



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-10312
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

April 30, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on January 5, 2006. On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 10, 2007; answered it on January 2, 2008; and requested a hearing before an administrative judge. DOHA received the request on January 7, 2008. Department Counsel was prepared to proceed on January 31, 2008, and the case was assigned an administrative judge on February 4, 2008. It was reassigned to me on February 6, 2008. DOHA issued a notice of hearing on February 7, 2008, and I convened the hearing as scheduled on February 29, 2008.

Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified on his own behalf. I granted Applicant's request to keep the record open until March 17, 2008, to enable him to submit documentary evidence. He timely submitted AX A through N, and they were admitted without objection. Department Counsel's responses to AX A through N are attached to the record as Hearing Exhibits (HX) I and II. DOHA received the transcript of the hearing (Tr.) on March 10, 2008. The record closed on March 17, 2008. Eligibility for access to classified information is denied.

Unauthenticated Report of Investigation

Department Counsel offered GX 4, a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he waived it (Tr. 28). Accordingly, I admitted GX 4.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR except ¶ 1.e. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 53-year-old senior designer, working for a defense contractor at a shipyard. He has worked for his current employer since January 1992. He has a high school education and some technical training. He is married and has a 28-year-old son. His supervisors describe him as trustworthy, knowledgeable, and hard-working (AX E, F, and N). He first received a clearance in March 1974. It was withdrawn during one of his changes of employment but has been restored since 1992.

During his career, Applicant has worked in shipyards throughout the country. While working in the southern U.S., he learned his grandmother was in poor health and was not receiving proper care. He moved to the northeast U.S. to care for her. He lived with his grandmother and remodeled her house. When his grandmother passed away in the late 1990s, his parents told him they had sold their house to his older brother and intended to move into his grandmother's house, leaving him to find another home (Tr. 32-33).

Applicant and his wife purchased a condominium. Shortly thereafter, the condominium complex was auctioned and sold, and the mortgage lenders notified condominium owners that their property was worth about half its previous value, and that they would be required to pay the difference in value (AX J at 1). Applicant was unable to refinance his mortgage, and he had insufficient income to pay his mortgage and credit card debts. He filed for Chapter 7 bankruptcy and received a discharge in December 1999 (Tr. 33-34). The bankruptcy is alleged in SOR ¶ 1.a.

When he filed for bankruptcy protection, he moved out of his condominium and leased an apartment. His relationship with his landlord became adversarial because his landlord refused to maintain the apartment. After the son of another tenant was arrested for making a bomb threat, Applicant decided to move out. The landlord wanted Applicant to buy out the remainder of the lease, and Applicant refused. Applicant apparently stopped paying rent. In November 2000, the landlord filed a complaint for eviction and nonpayment of rent and obtained a judgment against him for \$2,781 (GX 5). The judgment is alleged in SOR ¶ 1.e.

Applicant was unable to pay the judgment immediately because he did not have his checkbook or sufficient cash with him at the courthouse (Tr. 37, 51). In his answer to the SOR and at the hearing, Applicant asserted he had paid the judgment, either by check or money order, but he had no documentary evidence of payment (Tr. 39, 49).

Applicant testified he is unable to provide documentary proof that he paid the judgment because all his personal records were destroyed. After he moved out of the apartment, he stored his personal belongings and all his records at his father's home, the same place where his grandmother had passed away. After his father passed away in June 2001, his three older brothers took all of Applicant's personal property and records and disposed of them at the local dump (Tr. 38-39). At the hearing, Applicant stated he needed to "go back and quietly find out what's going on." He declared his intention to "write a check to [the landlord] this year and ask him to please go close out this documentation because I don't need it chasing me into the future" (Tr. 50). Applicant did not present any post-hearing evidence of action to satisfy the judgment.

Applicant failed to file his federal income tax return for 2001, and was notified that he owed more than \$5,000 in federal income taxes (Tr. 58; GX 2 at 8). He testified that he forgot to file his income tax return because of the bankruptcy and the death in the family. In January 2004 he was notified he owed an additional \$684 in federal income taxes. This tax liability arose because he did not realize that taxes were not withheld from his pay for off-duty teaching (Tr. 64). In September 2007, he initiated a payroll deduction to pay off delinquent taxes plus interest and penalties (GX 2 at 8). He failed to file his returns for 2002 and 2003 until October 15, 2007, after he received DOHA interrogatories about his financial situation (GX 2 at 16-17). He offered no explanation for his failures to file the returns for 2002 and 2003. He eventually received refunds for tax years 2002, 2003, and 2004 (AX B, C, D, and M at 1). He filed his 2007 return on time and apparently is entitled to a refund (AX I). The delinquent taxes, penalties, and interest for the earlier years have been paid in full (AX H and M at 2-3). Applicant's tax delinquencies and failures to file are alleged in SOR ¶¶ 1.b, 1.c, and 1.d.

