

DATE: December 11, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-00463

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant accumulated numerous delinquent debts during his second marriage, due to excessive spending on his credit card accounts. He filed a Chapter 13 bankruptcy, but he withdrew it when the payments were increased. He made no payments on the debts included in the bankruptcy, but instead relied on a four-year statute of limitations to bar collection efforts. He has not mitigated the security concern based on financial considerations. Clearance is denied.

STATEMENT OF THE CASE

On May 18, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline F (Financial Considerations) of the Directive.

Applicant answered the SOR in writing on June 23, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 26, 2006, and heard on November 15, 2006, as scheduled. I held the record open for 15 days to allow Applicant to submit additional documentary evidence. I received his additional evidence on November 21, 2006, and it is incorporated in the record as Applicant's Exhibit (AX) E. Department Counsel's response to AX E is attached to the record as Hearing Exhibit I. DOHA received the hearing transcript (Tr.) on November 29, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 47-year-old electronics engineer for a federal contractor. He holds a master's degree in physics, has worked for his current employer since January 1982, and has held a security clearance for 25 years (Tr. 6-7). His clearance was last renewed in April 1999 (Government Exhibit (GX) 1 at 6). He has consistently received excellent performance reports and has received two "special recognition" awards and one "spot" award (AX B and C).

Applicant was married in August 1984 and divorced in October 1995. He remarried in March 1996. He has two stepsons, ages 22 and 27. The younger is finishing his education and is financially independent (Tr. 36-37). The older is in prison (Tr. 37).

Applicant and his second wife became financially overextended by extensive use of credit cards and making only the minimum required payments. He testified his wife preferred to "hoard the money in the bank account" rather than pay off the credit card accounts (Tr. 45).

The SOR lists four delinquent accounts totaling about \$23,756. Applicant filed a petition for Chapter 13 bankruptcy in January 2001. He withdrew it in August 2002, at his wife's insistence, because the payments to the trustee were increased by 50 percent (Tr. 37-38). He testified his bankruptcy covered more than \$80,000 in delinquent debts that remain unpaid. He has made no effort to pay his creditors, but instead he has waited for the four-year statute of limitations to run so that the debts cannot be legally enforced. He has not attempted to negotiate settlements with any of his creditors (Tr. 43). He believes that if he makes any payments on his delinquent debts they will be revived for the full amount and the statute of limitations will begin to run anew (Tr. 20, 42). He testified he was unaware that he could have converted his Chapter 13 bankruptcy to a Chapter 7 (Tr. 38-39).

Applicant controlled the finances during his first marriage and accumulated considerable savings. His first wife received more than \$100,000 after they divorced. Applicant was emotionally attached to the house in which they lived, and he converted the mortgage to a 15-year mortgage and frequently made double payments (Tr. 39). He now rents this house for about the amount of the mortgage payments (Tr. 40). He owes only about \$12,000 on the mortgage (Tr. 29; GX 4 at 2). He has not considered a home equity loan on this property, even though he estimates it is worth about \$70,000 (Tr. 42).

Applicant earns about \$84,000 per year and contributes one-fourth of his income to his 401(k) retirement account, which is currently worth about \$110,000. He also has an IRA account worth about \$35,000. He and his wife own two cars that are paid for (Tr. 29; GX 4 at 2). He testified he could develop a plan to pay down his debts, but he has chosen not to do so in order to avoid confrontation with his wife (Tr. 45-46). He has considered financial counseling, but his wife refused to consider it (Tr. 45).

Applicant blames his financial problems on his wife's excessive spending and insistence on making only the minimum payments. He testified they have destroyed their credit cards and use only cash. He testified he did not know if all the credit card accounts have been closed (Tr. 47). His credit bureau report dated August 10, 2006, reflected numerous closed accounts but two credit card accounts that were still open, on which the date of last activity was January 2001 (GX 4 at 1). He relies on his wife's promise to not resume using credit cards (Tr. 48). His annual pay of about \$84,000 per year is deposited directly in his bank account. He does not know his net take-home pay, and he relies on his wife to pay all the bills (Tr. 41-42).

Applicant and his wife live in a home that his wife purchased before they were married. He estimates that it is worth less than she paid for it (Tr. 41).

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *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). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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 his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history raises DC 1 and DC 3. It appears that he has the income and assets to resolve his delinquent debts, but he has chosen not to.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or the indebtedness was an isolated incident (MC 2). Directive ¶¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant has multiple delinquent debts that remain unpaid. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Applicant's financial problems resulted from overspending and making minimal payments. He and his wife chose to increase their savings rather than pay off their credit card debts. MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is not established because Applicant has acceded to his wife's wishes and not sought financial counseling.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. 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." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

Applicant initiated a Chapter 13 bankruptcy, but he withdrew it because making the required payments would have required a lifestyle change that he and his wife were unwilling to accept. Instead, he has chosen to rely on a four-year statute of limitations that now bars collection of his delinquent debts. *See* Texas Civil Practice and Remedies Code, § 16.004(a)(3), as amended (AX E). The statute of limitations is relevant because it tends to show Appellant is no longer susceptible to legal action to enforce the debt. Thus, he is less vulnerable to coercion or temptation to engage in illegal conduct to generate funds. However, reliance on a statute of limitations does not demonstrate a good-faith effort to resolve debts within the meaning of MC 6. ISCR Case No. 99-9020 at 6 n.12 (App. Bd. Jun. 4, 2001). I conclude MC 6 is not established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. *See* Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant is a mature adult and a talented engineer. He has held a security clearance for 25 years. He appears to have been fiscally responsible during his first marriage, and he accumulated considerable savings and equity in a home. He and his second wife accumulated more than \$80,000 in delinquent debt between his marriage in March 1996 and his bankruptcy petition in January 2001. Since then, his strategy has been one of avoidance. He avoided using the equity in his previous home because of his emotional attachment to it. He knew he and his second wife were headed for financial trouble, but he did not intervene for fear of provoking conflict with her. He dismissed the Chapter 13 bankruptcy because of his wife's objections to the amounts of the payments required. He did not avail himself of financial counseling because of his wife's objections. He blames his wife for his financial difficulties, but he has entrusted her with the family finances and does not know how their money is spent. He did not know at the time of the hearing whether all credit card accounts were closed, and he relies on his wife's promises to stay out of further financial difficulty. He has taken no action to insure that she will not obtain a replacement card for an open credit card account and resume using it. Although the running of the statute of limitations has reduced his vulnerability to pressure, coercion, exploitation, or duress, he has avoided taking any meaningful measures to reduce the likelihood of recurring financial problems.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the interests of national interest to continue his security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge