



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-01336
)
Applicant for Security Clearance)

Appearances

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

10/31/2014

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines F (financial considerations) and E (personal conduct). Clearance is granted.

Statement of the Case

On February 4, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On May 23, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). 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 June 9, 2014 and July 1, 2014, Applicant answered the SOR by two separate responses. On August 28, 2014, Department Counsel was prepared to proceed. On September 3, 2014, DOHA assigned the case to me. On September 25,

2014, DOHA issued a notice of hearing scheduling the hearing by video-conference for October 7, 2014. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through AE C, which were received into evidence without objection. I held the record open until October 21, 2014, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE D through AE G, which were received into evidence without objection. On October 15, 2014, DOHA received the hearing transcript (Tr.).

Procedural Matters

Department Counsel moved to withdraw SOR ¶¶ 1.f, 1.i, 1.j, and 2.a. There being no objection from the Applicant, I granted Department Counsel's motion. (Tr. 14-16, 59-62, 89-90.)

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions 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 38-year-old mail specialist, who has worked for a defense contractor since May 2001. He seeks to retain his secret security clearance, which is a requirement of his continued employment. Applicant has continuously held a security clearance since 2001. (GE 1, Tr. 27, 30-31.)

Applicant graduated from high school in May 1994. He was awarded an associate of arts degree in music education in May 1996. (Tr. 28-30.) Applicant married in June 1996 and has an 18-year-old son, who is a sophomore attending a community college. Applicant's wife is employed as a substitute teacher. Applicant did not serve in the armed forces. (GE 1, Tr. 31-34.)

Financial Considerations

With three allegations withdrawn, seven allegations remain under this concern consisting of four collections accounts, two past-due accounts, and one charged-off account. Applicant was able to demonstrate significant progress in regaining financial responsibility. The following summary provides the current status of Applicant's debts.

SOR ¶ 1.a – Collection credit card account for \$1,311. Applicant set up a payment plan with the creditor and is making \$100 monthly payments. (Tr. 42-44, AE A, AE E.) SOR ¶ 1.b – Charged-off truck loan for \$7,735, which represents the

deficiency after truck was repossessed. Applicant set up a payment plan with the creditor and is making \$400 monthly payments. (Tr. 45-47, AE B, AE E.) SOR ¶¶ 1.c and 1.e – Collection student loan account for \$19,522 and past-due amount of \$1,938 for a student loan account, respectively. Applicant contacted the creditor to negotiate affordable monthly payments. He was able to do so and his payments are \$29 per month. (Tr. 47-50.)

SOR ¶ 1.d – Past-due mortgage amount for \$3,893. Applicant unsuccessfully attempted to modify his monthly payments after his wife became ill. In June 2014, he moved out of his home and is attempting to sell his home by short sale. Applicant has kept his lender up-to-date on his actions. (Tr. 50-56.) SOR ¶ 1.g – Collection cable account for \$1,058 – Applicant contacted the creditor and is attempting to work out a payment plan. (Tr. 56-58.) SOR ¶ 1.h – Collection magazine account for \$126. Applicant paid this account in full. (Tr. 58-59, AE C, AE E.)

Applicant attributes his financial difficulties to a six-month loss of income following his wife's back surgery and complications approximately two years ago. (Tr. 55, 69-71.) Additionally, Applicant retained the services of a credit counselor, who has developed a budget for him. His credit counselor's long-term plan is to revise Applicant's budget every month and make adjustments as needed. Applicant's budget reflects that he is living a modest lifestyle and is doing his best to regain financial responsibility with his available resources. (AE F, AE G.)

Personal Conduct

The SOR alleged that Applicant falsified his February 2013 e-QIP by failing to list the extent of his indebtedness as reflected above. He credibly testified that his failure to list his debts was caused by confusion and his inability to understand the questions.¹ He further testified that there was no one to assist him in completing his e-QIP and that he answered the questions to the best of his ability. (Tr. 36-40.) One month later, during his Office of Personnel Management Personal Subject Interview (OPM PSI) in March 2013, Applicant volunteered that he had financial issues and proceeded to discuss his debts in detail with the OPM agent. He was completely forthright during his testimony concerning his debts. (GE 2, Tr. 40-42, 62-65.)

Character Evidence

Applicant's supervisor submitted a favorable reference letter on his behalf. She stated that Applicant was been employed by their company for 13 years and described him as dependable, knowledgeable, punctual, and reliable. She fully supports him in obtaining a security clearance. (AE D.)

¹Applicant qualified for an employment program that specializes in placing individuals with various forms of disabilities. He described his employer as "an association that helps those with disabilities become independent on their job." (Tr. 66-67.)

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

Financial Considerations

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 Applicant’s 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. Therefore, 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)). However, 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.

Applicant receives full credit under AG ¶ 20(b) because his wife's back surgery and subsequent unplanned six-month loss of her income was beyond his control. He attempted to negotiate settlements with his creditors and the majority of his creditors were willing to work with him. With his available resources, he acted responsibly under the circumstances. Even though he did not have the funds for full repayment, he remained in contact with his creditors and took reasonable steps to resolve his debts.²

AG ¶ 20(c) is applicable because Applicant sought financial counseling. His financial counselor has developed an adjustable budget that will help him regain financial responsibility. Applicant has provided documentation demonstrating that his financial problems are being resolved. Furthermore, there is sufficient information to establish mitigation under AG ¶ 20(d).³ Applicant has resolved most of his SOR debts

²"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 she maintained contact with her creditors and attempted to negotiate partial payments to keep his debts current.

³The 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

by either repaying them in full or setting up payment plans. Given his financial situation, Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is not relevant.

Personal Conduct

Posing potential security concerns are Applicant's documented omissions of his indebtedness on his February 2013 e-QIP. His omissions are, however, attributable to an honest mistake. While Applicant could reasonably have been expected to be more diligent about checking on the status of his debts, his judgment lapses are not enough to impute knowing and willful falsification under Guideline E. There being no misconduct substantiated, there is no need to discuss extenuation or mitigation. *Cf.* ISCR Case No. 02-13568 (February 13, 2004). I conclude he did not knowingly attempt to mislead the Government when completing his e-QIP.

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 Guidelines F and E are incorporated in this whole-person section. However, further comments are warranted.

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)).

Applicant's 13 years of 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 and lives within his means. 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, are in a payment plan, or are in the process of being addressed. Due to circumstances beyond his control, his debts became delinquent. Despite Applicant's recent financial setback as a result of his wife's surgery and loss of her work income, it is clear from his actions that he is on the road to a 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 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 and personal conduct 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 1 – 1.e:	For Applicant
Subparagraph 1.f:	Withdrawn
Subparagraphs 1.g – 1.h:	For Applicant
Subparagraphs 1.i – 1.j:	Withdrawn
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	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