



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 14-04193
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

02/24/2016

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on May 14, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on November 19, 2014, 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR. He submitted a notarized, written response to the SOR allegations dated February 17, 2015, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on November 5, 2015. Applicant received the FORM on November 13, 2015. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on February 2, 2016. The Government submitted seven exhibits, which have been marked as Items 1-7. Items 1-5 and Item 7 are admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1.

Procedural and Evidentiary Ruling

Item 6 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The seven-page document is a summary of an interview with an Office of Personnel Management (OPM) investigator of Applicant, which occurred on June 19, 2013, in conjunction with his background investigation. DOD Directive 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd. February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is attempting to act in good faith, having highlighted the issue in a footnote in the FORM, Item 6 is not authenticated nor is it a sworn declaration. (See Government's FORM, p.2, footnote 1) Applicant did not respond to the FORM. His failure to do so is not a knowing waiver of the rule. Waiver requires "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, 9th ed., West 2009).

Applicant was informed that he could object to the admission of Item 6 on the grounds it was not authenticated as required by ¶ E3.1.20 of the Directive. If he did so, the document in Item 6 would not be considered. I cannot conclude he expressly waived this rule because he did not respond to the FORM. The record does not establish that Applicant's failure to address the accuracy of Item 6 through a response to the FORM was a knowing waiver of the rules outlined in the Directive, enclosure 2, ¶ E3.1.20. Item 6 is not admitted into the record.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.j, 1.l, and 1.m of the SOR. His admissions are incorporated herein as findings of fact.

He denied the factual allegations in ¶ 1.k of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 50 years old, works as a firefighter for a DOD contractor. He has held his current position since March 2003, without any disciplinary issues. Applicant has not served in the military. He graduated from high school in 1983. The records lacks any evidence that Applicant has mishandled classified information or violated the rules for managing classified information.²

Applicant married his first wife in 1988, and they divorced in 2007. He has a 27-year-old daughter and 24-year-old twin daughters from his first marriage. He married his second wife in June 2008, and they separated in November 2010. The record lacks any evidence that they have divorced.³

Applicant and his estranged wife filed a joint bankruptcy petition under Chapter 13 of the bankruptcy code on November 18, 2010. Applicant and his wife provided the bankruptcy court with their financial information, completed their credit counseling, and listed their creditors. After their creditors received notice of the petition, at least two large creditors filed objections to the payment plan in their Chapter 13 case. The court held a confirmation hearing on April 12, 2011. The court declined to confirm their payment plan and dismissed their petition on that date. Because of the court ruling, Applicant and his estranged wife did not make payments under the plan. The 2013 credit report indicates that two of the debts listed in the SOR were included in the bankruptcy petition. Since the actual schedule of creditors included in his bankruptcy petition is not part of the record, I cannot conclude that more SOR debts were part of the plan.⁴

The SOR identified 12 purportedly continuing delinquencies, as reflected by credit reports from 2013 and 2014, totaling approximately \$28,942. Some accounts have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly in both credit reports, in many instances duplicating

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²Item 3.

³Item 3.

⁴Item 4; Item 5.

other accounts listed, either under the same creditor or collection agency name or under a different creditor or collection agency name. Some accounts are identified by complete account numbers, while others are identified by partial account numbers, in some instances eliminating the last four digits and in others eliminating other digits. The SOR also lists his Chapter 13 bankruptcy filing.⁵

In his response to the SOR, Applicant advised that the \$1,107 tax was paid in 2012 and that the \$2,932 judgment was paid, a fact confirmed by the 2013 credit report. The 2013 credit report also indicated that Applicant disputed the \$2,838 debt in allegation 1.m and that this debt had been paid in full. These three debts are not listed on the July 2014 credit report.⁶

The July 2014 credit report does not list the debts in SOR allegations 1.k (\$2,245) and 1.l (\$463). The \$5,960 creditor debt in allegation 1.h for a tax lien is not listed as a tax lien or a debt on either credit report. Applicant denied the debt in allegation 1.k, which is with the same creditor as identified in allegation 1.m. The debts are the same.⁷

Although Applicant admitted the two medical debts in 1.e (\$173) and 1.f (\$29), the actual creditor is not identified on the credit reports. He advised that he was looking into these accounts. In his response, Applicant advised that he had contacted the creditor in allegation 1.d (\$832) and that he was working on a settlement. He also advised that he planned to pay the remaining debts, but did not provide a clear plan. He indicated that he was currently paying other credit debts.⁸

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available,

⁵Item 1.

⁶Item 2; Item 5.

⁷Item 5; Item 7.

⁸Item 2.

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for financial considerations is set out in AG ¶ 18:

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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant developed significant financial problems during his second marriage. Most of the debts had not been resolved at the time the SOR was issued. These two disqualifying conditions apply to the SOR debts with one exception. SOR allegation 1.h (\$5,960) is not listed as a debt with the identified creditor or as a tax lien on either credit report in the record. The Government has not established its case as to allegation 1.h.

The financial considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

(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; 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 financial problems began with his second marriage and separation. He and his estranged wife filed a Chapter 13 bankruptcy in an effort to gain control over their debts. Because bankruptcy is a legal means to resolve their debts, Applicant acted responsibly under the circumstances. A Chapter 13 bankruptcy allows an individual to develop a plan to pay their creditors, at least a portion of the debt owed. The fact that the court declined to approve Applicant's payment is not held against him because the record lacks evidence explaining the reason for the court's decision after two creditor's challenged his petition. AG ¶ 20(b) is only partially applicable because many of the SOR debts are not identified as being in his payment plan.

Credit counseling is a requirement for filing a Chapter 13 bankruptcy petition. Applicant complied with this requirement. He did not provide earnings statements or a budget, making it difficult to assess his current finances. However, Applicant paid the judgment and the tax debt. He also resolved one other SOR debt, an indication that he has made an effort to resolve his debts. AG ¶ 20(c) is partially applicable.

Applicant disputed the debt in allegation 1.m. Since this debt has been paid, his dispute was reasonable. AG ¶ 20(e) applies to this allegation only.

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 an applicant's conduct and all relevant 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.

Under AG ¶ 2(c), 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In assessing whether an applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

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." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). 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. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). 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." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). 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. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. One SOR debt is not listed on the two credit reports of record. Applicant developed financial problems in his second marriage. He attempted to correct his credit problems through a Chapter 13 bankruptcy, which would allow him to pay or partially pay his creditors. This action failed for unknown reasons. Three debts are paid or resolved for a total of \$10,372. The \$1,107 tax lien is considered resolved as it is not listed on the 2014 credit report along with several other resolved or paid debts. Applicant still owes approximately \$13,372 in unpaid debts listed on the SOR, which is less than half of the total SOR debt. He advised that he is paying other creditors, while working to resolve at least one other SOR debt. A review of the record evidence shows that he has taken affirmative action to pay or resolve his delinquent debts raising security concerns. See AG ¶ 2(a)(6). He has not been able to pay all the debts at one time, nor is he required to do so to hold a security clearance. He is working slowly towards the resolution of his debts. His unpaid debts cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a position of trust. While some debts remain unpaid, they are insufficient to raise security concerns.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

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.m:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is granted.

MARY E. HENRY
Administrative Judge