The SOR ¶ 1.f alleges a delinquent cell phone service account. Applicant testified a dispute arose about charges for unwanted services that he did not know he was receiving. During a cell phone conversation with a customer service representative while he was driving his car, he became angry and threw the cell phone out the window (Tr. 41-43). He testified this incident "was a business part of my life that had nothing to do with my ability to maintain a security clearance" (Tr. 54). Applicant admitted the debt

in his answer to the SOR, but pointed out that he continues to have cell phone service with the same carrier and pays his bills on-line and on time (Answer to SOR; Tr. 70). The debt apparently was some combination of an early-termination penalty and the charges for unwanted services. The cell phone provider's continuation of service and the fact that the alleged debt does not appear on his most recent credit report submitted by the government (GX 3) strongly suggests the cell phone provider's claim was abandoned or compromised.

Applicant submitted a personal financial statement on October 15, 2007, reflecting net monthly income of \$4,150, expenses of \$2,812, debt payments of \$363, and a remainder of \$975. His payments on a car loan, unsecured personal loan and a credit card account are current (GX 2 at 5).

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 have 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 criteria contained in the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 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.

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. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 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 AG ¶ 2(b).

Analysis

The security concern relating to Guideline F is set out in AG ¶ 18 in pertinent part as follows:

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.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(b) is a two-pronged condition that is raised where there is “indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.” AG ¶ 19(c) is raised when there is “a history of not meeting financial obligations.” AG ¶ 19(e) is raised when there is “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” AG ¶ 19(g) is raised by “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.”

Applicant's financial history raises AG ¶¶ 19(a), (c), and (e). His failure to file federal income tax returns for tax years 2001, 2002, and 2003 raises AG ¶ 19(g). AG ¶ 19(b) is not raised because there is no evidence of "frivolous or irresponsible spending."

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), (e), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

The first prong of AG ¶ 20(a) ("so long ago") is established for the allegations in SOR ¶¶ 1.a, 1.e, and 1.f, but it is not established for Applicant's failure to file income tax returns, because he did not file the 2002 and 2003 returns until he received the DOHA interrogatories in October 2007. The second prong ("so infrequent") is not established because of his multiple delinquent debts. The third prong ("unlikely to recur") is established for the bankruptcy (SOR ¶ 1.a), triggered by an unforeseen and calamitous drop in property values; and the rent dispute (SOR ¶ 1.e), triggered by the indifference of a "slumlord" and Applicant's misguided attempt to resolve the dispute by withholding rent payments.

The final prong of AG ¶ 20(a) ("does not cast doubt") is not established. Applicant first received a clearance in 1974 and has held a clearance continuously since 1992, apparently without incident. He is highly regarded by his supervisors. He has weathered several personal crises, including the illness and death of his grandmother, the financial disaster involving his condominium, the deaths of his parents, and the destruction of his personal property, mementoes, and personal records by his older brothers. However, he does not believe that his personal conduct is relevant to holding a security clearance. He did not initiate his payroll deductions for delinquent taxes until September 2007, and he did not file his returns for 2002 and 2003 until he received the DOHA interrogatories in October 2007. His financial track record since 1999 raises doubt about his current reliability, trustworthiness and good judgment. I conclude AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that "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.” AG ¶ 20(b). Both prongs, i.e. conditions beyond the persons’s control and responsible conduct, must be established.

Applicant’s bankruptcy was the result of an unexpected downturn in the value of his condominium, and he acted responsibly by attempting to pay his bills and then seeking bankruptcy protection. However, his remaining debts were the product of inattention, ill-advised withholding of rent, and anger directed toward his cell phone provider. I conclude AG ¶ 20(b) is established only for the bankruptcy.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control. Applicant has not received counseling. His federal income taxes are under control, and his cell phone provider has apparently forgiven the charges alleged in SOR ¶ 1.f, but the judgment for unpaid rent is unresolved. I conclude AG ¶ 20(c) is established for all the allegations except 1.e.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). 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). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. Applicant’s bankruptcy petition in 1999 was a reasonable and prudent response to the financial crisis he experienced. However, he did not initiate his payroll deductions to pay his delinquent taxes until September 2007, and he did not file his tax returns for 2002 and 2003 until he received the DOHA interrogatories in October 2007. Although the cell phone issue apparently is resolved, it was not due to any affirmative action on Applicant’s part. The debt for unpaid rent is unresolved. I conclude AG ¶ 20(d) is established for the bankruptcy but not for the remaining allegations.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature adult who has held a security clearance for many years without incident. The DOHA interrogatories motivated him to resolve his income tax problems. However, at the hearing he still persisted in his belief that the "business part" of his life had nothing to do with his ability to hold a clearance. He was candid and straightforward at the hearing. His memory of events was vague at times, clouded by the passage of time, but he was credible. His financial track record and his attitude about the irrelevance of his personal life to suitability for a clearance leave me with concern whether his financial problems will recur.

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 financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge