 1) 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 waived this rule. He did not mention Item 4 in his response to the FORM. He may not have read the footnote advising him to review Item 4 for accuracy. The record does not establish that Applicant's failure to address the accuracy of Item 4 in his response to the FORM was a knowing waiver of the rules outlined in the Directive, enclosure 2, ¶ E3.1.20. However, Item 4 has relevant information that should be considered in deciding his eligibility for a security clearance. Although not authenticated, I will consider the content of Item 4 concerning his access to classified information.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c of 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 36 years old, works as an electrician for a DOD contractor. He began his current employment in June 2014. Applicant also worked as a federal contractor for several companies between November 2007 and March 2012. He was unemployed from March 2012 until February 2013. From March 2013 until June 2014, he worked as a technician for two other companies. He left each job for a better-paying job and better benefits.¹

Applicant graduated from high school. Although he has never married, Applicant currently lives with his girlfriend and has since 2010. He has two sons, ages 15 and 12, from another relationship. His children live with their mother in another state.²

Applicant currently earns \$2,917 a month in gross income plus overtime pay. His biweekly gross income in October and November was \$1,951, \$2,170, \$2,826, and \$2,607. His biweekly deductions include federal and state taxes, Social Security, health insurance, dental and vision insurance, life insurance, two small 401k loans, and child support, leaving biweekly net income for October and November of \$960, \$1,091, \$1,481, and \$1,351. He did not provide a budget showing his monthly expenses. Except for the three debts listed in the SOR, the only credit report of record reflects that his current monthly expenses are paid.³

The SOR identifies three debts totaling \$32,217. Applicant lived in a modular home with the mother of his children. After they separated, she continued to live in the home with the children. Applicant believed his name had been removed from the loan and was not aware that the modular home was vacant until he met with the OPM investigator. In 2013, the mother of his children filed for bankruptcy. As a result, the creditor is seeking payment of the remaining debt (1.a \$20,381) from him. He is considering filing bankruptcy to discharge this debt only, but he has not contacted an attorney because of his work schedule.⁴

SOR allegation 1.b relates to Applicant's child support arrearage of \$11,773. Applicant's documentation shows that beginning with his first paycheck in June 2014

¹Item 3.

²Item 3.

³AE A.

⁴Item 2; Item 4; Item 5; AE A.

from his current employment, child support payments of \$351 have been deducted from his biweekly pay. These payments include his regular monthly child support payments and his arrearage. Between June 2014 and November 2015, Applicant paid approximately \$12,705 towards his monthly child support and his arrearage. He was unable to obtain a statement from the state agency on the amount remaining on his debt.⁵

The last SOR allegation (1.c) concerns a 2009 debt of \$163 for energy for the modular home. He was unaware of the debt until he met with the OPM investigator. Applicant paid this debt in full in August 2015. The July 2014 credit report also lists an unpaid phone debt of \$115. Since this debt is not listed on the SOR, it is presumed that Applicant paid the debt. The record lacks evidence of financial or consumer counseling.⁶

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

⁵Item 2; Item 5; AE A.

⁶Item 2; Item 4; Item 5.

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 financial problems when he was unemployed for nearly a year and after his former girlfriend discharged the debt in SOR allegation 1.a in bankruptcy. At the time of issuance of the SOR, most of the debts had 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:

- (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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant was unemployed for nearly a year, ending in March 2013. He fell behind in his bill payments, particularly his child support. The largest debt is a result of his former girlfriend's failure to continue the payments on the modular home and her decision to file bankruptcy. Both of these incidents are factors beyond his control. When he obtained employment, he began to pay his past non-SOR debts. When he began his current employment, he also started immediate payments on his child support, current and arrearage, as his income had improved. His actions on his past-due debts show that he acted responsibly under the circumstances. Applicant pays his current bills; he has resolved two small bills; and he pays his child support arrearage. He has control of his finances, and he has made a good faith effort to resolve his debts. AG ¶¶ 20(b) to 20(d) 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 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.

In 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 but the debt 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.

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. Applicant’s largest SOR debt arose because his former girlfriend stopped paying the mortgage on a modular home they had purchased in 2000 and then had the debt discharged in bankruptcy without his knowledge. He learned about the debt when the creditor sought payment from him. He fell behind in his child support payments and other non-SOR debts when he was unemployed for nearly one year. His first job allowed him to begin repaying his debts, but the income was insufficient to pay all his past-due bills. With his current job, he knew that he would earn sufficient income to pay his child support and to resolve his past-due child support. As soon as he started the job in June 2014, child support payments, including the arrears, were deducted from his pay and continue with every paycheck. Applicant is financially responsible as shown by the credit report in the record. He did not make the decision to forego the monthly payment on the modular home, which has created a significant debt for him. He has shown a track record for debt resolution, and he has a plan to resolve the largest debt by filing bankruptcy. Most

significantly, he has taken affirmative action to pay or resolve two of the three delinquent debts raising security concerns. (See AG ¶ 2(a)(6).) In reviewing the evidence of record, I find that the debt on the modular home cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. While the modular home debt remains unpaid, this unpaid debt is not sufficient to raise a security concern.

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:

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| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | 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 granted.

MARY E. HENRY
Administrative Judge