



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-00044
)
Applicant for Security Clearance)

Appearances

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

08/15/2014

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 July 9, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On February 26, 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.

On March 15, 2014, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. Subsequently, on April 25, 2014, Applicant submitted an e-mail requesting that his case be heard before an

administrative judge. On April 30, 2014, Department Counsel was prepared to proceed. On May 20, 2014, the case was assigned to me. On May 22, 2014, DOHA issued a notice of hearing scheduling the hearing for June 25, 2014. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through GE 5, and Hearing Exhibits (HE) I and II, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through TT, which were received into evidence without objection.

I held the record open until July 18, 2014, to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted AE UU through AE ZZ, which were received into evidence without objection. On July 7, 2014, DOHA received the hearing transcript (Tr.). On July 18, 2014, the record closed. On August 8, 2014, I contacted the Applicant by e-mail seeking clarification and additional information pertaining to the status of several accounts. Applicant submitted AE AAA through KKK, which were received into evidence without objection.

Findings of Fact

In his SOR answer, Applicant admitted all of the allegations 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 62-year-old information technology specialist, who has been employed by a defense contractor since July 2013. He seeks a secret security clearance, which is a requirement of his continued employment. (GE 1, Tr. 27-29.)

Applicant graduated from high school in June 1969. He was awarded two associate's degrees, the first in electronics technology in January 1992 and the second in general business in January 1993. Additionally, Applicant has also been awarded numerous job-related certificates. (GE 1, AE M, AE BB, AE DD, Tr. 32-34.)

Applicant has been married three times. His first marriage was from April 1974 to September 1975 and his second marriage was from October 1975 to August 2004. He has five adult children from his second marriage. His first two marriages ended by divorce. Applicant married his third and current wife in September 2005. He and his wife have a part-time entertainment business. (GE 1, Tr. 35-38, 43-45.)

Applicant served in the U.S. Marine Corps from March 1972 to March 1992, and was honorably discharged as a staff sergeant (pay-grade E-6), having earned a 20-year retirement. (AE EE, AE FF, Tr. 38-41.)

Financial Considerations

Applicant's SOR contains 16 separate allegations under this concern. (SOR ¶¶ 1.a – 1.p). Applicant attributes his financial problems to his 2004 divorce and the recession that occurred in the last decade. Applicant's second wife was awarded one-half of his military pension, which was approximately \$700 a month, and \$1,300 in monthly alimony. In 2010, his former wife waived her alimony, but not before he had incurred substantial debt. In May 2007, Applicant accepted a ten-year retirement as a manufacturing technician. After that, he held several short-term jobs, attended school under the Department of Veteran's Affairs vocational rehabilitation program, and attempted to earn income through his entertainment business. He was unable to earn a living wage and fell deeper into debt until he began his current employment in July 2013. (SOR answer, GE 1, AE K, AE L, AE CC, AE TT, Tr. 16-17, 44-52, 96-100.)

As a result of Applicant's current employment, he is now earning a steady income and has made a concerted effort to repay his creditors and regain financial responsibility. Below follows a summary of Applicant's SOR debts and their current status.

SOR ¶ 1.a – Four state tax liens for \$415, \$2,453, \$1,229, and \$733. Paid in full in 2013. (AE A, Tr. 62-65, 81.) **DEBTS RESOLVED.**

SOR ¶ 1.b – Deficiency balance of \$7,508 owed for repossessed automobile. Applicant is making \$100 monthly payments. (AE XX, Tr. 81.) **DEBT BEING RESOLVED.**

SOR ¶ 1.c – Charged-off financial services account for \$2,549. Applicant is making \$65 monthly payments. (AE WW, Tr. 81-82.) **DEBT BEING RESOLVED.**

SOR ¶ 1.d – Collection account for \$1,181. Applicant is making \$107.60 monthly payments. (AE ZZ, Tr. 81-82.) **DEBT BEING RESOLVED.**

SOR ¶ 1.e – Water utility collection account \$56. Paid in full in May 2014. (AE B, Tr. 82.) **DEBT RESOLVED.**

