



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-01045
)
Applicant for Security Clearance)

Appearances

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

09/29/2014

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 October 13, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF 86). On April 30, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an 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) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue 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 continued or revoked.

On May 14, 2014, Applicant responded to the SOR. On July 14, 2014, Department Counsel was ready to proceed on Applicant's case. On July 18, 2014, DOHA assigned Applicant's case to me. On July 30, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for August 25, 2014. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5 and Hearing Exhibit (HE) I, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A through N, which were received into evidence without objection.

I held the record open until September 15, 2014, and granted Applicant an extension until September 22, 2014, to afford him the opportunity to submit additional documents. Applicant timely submitted AE O and AE EE, which was received into evidence without objection. On September 4, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant admitted in part and denied in part 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 52-year-old senior manager, who has been employed by a defense contractor since November 1996. He seeks to retain his security clearance, which is a requirement of his continued employment. (GE 1, Tr. 14-17.)

Applicant was awarded a bachelor of science degree in computer science in May 1986 and a master's of science degree in computer science in June 1993. He also took some continuing education classes as well as "some Ph.D. classes," but did not pursue an additional higher degree. (GE 1, Tr. 17-19.)

Applicant married in December 1987, and divorced in August 2010.¹ He has three adult children – a 25-year-old son, and two daughters ages 23, and 20. Applicant's son and youngest daughter are partially dependent on him for support. (GE 1, Tr. 19-22.) When Applicant's children had reached the age of majority, they chose to live with him. His son currently lives at home as well as his youngest daughter when she is not attending college. His oldest daughter is married and

¹ Applicant's former spouse filed for divorce in October 2009.

financially independent. (AE O, Tr. 63-64.) Applicant did not serve in the U.S. armed forces. (GE 1.)

Financial Considerations

Applicant's SOR contains five separate allegations – a Chapter 7 bankruptcy filed in May 2012 and dismissed in September 2013 and four charged-off accounts totaling \$44,415.

Applicant attributes his financial problems to a very costly 2010 divorce and a judgment awarded to his former in-laws. He was initially ordered to pay his former spouse alimony at \$1,200 a month that increased to its current rate of \$2,900 a month. That amount will increase to \$3,500 a month when their youngest daughter graduates from college in two years. His former spouse took him to court several times to get more money and had all of his assets frozen. During this time, Applicant was responsible for paying college expenses for his two oldest children and private school tuition for his youngest daughter as well as making the house payment. Applicant's former spouse refused to cooperate in setting a reasonable selling price for their marital home which prolonged the time Applicant was required to make house payments. His former spouse also failed to honor her agreement to repay one-half of the debt to her parents. At one time during their divorce, Applicant had a negative \$1.2 million balance in his bank accounts and 25% of his pay garnished. Their house eventually went into foreclosure and Applicant was forced to move out and rent a townhouse for himself and his children. Applicant was able to turn the momentum around; however, not before he had incurred significant financial damage. (Tr. 22-28, 41-49.)

Applicant is still recovering from the financial fallout following his 2010 divorce and judgment; however, he is well on the way to regaining financial responsibility. Below follows a summary of Applicant's SOR allegations/debts and their current status.

SOR ¶ 1.a – Alleges that Applicant filed a Chapter 7 bankruptcy petition in May 2012 that was dismissed in September 2013. That is correct. After Applicant's divorce, his former in-laws filed suit against him to recover the \$210,000 which he thought was a gift to him and his then wife. His former in-laws were awarded a \$235,000 judgment in March 2012. Following the judgment, Applicant's former in-laws had his bank accounts frozen and garnished his wages. Having no funds to meet his expenses or provide for his children, he filed for Chapter 7 bankruptcy protection. Applicant was then able to settle with his former in-laws for \$160,000 and convert his Chapter 7 to Chapter 11.² Having complied with the terms of his Chapter 11 bankruptcy, the presiding judge ordered it closed in September 2013. (GE 3, Tr. 29-34.) **ALLEGATION RESOLVED.**

² Applicant settled with his former in-laws for \$160,000 at 5% interest with a ten-year note making \$1,700 monthly payments. (Tr. 32.)

