



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-05610
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

01/20/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On February 1, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF 86). On June 13, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to 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* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for

Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On July 13, 2014, Applicant responded to the SOR. On September 15, 2014, Department Counsel was ready to proceed on Applicant's case. On September 29, 2014, DOHA assigned Applicant's case to me. On October 16, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for November 5, 2014. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A(1) through A(9), which were received into evidence without objection.

I held the record open until November 14, 2014, to afford Applicant the opportunity to submit additional documents. Applicant timely submitted AE B through J, which were received into evidence without objection. On November 14, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant denied all of the SOR allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 40-year-old software engineer staff member, who has been employed by a defense contractor since July 2008. He seeks a secret security clearance, which is a requirement of his continued employment. (GE 1; Tr. 18, 22-24.)

Applicant was awarded a bachelor of science degree in electrical engineering in July 1996, and a master of science degree in electrical engineering in July 1998. (GE 1; Tr. 24-26.)

Applicant was previously married from December 1995 to January 2004, and that marriage ended by divorce. He remarried in May 2007. Applicant has three children from his first marriage – a 17-year-old daughter, a 16-year-old son, and a 13-year-old son. He has two sons, ages 6 and 3 from his second marriage. Applicant is currently paying his former spouse \$1,500 in monthly child support. His wife does not work outside the home. (GE1; Tr. 16, 26-27.) Applicant did not serve in the armed forces. (GE 1; Tr. 16.)

Financial Considerations

Applicant's SOR contains four separate allegations consisting of a consent final judgment filed in October for \$278,657, a collection mortgage account for \$60,186,

delinquent property taxes for \$3,600, and delinquent homeowner's association fees for \$2,000. (SOR ¶¶ 1.a. – 1.d.)

Applicant's four SOR debts are all tied to problems he encountered surrounding his attempts to sell a home in a depressed housing market. In August 2007, Applicant purchased a home in State A secured by a \$232,000 mortgage. When Applicant was hired by his current employer in July 2008, his hiring was conditioned on him relocating to State B within one year. He engaged in significant efforts to sell his home, discussed *infra*, but the housing market in State A "was in a pretty bad state." Despite being given an extension from his employer on his relocation date, Applicant was unable to sell his home. In September 2010, he relocated to State B to keep his job. (Tr. 12, 17, 22-24, 28-29.)

Applicant put his home on the market in July 2008 as soon as he was hired by his employer. Unable to sell his home in a depressed housing market for over one year, he consulted two attorneys, his bank, and an accountant. He also went through bank-endorsed credit counseling, applied for relief with the Home Affordable Foreclosures Alternative (HAFA) Program, and changed real estate agents. Following the advice of his bank to enter into a strategic foreclosure, Applicant attempted to sell his home by short sale and over the course of three years he received eight individual offers. To comply with the bank's requirements for a strategic foreclosure, he "swallowed hard" and stopped paying his mortgage, homeowner's association dues, and property taxes. Upon receiving his eight short sale offer, Applicant presented the offer to the bank. The bank was sufficiently confident that the 8th short sale offer would be approved that it advised Applicant to move to State B. In September 2010, Applicant did just that. He and his family left their home in State A and moved to State B. (Tr. 12, 31-37, 56-62; AE A(1) – AEA(9).)

After Applicant moved to State B, the eighth short sale offer fell through. Applicant and the bank entered into a consent final judgment on October 31, 2012, and the home went to a foreclosure sale on March 14, 2013. The home was eventually sold on June 20, 2013 for \$151,111. The bank issued Applicant a Form 1099A, Acquisition or Abandonment of Secured Property, for his home. The Form 1099A listed the balance of principle outstanding at \$225,365 and the fair market value of the property at \$121,000. Applicant is awaiting receipt of a Form 1099C and will include it as income when he files his federal income tax return. (SOR answer; GE 3; Tr. 37-51.)

The following summarizes the status of each SOR debt:

SOR ¶ 1.a – consent final judgment entered in October 2012 for \$278,657. See discussion *supra*. **DEBT BEING RESOLVED.**

SOR ¶1.b – collection mortgage collection account for \$60,186. This amount was apparently submitted to the credit bureau in error. Applicant contacted the creditor by letter dated November 27, 2013, and disputed this charge. This account was

subsequently removed from Applicant's credit report. (SOR answer, GE 2, GE 3; Tr. 53-55.) **DEBT RESOLVED.**

SOR ¶¶ 1.c – 1.d -- delinquent property taxes for \$3,600, and delinquent homeowner's association fees for \$2,000, respectively. These accounts were included in the consent final judgment entered in October 2012, and Applicant is no longer liable for these debts. These accounts were subsequently removed from Applicant's credit report. (SOR answer, GE 2, GE 3, Tr. 51-53.) **DEBTS RESOLVED.**

Applicant's monthly budget reflects a monthly gross salary of \$11,628, a monthly net salary of \$8,094, and a net monthly remainder of \$907. Applicant's recent credit report and budget reflect that he is current on his monthly bills and lives within his means. GE 2, GE 3; Tr. 2762-64.)

Character Evidence

Post-hearing, Applicant submitted a favorable work-related reference letter; a history a cash awards received in 2009, 2010, 2011, and 2014; four special recognition awards; a performance review rating history reflecting exceptional work performance from 2008 to 2014; and a salary history reflecting consecutive merit-based pay raises. (AE B – AE J.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 adjudicative guidelines. These guidelines 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 overarching 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.

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 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 “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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 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 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

AG ¶ 18 articulates the security concern relating to financial problems:

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 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.”

Applicant's history of delinquent debt is established by the evidence presented. The Government established disqualifying conditions AG ¶¶ 19(a) and 19(c).

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's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Nevertheless, he receives partial credit under AG ¶ 20(a) because the debts occurred under circumstances that are unlikely to recur and his behavior does not cast doubt on his current reliability, trustworthiness, or good judgment.

Full application of AG ¶ 20(b) is warranted. Applicant could not have anticipated the collapse of the housing market and the difficulty he would encounter selling his home. Once confronted with a depressed housing market, he did everything within his ability to act responsibly. As noted *supra*, Applicant's debts are resolved or are being resolved and he has made substantial progress in regaining financial responsibility.¹

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9

AG ¶¶ 20(c), 20(d), and 20(e) are fully applicable. Applicant made a good-faith effort to address his credit concerns and successfully resolved all of his debts. He underwent bank-sponsored financial counseling during this process, and successfully disputed the \$60,186 collection mortgage account.

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 the 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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's employment with a defense contractor weighs heavily in his favor. He is a law-abiding citizen and a productive member of society. He is current on his day-to-day expenses, lives within his means, and his SOR debts have been resolved or are being resolved. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating 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." 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. 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." The Judge can reasonably consider the entirety of an applicant's financial

(App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether she maintained contact with her creditors and attempted to negotiate partial payments to keep her debts current.

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. 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. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

Applicant's debts have been paid or are being resolved. Due to circumstances beyond his control, his debts became delinquent. Despite his financial setback as a result of a depressed housing market, it is clear from Applicant's actions that he is on the road to a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's years of financial responsibility before falling into debt, the circumstances that led to his financial difficulties, his financial recovery, the steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, the mature and responsible manner in which he dealt with his situation, his reference letter, and his testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

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

Subparagraphs 1.a to 1.d: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Clearance is granted.

Robert J. Tuidor
Administrative Judge