



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-18881
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

January 30, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations), based on a single delinquent debt of about \$146,000. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on June 14, 2007. On September 15, 2008, 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. 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) promulgated by the President on December 29, 2005.

Applicant received the SOR on September 24, 2008; answered it on October 13, 2008; and requested a hearing before an administrative judge. DOHA received the

request on October 16, 2008. Department Counsel was ready to proceed on October 31, 2008, and the case was assigned to me on the same day. DOHA issued a notice of hearing on November 24, 2008, scheduling the hearing for December 18, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I held the record open to permit both parties to submit evidence and argument on an issue of reciprocal recognition of clearances, and they submitted Hearing Exhibits (HX) I and II. DOHA received the transcript (Tr.) on December 23, 2008. The record closed on January 9, 2009.

Reciprocal Recognition of Clearance

Applicant testified he had received a clearance from another federal agency (Tr. 84-86). Based on his testimony, I directed the parties to provide evidence and legal authorities pertaining to Applicant's entitlement to reciprocal recognition of his clearance from another federal agency.

The National Industrial Security Program Operating Manual (NISPOM), DOD 5220.22-M, February 28, 2006, paragraph 2-204, provides:

Any previously granted PCL [personnel clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

The documents submitted by Applicant and his facility security officer reflect that he received a clearance based on a "minimum background investigation," much narrower in scope than required for a security clearance, and his existing clearance does not allow access to classified information. Accordingly, I have concluded he is not entitled to reciprocal recognition of his clearance from another federal agency.

Findings of Fact

In his answer to the SOR, Applicant admitted the debt alleged in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 42-year-old information systems engineer employed by a defense contractor since June 2007. He has a favorable trustworthiness determination from another federal agency based on a "minimum background investigation." That determination was not a security clearance. He has never held a security clearance.

Applicant and his spouse are natives of Bangladesh. He came to the U.S. on a tourist visa. He obtained a student visa and attended college in the U.S. from January

1988 to July 1991, when he graduated with a bachelor's degree in information systems. He and his spouse were married in August 1993. They have two children, ages 11 and 7. He became a U.S. citizen in July 1996, and his spouse became a U.S. citizen in March 2002.

The debt arose when Applicant signed as a guarantor on a small business loan of \$205,000 to purchase a day care center in the spring of 2002, to be operated by Applicant and his spouse (Tr. 49-50). The day care center was fully licensed to operate at the time it was purchased (Tr. 45). Applicant and his spouse purchased the corporation that had been operating the day care center, and the loan was made to the corporation, with Applicant as guarantor (Tr. 45-47). Applicant handled the administration of the business during his off-duty hours and his spouse managed the daily operations (Tr. 51). The business took more time to manage than they expected and the regulations were more complex and onerous than expected. In 2004, the county withdrew his operating license for regulatory noncompliance (Tr. 52-54, 81-82). Applicant and his spouse unsuccessfully attempted to sell the business (Tr. 53).

Applicant and his spouse made payments on the loan for about two years. After the day care center defaulted on the loan, the lender demanded payment from Applicant as guarantor of the loan (Tr. 64). In addition, the lender took the \$30,000 certificate of deposit Applicant had pledged as collateral for the loan (Tr. 56-57). In June 2005, Applicant offered to settle the debt for \$8,000, but his offer was rejected on the ground that he had sufficient equity in his personal residence to satisfy the debt in full (AX E). In February 2006, the lender obtained a judgment against him for \$168,519 (GX 2). In May or June 2006, he offered \$18,000 to settle the debt, and later offered \$20,000, but these offers also were rejected. Although rejecting his offers, the lender suggested that a settlement for half the equity in his home might be acceptable. The principal balance in June 2007 was \$148,625 (AX D). His lawyer has suggested bankruptcy as an option, but he rejected that option as a "matter of dignity." (Tr. 83.) The debt has not been resolved.

During an interview with a security investigator in July 2007, Applicant reported net monthly household income of \$8,485; expenses of \$2,815; debt payments of \$2,905 (1st mortgage), \$623 (2nd mortgage), and \$621 (car payment), leaving a net remainder of \$1,521 (GX 3 at 4). The car loan has since been paid off. He is current on all his financial obligations except the unpaid judgment (AX A, B, and C).

Applicant testified he estimated the market value of his residence at between \$650,000 and \$700,000 (Tr. 67). The balance on his first mortgage is about \$298,000 (Tr. 69; GX 5 at 3). He also obtained a second mortgage for about \$81,000 in October 2001 (Tr. 70). He used the second mortgage to make improvements to his home and pay off a car loan. The home improvements were made over several years. He borrowed about \$36,000 to purchase a new car in the fall of 2005. He also owns two older cars. Even though he has about \$240,000 in equity in his home, he testified he has not borrowed against his equity because he would not be able to afford the payments if he increased the amount of his loan (Tr. 70-71).

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 SOR alleges an unsatisfied judgment against Applicant in the amount of \$168,000. The evidence shows that the balance due is \$146,625. The concern under this guideline is set out in AG ¶ 18 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.

The disqualifying condition in AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised when there is “a history of not meeting financial obligations.” Applicant’s financial history raises both of these disqualifying conditions, shifting the burden to him to refute, 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 a final conjunctive prong. 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 not established because the debt is not resolved. The second prong (“so infrequent”) is established because there is only one debt, incurred almost seven years ago. The third prong (“under such circumstances that it is unlikely to recur”) is established because the debt was incurred when Applicant and his spouse decided to buy a business without realizing the complexity of the regulatory requirements for operating a day care center and without realizing how much of their available time would be required to properly operate it. Applicant has learned from his experience and is not likely to venture into such uncharted waters again.

The final prong (“does not cast doubt” on current reliability, trustworthiness, or good judgment) is not established. Applicant’s decision to buy the business and guarantee the loan was due to his lack of experience. He has learned from that experience and has not demonstrated bad judgment in any other financial matters. However, he has not taken reasonable measures to resolve the debt, thereby raising doubt about his reliability and trustworthiness. His settlement offers of \$8,000 and \$10,000 bordered on the frivolous. In the fall of 2005, he borrowed \$36,000 to buy a new car, even though he already owned two cars and his day care business was in distress. He bought the new car shortly after his settlement offer of \$8,000 was rejected. He has rejected his lawyer’s advice to pursue a bankruptcy action, even though a Chapter 13 bankruptcy would allow him to pay the balance in installments while preserving his dignity. 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 person’s control and responsible conduct, must be established.

The first prong of AG ¶ 20(b) is not established because Applicant and his spouse made a deliberate decision to borrow the money and buy the business. The second prong also is not established, because Applicant has not acted responsibly in resolving the debt, for the reasons set out above in the discussion of AG ¶ 20(a).

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). Applicant has retained a lawyer to assist him, but there is no evidence the problem is being resolved or under control. I conclude AG ¶ 20(c) is not established.

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). Other than making a few unrealistic settlement offers, Applicant has done virtually nothing to resolve the debt. His most recent offer to settle the debt for \$20,000 was rejected about 18 months ago, in June 2007. He did not respond to the offer to settle for half his home equity. I conclude AG ¶ 20(d) is not established.

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. I have incorporated my comments under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature, well-educated, articulate person. He was candid and sincere at the hearing. He regrets the bad business decision that caused his indebtedness, but he has not been diligent in resolving it. He has retained a lawyer to assist him, but no significant progress has been made. Until he can resolve the debt, he will continue to be vulnerable to pressure, coercion, exploitation, or duress.

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:

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

Subparagraph 1.a:

Against Applicant

Conclusion

In light of all of the circumstances, 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