SOR ¶ 1.f – Foreclosure mortgage account for \$152,312 with a past-due balance of \$82,916. Applicant used his credit along with another individual to purchase an investment property in 2008. Purchasing this house at the time, based on the market, appeared to be a prudent course of action. The housing market collapsed and the investment failed. The property went into foreclosure in November 2010. On August 4, 2014, the property was sold at public auction leaving a \$108,452 deficiency. The mortgage company has advised Applicant that they will issue a Form 1099C relieving him of any further liability. (GE 5, AE YY, AE CCC, AE DDD, AE JJJ, AE KKK, Tr. 67-82-83, 87-91.) **DEBT BEING RESOLVED.**

SOR ¶ 1.g – Judgment in favor of a credit union for \$23,007. Applicant co-signed for his daughter’s automobile loan and she failed to make payments. Applicant is making \$100 monthly payments. (AE C, AE UU, Tr. 65-67, 83.) **DEBT BEING RESOLVED.**

SOR ¶ 1.h – Security services collection account for \$509. Applicant settled and paid off account for lesser amount of \$255 in May 2014. (AE D, Tr. 83.) **DEBT RESOLVED.**

SOR ¶ 1.i – Collection account for \$65. Paid in full in May 2014. (AE E, Tr. 83.) **DEBT RESOLVED.**

SOR ¶ 1.j – Cable company collection account for \$552. Paid in full in May 2014. (AE F, Tr. 83.) **DEBT RESOLVED.**

SOR ¶¶ 1.k through 1.p – Internal Revenue Service (IRS) tax liens - \$7,243 for 2004; \$3,691 for 2005; \$4,354 for 2006; \$2,188 for 2007; \$2,407 for 2009; and \$957 for 2010. In May 2014, Applicant began a monthly payment plan with the IRS to repay his back taxes. (AE G – AE J, Tr. 52-63, 83.) **DEBTS BEING RESOLVED.**

Applicant submitted documentation showing that he is current on the five accounts for which he is making payments. (AE XX, AE WW, AE ZZ, AE UU, AE G – AE J, AE HHH.)

Applicant sought financial counseling through his bank. Although he did not complete a formal program, he did consult with a financial counselor on an as-needed basis, most recently in May 2014. (AE AAA, Tr. 77, 79-81.) Applicant’s post-hearing budget reflects joint monthly income of \$4,519, with a net monthly remainder of \$899. (AE EEE – AE GGG, AE III, Tr. 72-78.) It is clear from his budget that he is living within his means and being mindful of his obligations to budget enough funds to pay off his creditors.

Character Evidence

Applicant provided work performance evaluations from previous employers covering the timeframe 1997 to 2011. These 14 years of evaluations reflect above average performance. (AE N – AE AA.) Additionally, Applicant submitted 13 reference letters from a wide range of individuals to include former instructors, supervisors, landlord, co-workers, friends, and leadership from his church. (AE GG – AE SS.) The collective sense of these references reflects that Applicant is a trustworthy individual of strong moral character. His work-related references convey that he is a valued and trusted employee, who is making a contribution to the defense industry.

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.

Partial application of AG ¶ 20(b) is warranted. Applicant could not have anticipated the extent and duration of the recession and housing market crash in the last decade. Additionally, the financial impact of his 2004 divorce remains to this day. In 2010, his former spouse waived her alimony and in 2013 Applicant was hired by his current employer. Applicant remained in contact with his creditors to a certain extent; however, with limited or no money there was little he could convey other than when he had the money, he would pay them. As noted above, Applicant is doing his level best to repay his creditors and regain financial responsibility.¹

AG ¶ 20(c) is applicable. Although Applicant did not attend a formal counseling program, he did seek the counseling service offered through his bank and consulted with a financial counselor on an as-needed basis. Applicant's budget demonstrates that he is living within his means while making a good-faith effort to repay his creditors. Applicant produced sufficient documentation to warrant full mitigation under AG ¶ 20(d).² Applicant has resolved or is in the process of resolving all of his SOR debts. AG ¶ 20(e) is not relevant.

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

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 20 years of honorable service in the Marine Corps as well as his service as a defense contractor and employment record weigh 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 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

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)).

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 does not lead a lavish lifestyle, lives within his means, and is current on his day-to-day expenses. His debts have been paid or are in a payment plan. In the case of his investment property, the mortgage company has indicated they will “forgive” the debt and issue a Form 1099C relieving him of further liability. Due to circumstances beyond his control, Applicant’s debts became delinquent. Despite his recent financial setback, it is clear from his 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 20 years of military service, years of financial responsibility before falling into debt, his financial recovery and 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 performance evaluations, 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:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a to 1.p:	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