



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-08877
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

07/24/2014

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 March 28, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On January 2, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an undated and incomplete SOR answer. On February 28, 2014, the DOD CAF contacted him by e-mail seeking clarification of his answer. On March 3, 2014, Applicant replied by e-mail denying both allegations with explanations.

Department Counsel was prepared to proceed on April 4, 2014. The case was assigned to me on April 9, 2014. DOHA issued a notice of hearing on April 17, 2014, scheduling the hearing for May 13, 2014. On April 24, 2014, DOHA issued an amended notice of hearing rescheduling the case for May 15, 2014. The hearing was held as rescheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through GE 4, and Hearing Exhibit (HE) I, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A and B, which were received into evidence without objection.

I held the record open until June 4, 2014, to afford the Applicant the opportunity to submit additional documents. Applicant submitted AE C through AE NN, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on May 23, 2014. The record closed on June 4, 2014.

Findings of Fact

Applicant denied SOR ¶¶ 1.a and 1.b, with explanations. Applicant's answers and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 57-year-old senior director of professional services, who has been employed by a defense contractor since June 1983. He has held a security clearance since 2001 that was upgraded to a top secret security clearance in 2007. (GE 1, Tr. 14-18.)

Applicant graduated from high school in June 1974. He was awarded an associate's degree in computer electronics in May 1982. (GE 1, Tr. 18-19.) Applicant married in April 1978. He and his wife have three adult children. His middle son, age 32, lives at home and is financially "semi" dependent on Applicant for support. His other two children are independent. (GE 1, Tr. 21-22.)

Applicant served in the U.S. Air Force from November 1974 to January 1980, and was honorably discharged as a sergeant (pay-grade E-4). His wife also served in the Air Force from September 1976 to August 1979, and was honorably discharged as a senior airman (pay-grade E-4). (AE D, AE E, Tr. 20-21.)

Financial Considerations

Applicant's SOR alleges two mortgage foreclosure deficiency balances of \$54,168 and \$54,121. (SOR ¶¶ 1.a (Property A) and 1.b (Property B)). These two deficiency balances arose from two homes he purchased in 2008 as investment properties to subsidize his retirement income. (SOR ¶¶ 1.a and 1.b, Tr. 23-26.)

At the time Applicant purchased these properties in 2008, he and his wife conducted a financial analysis regarding the feasibility of purchasing them taking into account his income and various possible tenant scenarios. (Tr. 26-28.) Property A was Section 8 housing with rent guaranteed; however, rent was capped at a specified amount. After Applicant purchased the properties, local authorities determined Property A was in a flood plain. This determination resulted in a significant insurance increase changing Property A from a profitable investment to a losing investment. Applicant now had a negative \$225 monthly deficit that he was required to absorb as a result of the rent cap. (Tr. 28-29, AE T, AE U.) At about the time Applicant experienced a negative cash flow on Property A, he also began having problems keeping paying tenants in Property B. Properties A and B became unaffordable liabilities in a relatively short period of time. (Tr. 29-33, 45-56, 76-80, 87-89.)

When Applicant realized that he could no longer afford to keep his two investment properties, he attempted: (1) to sell the properties through short sale or execute a deed in lieu of foreclosure; (2) tried to renegotiate his mortgages with the bank; (3) attempted to list his properties with a local realtor; (4) tried to sell the properties himself; (5) attempted to increase rent on his Section 8 home; and (6) listed properties with the Veteran's Administration. All of these efforts were unsuccessful and are well documented in the record. (Tr. 41-42, 57-63, 72-73, 80-85, GE 2, GE 4, AE A, AE C, AE L, AE M, AE N, AE X, AE Y, AE Z, AE AA, AE BB, AE CC, AE DD, AE EE, AE JJ.)

No longer able to afford these two investment properties, Applicant consulted with an attorney regarding options and received counseling regarding the foreclosure process. Following that advice, Applicant stopped making mortgage payments on the Properties A and B in early 2011. The bank initiated foreclosure proceedings and auctioned them off. The bank subsequently issued a Form 1099-A for both properties also in 2011. Applicant made numerous attempts to contact the bank to secure a Form 1099-C on both properties, but was unable to do so. The bank did, however, issue Applicant a letter dated May 15, 2014 stating that both mortgage accounts had a zero balance and that he had no further obligation on the two loans. Additionally, his May 2014 credit report reflects zero balances on both mortgage accounts. **The delinquent mortgage accounts alleged in SOR ¶¶ 1.a and 1.b are resolved.** (Tr. 42-45, 56, 65-72, 86-87, 89-94, GE 2, AE A, AE C, AE K, AE L, AE O, AE P, AE V, AE W.)

While owning Properties A and B, Applicant's wife was diagnosed with sleep apnea in 2010 and during a hospital procedure in December 2010 to correct her sleep apnea, she contracted Methicillin-resistant *Staphylococcus aureus* (MRSA). Applicant's wife spent most of 2011 convalescing and to this day has not fully recovered and must limit her activities. Also, during this time-frame, Applicant's mother-in-law became ill, was placed in hospice, and died in early 2012. His father-in-law passed away shortly after that. These events impacted Applicant's situation, particularly in light of the fact that his wife was primarily responsible for managing Properties A and B. Her illness and family problems not only affected her ability to

manage the properties, but also affected her ability to work and earn income. (Tr. 61-63, 96-97, AE A, AE C, AE Q, AE R, AE S.)

Applicant's budget reflects that his finances are under control, that he lives within his means, has regained financial responsibility, and has a net monthly remainder of \$1,926. His bank accounts are in good standing with adequate funds and he has a 401k account with a \$409,051 balance as of May 2011. (Tr. 33-41, 85, GE 2 AE G, AE K, AE GG, AE HH, AE II, AE KK, AE LL, AE MM, AE NN.)

Character Evidence

Applicant has worked for his company for 31 years. During those 31 years, Applicant's job title changed as a result of receiving numerous promotions. In December 2011, he was awarded a bonus payment as a reward for contributing to his company's growth and success. (GE 2, AE F.)

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 in 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 debt 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 extent and duration of the housing market crash as well as the increased costs of retaining his two properties. Additionally, he could not have foreseen that his wife would have contracted MRSA following a surgery to correct her sleep apnea. To Applicant's credit, he acted responsibly and remained in contact with his creditor during this entire process.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 (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 he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

AG ¶ 20(c) is not applicable. Applicant's budget does, however, demonstrate that he is living within his means and has regained financial responsibility. Applicant produced ample documentation to warrant full mitigation under AG ¶ 20(d).² Applicant has resolved his two SOR debts. AG ¶ 20(e) is not relevant.

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 service as a defense contractor weighs in his favor. He is a law-abiding citizen and is a productive member of society. He is current on his day-to-day expenses, lives within his means, and his SOR debts have been fully mitigated. After having had an opportunity to observe Applicant, assess his credibility, and consider

²The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

the steps he has taken to regain financial responsibility, he has done all that could be expected.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's service as a defense contractor, his efforts to resolve his financial situation, his past military service, his potential for future service as a defense contractor, the mature and responsible manner in which he dealt with his adverse situation, 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. Applicant has fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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 and 1.b: 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. Eligibility for a security clearance is granted.

ROBERT J. TUIDER
Administrative Judge