



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-06511
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: Barr D. Younker, Jr., Esq.

03/25/2016

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 June 9, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 26, 2015, 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. 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, revoked, granted, or denied.

On February 19, 2015, Applicant responded to the SOR. On August 4, 2015, Department Counsel was ready to proceed. On August 12, 2015, DOHA assigned Applicant's case to me. On August 28, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of video teleconference hearing setting the hearing for September 16, 2015. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 4, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A through AE R, which were received into evidence without objection.

I held the record open until September 25, 2015, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE S through AE U, which were received into evidence without objection. On September 24, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.d and 1.e with explanations, and denied ¶¶ 1.b, 1.c and 1.f with explanations. After a thorough review of the evidence, I make the following findings of fact.

Background Information

Applicant is a 31-year-old construction laborer who began employment with a defense contractor in July 2014. He was granted a first-time interim clearance before deploying to Afghanistan on a one-year assignment in July 2014. However, Applicant was required to return to the United States in January 2015 because his clearance was revoked as a result of these proceedings. He seeks a secret security clearance as a condition of his employment. (GE 1; Tr. 18-19, 31, 30, 46-47, 70)

Applicant graduated from high school in May 2003. After high school, he attended trade school "from the end of '03 to the beginning of '04" where he took welding courses. (GE 1, Tr. 18) Applicant married in June 2004, and has four minor children. His wife is not employed outside the home. Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 19-20, 39)

Financial Considerations

Applicant's SOR lists six separate debts totaling \$19,413. (SOR ¶¶ 1.a. – 1.f; GE 3, GE 4.) Applicant traces his financial problems to 2008 when he was self-employed and "was dropped by [a] customer . . . and [his] income was reduced by . . . at least 50 percent." Shortly after that, his father became disabled and Applicant bought a van in order for his mother to have a means of family transportation. Applicant had also made some necessary home repairs and bought a car that would provide safe transportation for his wife and four children. He was in the process of

rehabilitating his finances when his income significantly decreased after leaving Afghanistan early. (Tr. 23-31, 43-46, 54-59, 71-73)

The following summarizes the status of each SOR debt:

SOR ¶ 1.a – Charged-off credit card account in the amount of \$5,262. Applicant is making monthly payments on this account. **DEBT BEING RESOLVED.** (Tr. 65-66; AE O, AE S)

SOR ¶ 1.b – Charged-off medical bill in the amount of \$286. Paid in full. **DEBT RESOLVED.** (Tr. 32, 66; AE D)

SOR ¶¶ 1.c – Collection account for cell phone in the amount of \$205. Paid in full. **DEBT RESOLVED.** (Tr. 32-34, 67; AE E)

SOR ¶ 1.d – Collection account for credit card in the amount of \$7,490. Applicant is making monthly payments on this account. **ACCOUNT BEING RESOLVED.** (Tr. 34-39; AE F, AE L, AE N, AE P, AE Q, AE T)

SOR ¶ 1.e – Collection account deficiency after a voluntary vehicle repossession in the amount of \$5,651. Applicant is making monthly payments on this account. **ACCOUNT BEING RESOLVED.** (Tr. 37-39, 48-54, 67-68; AE K, AE M, AE U)

SOR ¶ 1.f – Collection account for credit card in the amount of \$519. Paid in full. **DEBT RESOLVED.** (Tr. 68-69; AE R)

Applicant stated that if he knew his job was at risk when he was making \$11,000 a month while working overseas, he would have paid off his SOR debts versus making home repairs. He enjoys his work as a defense contractor. (Tr. 42, 59-61) Applicant stated that his employer will rehire him if his clearance is reinstated. (Tr. 70-71)

In November 2014, Applicant retained the services of a law firm specializing in credit repair, which occurred before he received his SOR. The law firm assisted Applicant with his credit repair until he was no longer able to pay them as a result of his early return from Afghanistan. (Tr. 35, 61-64; AE J) At present, Applicant's gross monthly income is "about \$2,600 or \$2,800" and his net monthly income is \$2,000. (Tr. 39)

Character Evidence

Applicant submitted three reference letters: (1) a former employer; (2) his project manager in Afghanistan; and (3) and a long-time family friend. The collective sense of these letters conveys that Applicant is hardworking, honest, and trustworthy. They all support reinstatement of his security clearance. Applicant's project manager

observed Applicant on a daily basis while in Afghanistan and stated, “[Applicant] was one of our best employees and it put us in a difficult position on the job when we lost him.” (Tr. 40-41; AE G – AE I)

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 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 debts 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. A significant period of time has elapsed since his 2008 reduction in income precluding full application of this mitigating condition. Additionally, no reasonable son, spouse, or parent would allow their family members to maneuver in unsafe transportation. Furthermore, Applicant having the benefit of hindsight would have deferred his home repairs had he known he would have lost his overseas job as a result of his financial problems. As noted *supra*, Applicant has paid or is resolving all of his debts and has made substantial progress in regaining financial responsibility.¹

AG ¶¶ 20(c) and 20(d) are fully applicable. Applicant retained the services of a law firm to repair his credit before his SOR was issued. He was making progress until he was no longer able to afford their services as a result of his early return home from Afghanistan. However, as noted, Applicant has paid in full three of his SOR debts and is making timely monthly payments for his remaining three 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.

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 willingness to work in Afghanistan as a defense contractor weighs 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 resolved or are being resolved. 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).

Through a combination of events, Applicant's debts became delinquent. Applicant understands what he needs to do to establish and maintain his financial responsibility. His efforts at debt resolution have established a "meaningful track record" of debt re-payment. I am confident he will resolve the three remaining debts on his SOR and maintain his financial responsibility.²

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's 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 character evidence, 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.f: For Applicant

²Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems."). This footnote does not imply that this Applicant's security clearance is conditional.

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. Clearance is granted.

Robert J. Tuidor
Administrative Judge