



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-10108
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2013

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 22, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On January 15, 2013, 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 answered the SOR on February 7, 2013. Department Counsel was prepared to proceed on May 15, 2013. The case was assigned to me on June 11,

2013. DOHA issued a notice of hearing on July 9, 2013, scheduling the hearing for July 30, 2013. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 6, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through G, which were received into evidence without objection.

I held the record open until August 19, 2013, to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted AE H through P, which were received into evidence without objection. At Applicant's request, I granted him an extension until September 12, 2013 to submit further documents. Applicant timely submitted AE Q, which was received into evidence without objection. DOHA received the hearing transcript (Tr.) on August 8, 2013. The record closed on September 12, 2013.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a and 1.b. with explanations, and denied SOR ¶ 1.c with explanations. His answers and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact. I found Applicant's testimony to be credible.

Background Information

Applicant is a 40-year-old project engineer, who has worked for his current employer, a defense contractor, since May 2013. He seeks to retain his secret security clearance, which is a requirement of his continued employment. (Tr. 17-18, GE 1.) Applicant had held a top secret security clearance for eight years while working for a previous employer, also a defense contractor. (AE I.)

Applicant was awarded a bachelor of science degree in computer science in August 1999. He married in November 2000 and has two children, ages seven and two. He did not serve in the armed forces. (Tr. 18-21, GE 1.)

Financial Considerations

Applicant's SOR alleges three separate debts consisting of a charged-off home equity line of credit for \$32,164, a charged-off home mortgage for \$177,000, and a charged-off credit card account for \$707. (SOR ¶¶ 1.a – 1.c.)

Like many other home owners in the last decade, Applicant's financial problems stem from the housing market crash. While housing markets were booming, he was counseled by his lender to use the equity from his first home as a down payment to purchase a second home, which he did. Having no reason to believe that he would be unable to sell his first home, he proceeded with the purchase of his second home. He

moved out of his first home and into his second home in approximately September 2006. Unfortunately, the crash occurred around the time he and his family had moved into their second home. Applicant was in the precarious position of owning two homes with his lender holding three mortgages – one on his first home, one on his second home, and a home equity line of credit (HELOC) loan that provided him with the down payment to purchase his second home. For two years Applicant was unable to sell his first home and in the process exhausted his savings trying to keep his mortgages current. (Tr. 22-24, 46, 55.)

Unable to sell his first home, out of cash, and unable to continue making two house payments, Applicant sought professional help from a bankruptcy attorney in mid-2009. In the process, he consulted with 11 attorneys before retaining his current attorney. He was dissatisfied with the advice of the first 11 attorneys because their solution to his financial problems was to declare bankruptcy. Applicant was unwilling to file bankruptcy with his goal “to do the most responsible thing we could” at the time. His current attorney counseled Applicant not to make any further payments on his first home, let it go into foreclosure, and attempt to sell that home on a short sale. (Tr. 24-26, 43-44.)

Following is a description of Applicant’s three debts and their current status:

CHARGED-OFF HOME EQUITY LINE OF CREDIT IN THE AMOUNT OF \$32,164. Applicant’s current credit report dated July 22, 2013, in reference to this account states “Paid, Closed. \$32,164 written off.” Applicant provided a letter from the bank dated September 19, 2012, which states, “We are pleased to inform you that we have approved your Home Equity account for participation in a principle forgiveness program offered as a result of the Department of Justice and State Attorneys General global settlement with major mortgage servicers . . . You will receive a full forgiveness of the remaining principal balance of \$31,204.36 on your Home Equity Line of Credit Account,” adding that Applicant no longer owed the money and the bank was waiving any outstanding fees and accrued interest. The bank also provided Applicant with a 2012 Form 1099, Cancellation of Debt, which he included on his income tax return. **ACCOUNT RESOLVED.** (SOR ¶ 1.a, SOR response, Tr. 26-31, AE A, AE B, AE C, AE D.)

CHARGED-OFF MORTGAGE IN THE AMOUNT OF \$177,000. This account became past-due in June 2008 when Applicant was unable to continue making two house payments. Until then Applicant was making the \$3,000 house payments on the first house. When he retained his attorney, he was advised to discontinue making payments on the first home. Applicant attempted to sell his first home as a short sale five times and provided documentation of those five separate attempted short sales, which occurred on March 9, 2008, July 15, 2008, October 21, 2008, March 12, 2009, and June 30, 2009. Offers ranged from a low of \$103,890 to a high of \$237,000. The bank rejected all five short sale offers. Applicant also tried unsuccessfully to rent the first home. Since Applicant stopped making payments in June 2008, the bank has not pursued him and he continued to follow his attorney’s advice throughout the process.

It is unclear why the bank did not pursue this arrearage, but at this time the statute of limitations has been tolled. (SOR ¶ 1.b, SOR response, Tr. 31-34, 43-44, 47-57, AE I.) While the tolling of the statute of limitations is not viewed as an acceptable defense in this venue, the fact remains that the creditor has charged-off this debt and it is no longer legally enforceable. Applicant demonstrated a good-faith effort by making payments on his first home for two years until it was no longer possible to do so, by attempting to short sell this first home five times, and by trying to rent it. **ACCOUNT RESOLVED.**

Applicant's attorney had also counseled him to default on his second home because it was "upside down." Applicant refused to follow that advice because although it may have been financially smart, he did not believe that it was the morally right thing to do. His goal throughout the process was to do the best he could with the financial resources available to him. (Tr. 58-60.)