SOR ¶ 1.b – Charged-off credit card account in the amount of \$4,506. While Applicant was going through Chapter 7 bankruptcy proceedings, neither the creditors nor Applicant were allowed to contact each other. After Applicant’s Chapter 7 petition was dismissed, his attorney notified his creditors and informed Applicant that all of his credit card debts had “been written off.” In any event, this creditor contacted Applicant and they reached a settlement in which Applicant would make six monthly payments of \$1,123 beginning in May 2014. As of the hearing date, Applicant had made five of the six monthly payments. Post-hearing, Applicant provided documentation of the sixth and final payment. (GE 5, AE J, AE O, AE P, Tr. 34-38.) **DEBT RESOLVED.**

SOR ¶ 1.c – Charged-off credit card account in the amount of \$10,200. Creditor wrote off this debt and issued Applicant a Form 1099-C for this account in January 2014. Applicant reported this write-off as income on his 2013 federal income tax return. (SOR answer, GE 4, GE 5, Tr. 38-41.) **DEBT RESOLVED.**

SOR ¶¶ 1.d and 1.e – Charged-off credit card accounts to same credit card company in the respective amounts of \$18,657 and \$11,052. These accounts were opened in 2002 and charged-off in 2012 after Applicant filed bankruptcy. Applicant contacted the creditor and determined that the debt in SOR ¶ 1.d was not in his name, but rather was in his former spouse’s name and the creditor refused to discuss the account further with him. However, the debt in SOR ¶ 1.e was in his name. The amount due was no longer \$11,052, but \$5,894. Applicant and the creditor settled the account for \$3,540 to be paid in five \$708 monthly payments. He is making those payments by direct debit. Applicant provided documentation supporting same. (GE 4, AE O, AE DD, AE EE, Tr. 41-53.) **DEBT(S) RESOLVED OR BEING RESOLVED.**

Applicant’s post-hearing budget reflects a gross monthly income of \$14,821, with a net monthly remainder of \$2,626. (AE O, AE R, Tr. 53-62.) It is clear from his budget that he is living within his means being mindful of his obligations to budget enough funds to pay off his creditors.

Character Evidence

Applicant provided work performance evaluations from his employer covering the timeframe 2009 to 2013. These five years of evaluations reflect sustained superior performance. (AE Z – AE CC.) Additionally, Applicant submitted seven reference letters from a wide range of individuals to include a former supervisor, senior co-workers, and friends. (AE S – AE Y.) These references reflect that Applicant is a trustworthy individual of strong moral character. His work-related references convey that he is a very valued and trusted employee, who is making a significant 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.

Full application of AG ¶ 20(b) is warranted. Applicant's separation, 2010 divorce, and subsequent financial fallout could not have been anticipated. Rarely does one encounter a divorce with such severe financial consequences in this venue. Applicant remained in contact with his creditors to the extent he was allowed as a result of pending bankruptcy proceedings. As noted above, Applicant has paid, settled, or otherwise resolved all of his debts and has made substantial progress in regaining financial responsibility.³

AG ¶ 20(c) is applicable. Applicant benefited from the financial counseling available through the bankruptcy process and his financial situation is clearly on the mend. Applicant's budget demonstrates that he is living within his means. Applicant produced sufficient documentation to warrant full mitigation under AG ¶ 20(d).⁴ Applicant has resolved or is in the process of resolving all of his SOR debts. AG ¶ 20(e) is not relevant.

³“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.

⁴The 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)).

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 18 years of sustained and honorable service with his defense contractor employer 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 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 have been paid or are in a payment plan. Due to circumstances beyond his control, his debts became delinquent. Despite Applicant's recent financial setback as a result of a most contentious and costly divorce, 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 years of financial responsibility before falling into debt, the circumstances that led to his financial difficulties, 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, his devotion and loyalty to his children, 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.e:	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. Tuidor
Administrative Judge