



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 13-01321
)
Applicant for Security Clearance)

Appearances

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

06/30/2014

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 14, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On February 3, 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 answered the SOR on March 14, 2014. Department Counsel was prepared to proceed on April 7, 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

14, 2014. On April 24, 2014, DOHA issued an amended notice of hearing rescheduling the case for May 16, 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 through AE O, 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 P and AE Q, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on May 27, 2014. The record closed on June 4, 2014.

Findings of Fact

Applicant admitted the allegations contained in SOR ¶¶ 1.a and 1.d, and denied 1.b and 1.c. He provided explanations for his admissions and denials. 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 48-year-old president and former chairman of the board and chief executive of a company with major defense contracts. As an officer of that company with significant responsibility, he requires a security clearance to effectively discharge his duties. Applicant is a first-time applicant for a security clearance. (GE 1, Tr. 14-16.) He has been with his company since January 2013. (AE G, AE H, Tr. 19-22, 65.)

Applicant graduated from high school in June 1983. He was awarded a bachelor of arts degree in economics in June 1986. (GE 1, Tr. 16-17.) Applicant was previously married from May 1987 to July 2004. That marriage ended by divorce. Applicant remarried in April 2005. Applicant has a 20-year-old son and a 19-year-old daughter from his previous marriage, and an 8-year-old son from his current marriage. He shares college costs for his two oldest children with his former spouse. (GE 1, Tr. 17-19.) Applicant's current spouse is employed full-time as director of design for a biking apparel company. (Tr. 19, 54-55.) Applicant did not serve in the armed forces. (GE 1, Tr. 22.)

Financial Considerations

Applicant's SOR alleges four separate debts totaling \$60,559 – a \$51,139 charged-off mortgage debt, a \$418 security service collection account, a \$304 medical collection account, and an \$8,698 past-due mortgage account. (SOR ¶¶ 1.a – 1.d.)

Applicant attributes his financial problems to the decline in the economy that occurred after the 2007 market crash. He was making a six-figure income as an investment banker up until then and subsequently was unemployed for about four years. Applicant went from a six-figure income to a three-year negative income in the years 2008, 2009, and 2010. As a result, he was forced to live off his savings and cash in his IRA to meet his living expenses. Before the 2007 crash, Applicant had enjoyed excellent credit and was current on his bills. Three years of negative income prompted his SOR debts and a decline in his credit rating. In 2011, Applicant's financial situation began to improve, and as of January 2013, he has regained his financial footing when he regained full-time employment. He considered bankruptcy, but decided against it because he wanted to repay his creditors. (Tr. 22-25, 50-52, 63-64, AE F.)

Applicant provided documentation that he has settled and paid all four accounts. After his debts became delinquent, Applicant remained in contact with his creditors. (SOR answer, AE A – AE D, AE O, AE P, AE Q; Tr. 29-48, 59-61.) His September 2013 personal financial statement reflects a monthly gross salary for Applicant and his wife at \$18,680, and a net monthly remainder of \$12,773. His home is appraised at \$1,500,000, and he has substantial savings, stocks, and bonds. (GE 2, AE I - AE L, Tr. 48, 56, 66-68.) Applicant's May 2014 credit report shows that all of his accounts are current and in good standing. (AE E.) He is current on all of his state and federal taxes. (Tr. 57-59.)

Character Evidence

Applicant submitted two work-related reference letters from company officers. Both letters are from senior executives and discuss his professionalism, knowledge, and support and counsel. They view Applicant's current and future contribution as a key to their company success. His references also note his overall contribution to the national defense and strongly recommend him for a security clearance. (AE M, AE N, Tr. 68.)

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 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 his behavior does not cast doubt on his current reliability, trustworthiness, or good judgment.

Full application of AG ¶ 20(b) is warranted. Applicant's sustained an almost four-year period of unemployment following the 2007 market crash. Since regaining full employment in January 2013, he has settled and paid all of his SOR debts. To Applicant's credit, he remained in contact with his creditors during this process.¹

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 settled and paid all of his 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

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.

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)).

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 the steps he has taken to regain financial responsibility, he has done all that could be expected. Applicant honored his obligations rather than "walking away" from them.

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 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 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:

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|---------------------------|---------------|
| 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. Eligibility for a security clearance is granted.

ROBERT J. TUIDER
Administrative Judge