CHARGED-OFF CREDIT CARD ACCOUNT IN THE AMOUNT OF \$707. Applicant stated that if this account appeared as late as it did in earlier credit reports submitted by the Government, it was an error. Applicant previously acknowledged this debt as his during an Office of Personnel Management (OPM) interview in March 2010 and later verified that debt as his in response DOHA interrogatories in October 2012. He explained during cross-examination that he did not have his financial records with him during his March 2012 OPM interview and confused that account with another account and mistakenly confirmed the information as correct in response to DOHA interrogatories. Applicant's noted that this creditor's entry on his July 22, 2013 credit report stated, "Paid. Closed/Never late." Post-hearing, Applicant submitted an e-mail dated September 12, 2013, further documenting his efforts to contact this creditor. He contacted three separate divisions of this creditor – the banking department, the credit card division, and the mortgage department. All three divisions had no record of this account. Applicant contacted the credit bureaus and they were also unable to confirm the existence this account. Applicant followed up with a written dispute to the creditor and they did not respond to his inquiry. This "charged-off" account has not appeared on Applicant's credit report since May 2011. Applicant would have been better served had he advised the OPM investigator in March 2010 that this was not his account and more importantly had he been more thorough when he later submitted his response to DOHA interrogatories. While much of the discussion regarding this account could have been avoided, I am satisfied that this account was reported in error and/or has been successfully disputed. **ACCOUNT RESOLVED.** (SOR ¶ 1.c, SOR response, Tr. 34-40, GE 2, GE 3, AE B, AE I, AE K, AE L, AE Q.)

Applicant did not seek formal financial counseling apart from the advice he sought from his attorney. His annual salary is \$87,000 his wife's annual salary is \$54,000, for a total of \$141,000. Applicant's personal financial statement, taking into account his income and the income of his wife, reflects a net monthly remainder of about \$4,000. Applicant and his wife do their best to provide for their two children by ensuring their son has good quality day care and their daughter is able to participate outside activities. He is current on all his debts and has about \$424,000 in total assets.

As noted, Applicant owns his own home and is current on his mortgage. He has approximately \$15,000 in his checking account, \$5,000 in his savings account, and a credit score of 701. Applicant's monthly budget reflects that he and his family live a measured and responsible lifestyle and live within their means. (Tr. 62-69, GE 5, AE E, AE F, AE G, AE J.)

Character Evidence

Applicant submitted two reference letters from a former project officer, and the vice president and facility security officer of a former employer. He also submitted performance evaluations covering the years 2010 to 2012. These individuals and evaluations describe in detail the significant contribution that Applicant has made, not only to their company, but also to the national defense. Applicant's references provide a favorable insight into his good character and trustworthiness. (AE M – AE P.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking to obtain 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 the 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

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 his admissions and the evidence presented. The Government established the 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 does not cast doubt on his current reliability, trustworthiness, or good judgment.

The housing market crash in the last decade wreaked financial havoc on countless homeowners, homeowners who had otherwise been current on their monthly expenses. Following the advice and encouragement of his lender, Applicant chose to upgrade the family home, and to do so borrowed against the equity of their home and used those funds as a down payment to purchase a second home. At the time he did this, the housing market was robust and he had no reason to believe that he would have had any difficulty selling their original home. With hindsight, one can debate the prudence of his choice, but what he did was not unusual at the time and was consistent with the advice and encouragement of his lender. While the market crash was beyond Applicant's control, his choice to purchase a second home was within his control and application of AG ¶ 20(b) has limited applicability. To Applicant's credit, he did remain in contact with his lender during this process, discussed *infra*.¹

AG ¶ 20(c) is partially applicable even though Applicant did not seek "formal" financial counseling. Recognizing that he could no longer continue paying a mortgage on his previous and current residence as well as a HELOC after having done so for

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.

two years, he consulted 11 bankruptcy attorneys before settling on his current attorney. He chose his current attorney because he was willing to pursue an avenue that did not involve bankruptcy. Additionally, Applicant has produced ample evidence that he is living within his means and has since regained financial responsibility. There are clear indications that his financial problems are resolved.

Furthermore, there is sufficient information to establish partial if not full mitigation under AG ¶ 20(d).² After making payments for two years on two homes and a HELOC, Applicant had exhausted his financial resources. He documented five attempts to short sell his first home from March 2008 to June 2009 with offers ranging from \$103,890 to \$237,000. All offers were rejected by the lender. I note that the charged-off mortgage is \$177,000. The debt is now charged-off and legally unenforceable. If Applicant had followed the advice of the first 11 attorneys he consulted, he would have filed for bankruptcy and this debt as well as the other debts most likely would have been discharged.

Applicant disputed the \$707 charged-off credit card debt. As noted, much of the discussion surrounding this debt could have been avoided had Applicant not acknowledged this debt as legitimate during his OPM interview and certifying it as accurate in subsequent DOHA interrogatories. However, once Applicant realized the debt was not his, he took sufficient steps to contest it, which triggers application of AG ¶ 20(e).

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

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)).

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 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 all of his SOR debts have been addressed. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

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." 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).

While one may take issue with Applicant's choices that led to and contributed to his financial difficulties, I note after having had an opportunity to observe him, assess his credibility, and consider the steps he has taken to return to financial responsibility that he has certainly done more than most in same or similar circumstances. Applicant did not simply "walk away" from his obligations on his first house, but rather tried to pay his mortgage as long as he could and then tried to short sell it – five times. It is

unclear why the lender did not accept any of the offers, particularly when Applicant located buyers who were willing to pay more than what was owed on the mortgage. His \$32,164 HELOC loan has been forgiven, the lender has issued a Form 1099, and Applicant included it on his income tax return. His \$707 credit card debt has been successfully disputed.

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 years of successfully holding a security clearance, his years of financial responsibility, his substantial steps 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 adverse situation, his reference letters and work performance evaluation, 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 to 1.c: 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

