



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-01110
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

11/24/2014

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 August 2, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF 86). On May 20, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) 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 grant a security clearance for

Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On July 22, 2014, Applicant responded to the SOR. On October 9, 2014, Department Counsel was ready to proceed on Applicant's case. On October 17, 2014, DOHA assigned Applicant's case to me. On October 20, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for November 3, 2014. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A(1) through AE A(31), which were received into evidence without objection.

I held the record open until November 14, 2014, to afford Applicant the opportunity to submit additional documents. Applicant timely submitted AE B through AE D, which were received into evidence without objection. On November 12, 2014, DOHA received the hearing transcript (Tr.).

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 42-year-old aircraft worker, who has been employed by a defense contractor since July 2013. He seeks a security clearance, which is a requirement of his continued employment. Applicant previously held a security clearance when he was on active duty in the U.S. Navy, discussed *infra*. (GE 1, Tr. 18-19, 50.)

Applicant graduated from high school in June 1991. He did not pursue higher education, but did receive a certificate from a technical school for attending a nine-month work-related course and also completed several service schools on active duty. (GE 1, Tr. 19-20.) Applicant served in the Navy from June 1991 to June 2012, except for a short break in service, and was honorably separated with a 20-year retirement as an aviation machinist mate first class (pay grade E-6). (GE 1, Tr. 24-25.)

Applicant married in August 1998, and divorced in December 2007. He has two sons from that marriage, ages 15 and 14. Applicant's sons are geographically distant from him and he pays \$1,147 in monthly child support to his former spouse. (GE 1, Tr. 20-23, 30-31, 38-39.) Applicant remarried in November 2013 and has a six-month-old son. His wife works part-time as a waitress and cashier at a local restaurant. (Tr. 23-24, 40, 51.)

Financial Considerations

Applicant's SOR contains seven separate allegations: (1) a utility collection account for \$82; (2) an unpaid medical account for \$129; (3) an unpaid medical account for \$80; (4) a past-due mortgage account for \$52,936; (5) a charged-off credit card account for \$21,643; (6) a charged-off credit card account for \$44,278; and (7) a credit card collection account for \$29,655.

Applicant attributes his financial problems to his 2007 divorce wherein he was responsible for the mortgage, all household bills, and payments for two automobiles. In 2009, the base where he was stationed closed and he was transferred to a new duty station. Before transferring, Applicant rented his home and unfortunately his tenant failed to pay rent as agreed. Applicant was unable to pay for two homes on his E-6 salary. He remained in contact with his creditors, but did not have the money to pay them. (Tr. 11-12, 31-38.)

In late 2010 to early 2011, Applicant consulted and retained a bankruptcy attorney. Applicant paid the attorney an upfront \$1,300 fee; however, the attorney never filed his bankruptcy petition, kept his money, and has since gone out of business. (Tr. 12, 26-28, 40-43, 51-52.) Applicant then filed Chapter 7 bankruptcy *pro per* in 2014 and was awarded a discharge on October 30, 2014. (Tr. 43-45.) Applicant paid the debts in SOR ¶¶ 1.a through 1.c. The remaining SOR debts were discharged in bankruptcy. (SOR answer, Tr. 28-30, 49, 53-54, AE B, AE C.)

Applicant completed the required credit counseling for Chapter 7 bankruptcy. (AE B.) He is current on his federal income taxes. (Tr. 45-47.) His budget reflects that he is current on his monthly bills and lives within his means. Applicant has a net monthly remainder of \$854 and this does not include \$300 he sets aside in savings every month. (Tr. 47-49, AE D.)

Character Evidence

Applicant provided enlisted performance evaluations covering his 20 years of naval service as well as numerous awards. His 20 years of service reflects sustained above average performance. Applicant also submitted a reference letter from his current supervisor. His supervisor stated that Applicant is a very valued and trusted employee, who is making a significant contribution to the defense industry. His supervisor strongly recommended Applicant for a security clearance. (AE A.)

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 2007 divorce, 2009 transfer and tenant problems, and subsequent financial fallout could not have been anticipated. He was saddled with all of the marital debt and required to pay his former spouse \$1,147 in monthly child support. As noted above, Applicant has paid or otherwise resolved all of his debts and has made substantial progress in regaining financial responsibility.¹

AG ¶ 20(c) is applicable. It is clear that Applicant benefited from the financial counseling available through the bankruptcy process and his financial situation is on the mend. Applicant's budget demonstrates that he living within his means. Having paid the debts in SOR ¶¶ 1.a – 1.c, Applicant is able to receive full credit for those debts under AG ¶ 20(d). The remaining debts were lawfully discharged under Chapter 7 bankruptcy and are resolved. AG ¶ 20(e) is not relevant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

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.

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 naval service and employment with a defense contractor 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 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 resolved through bankruptcy. Due to circumstances beyond his control, his debts became delinquent. He would have filed bankruptcy sooner in 2010 or 2011 had his bankruptcy attorney not abandoned him. With his financial situation in dire straits and having lost his retainer, Applicant chose to "go it alone." Despite his financial setback as a result of a contentious and costly divorce and financial costs associated with a transfer, it is clear from Applicant's actions that he is on the road to a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's years of financial responsibility before falling into debt, the circumstances that led to his financial difficulties, his financial recovery 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 20 years of naval service, his reference letter, 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.

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.g: 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