



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-09005
)
Applicant for Security Clearance)

Appearances

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

03/31/2016

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 April 18, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 26, 2015, 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F. 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 granted or denied.

On April 17, 2015, Applicant responded to the SOR. On September 9, 2015, Department Counsel was ready to proceed. On September 28, 2015, DOHA assigned Applicant's case to me. On October 30, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for November 16, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 5, which were received into evidence without objection. Applicant testified, called two witnesses, and offered Applicant Exhibit (AE) A, which was received into evidence without objection.

I held the record open until January 16, 2016, to afford the Applicant an opportunity to offer additional evidence. Applicant timely submitted AE B through AE L, which were received into evidence without objection. On November 24, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant admitted SOR ¶¶ 1.b – 1.h, and denied SOR ¶¶ 1.a and 1.i., with are duplicates. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 52-year-old senior instrumentation technician employed by a defense contractor since February 1985. He seeks a secret security clearance which is required to work on future projects for his company. He previously held a security clearance when he was initially hired by his company, but it was allowed to lapse. (GE 1, GE 3; Tr. 15-16, 21-22)

Applicant graduated from high school in 1981. He was awarded an associate of science degree in engineering electronics in 1983. (GE 1; AE J; Tr. 16-18) Applicant was married from 1997 to 2002, and that marriage ended by divorce. He remarried in 2003 and has a 22-year-old stepson, a 12-year-old son, and a 9-year-old daughter. Applicant's wife is not employed outside the home and homeschools their youngest child. (GE 1; Tr. 18-21) Applicant did not serve in the U.S. armed forces. (GE 1, GE 3)

Financial Considerations

Applicant's SOR lists nine debts. Excluding the two duplicate debts (SOR ¶¶ 1.a and 1.i), the remaining seven debts total \$21,570. (SOR ¶¶ 1.a – 1.i) Applicant's financial difficulties began in 2004 when he purchased a home for \$375,000 on a five-year interest-only loan. His monthly house payment for those five years was \$1,200; however, at the conclusion of five years, his monthly house payment increased to approximately \$3,000 in 2009. Applicant's mother-in-law lived with his family from 2003 and was contributing \$700 a month until she passed away in 2008. When Applicant's payments increased to \$3,000 a month in 2009, his father paid his house payments for 13 months. (SOR answer; GE 3, Tr. 22-24)

When Applicant's father was no longer able to afford to pay his house payments, Applicant faced foreclosure. He retained the services of a foreclosure attorney, who was able to qualify Applicant for the Home Affordable Refinance Program (HARP) in 2014, reducing his monthly house payments to \$1,746. However, during the time he was unable to pay the higher house payments, he relied on credit cards to make ends meet for his family. (Tr. 24-26, 28)

Applicant has been paying down the duplicate debt listed in SOR ¶¶ 1.a and 1.i, which is a vehicle repossession, through wage garnishment. When Applicant was unable to make his payments, his vehicle was repossessed followed by a 2011 judgment against him for \$16,065. As of December 2015, his balance was \$5,269. (Tr. 29; AE A, AE L) In December 2015, Applicant also paid in full the debt alleged in SOR ¶ 1.f, which is a \$51 cable television collection. (AE L)

In December 2016, Applicant enrolled his remaining SOR debts in a reputable debt consolidation program. The total amount of his debts enrolled in the program is \$23,520 and his monthly payments to the program are \$581. At the time of enrollment, his total estimated payoff time was three years, eight months. A review of his plan suggests a measured responsible plan to repay his creditors and included financial counseling. Applicant is making monthly payments to the plan through direct debit. (AE B, AE L)

Applicant's annual salary is approximately \$65,000, but with overtime his annual salary averages \$92,000. (Tr. 26) His post-hearing budget shows a net monthly remainder of \$1,396. Applicant's budget further reflects that he is leading a modest lifestyle and living within his means. (AE H)

Character Evidence

Two witnesses testified on Applicant's behalf – his supervisor (SUP) and his wife. SUP has known him for 20 years and supervised him for 15 years. SUP described him as "very dependable and hardworking" and as "one of the (company's) best" to complete employer assignments. SUP described Applicant as completely trustworthy. SUP committed to ensuring that Applicant would receive whatever company resources were available to assist him in resolving his financial problems. (Tr. 45-52) Applicant's wife committed to doing what was necessary to resolve their financial difficulties. (Tr. 57-58)

Applicant submitted documentation of several cash awards received in the 2000 to 2015 timeframe for outstanding performance. (AE C, AE E) He also provided documentation of management recognition noting his contribution to his team's success achieved in 2015. (AE D, 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.

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.

Partial application of AG ¶ 20(b) is warranted. Applicant chose to finance his home on a tempting five-year interest-only home loan anticipating that he would be able to refinance or somehow be able to make the payments. However, when Applicant lost his mother-in-law's financial contribution and the interest-free portion of his loan expired, he was unable to shore up the deficit. Applicant was forced to rely on his credit cards to make ends meet. By the time Applicant was able to reduce his mortgage to a manageable payment through HARP, his credit has suffered considerably.

AG ¶¶ 20(c) and 20(d) are fully applicable. Applicant benefited from financial counseling offered through his debt consolidation program. He is paying down his 2011 repossession judgment through garnishment and has made substantial progress. Applicant also paid off a cable television collection account. Applicant's debt consolidation plan is a measured responsible solution he has undertaken to repay his remaining creditors. He is making payments to the plan by direct debit and as long as he remains employed, he will be able to make those payments. Having heard Applicant's testimony, it is clear that this process has made a substantial impression on him. He realizes the importance of maintaining financial responsibility and is determined to follow through on his payments. 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 31 years of employment in the defense industry and having previously held a security clearance 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 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 are being paid through a reputable debt consolidation program. Due to circumstances, in part, beyond his control, his debts became delinquent. Despite his financial setback, 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, his witnesses and reference letters, 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.¹

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.i: 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. Tuider
Administrative Judge

¹Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow him the opportunity to have a security clearance while he works on her financial problems."). This footnote does not imply that this Applicant's security clearance is conditional.