



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



In the matter of:)
)
) ISCR Case No. 08-00349
)
)
Applicant for Security Clearance)

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: Dana D. Jacobson, Esq.

February 12, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the Financial Considerations security concerns. Eligibility for access to classified information is granted.

On June 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant 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; 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 answered the SOR on August 1, 2008, and requested a hearing before an administrative judge. The case was assigned to me on August 22, 2008. Applicant was working overseas, and was not scheduled to return to the United States until the last week of December 2008. After coordinating with Department Counsel and Applicant's counsel, DOHA issued a notice of hearing on December 19, 2008, and the

hearing was convened as scheduled on January 6, 2009. The Government offered Exhibits (GE) 1 through 9, which were received without objections. Applicant testified on his own behalf and submitted Exhibit (AE) A, which was received without objection. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted six pages of documents, which were marked AE B through F, and admitted without objections. Department Counsel's memos are marked Hearing Exhibits (HE) I and II. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

Procedural Rulings

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

Applicant is 51 years old. He served in the U.S. Army from 1974 until he retired as a warrant officer in 1996. He has an MBA degree. He was married to the same woman for 26 years, until they divorced in 2002. Applicant and his first wife remarried in 2004. That marriage ended in divorce in 2006. He married his current wife in 2006. He has three adult children from his first marriage and an infant child with his current wife.¹

Applicant and his former wife had financial problems in the 1980s. She was also in the Army, but was discharged for passing nonsufficient funds (NSF) checks. She was unemployed and had a difficult time finding work. They filed a Chapter 13 bankruptcy in 1988. He was unable to maintain the payments to the trustee. The bankruptcy court permitted the case to be converted to a Chapter 7 bankruptcy. His dischargeable debts were discharged on January 5, 1989.²

Applicant continued to have financial issues after the bankruptcy. He and his wife went through a number of separations and then finally decided to go through with a divorce. The separation agreement called for her to receive their house, and she would maintain the mortgage payments. Their divorce was final in October 2002. She received the house but did not keep up the payments on the mortgage. She planned to file for bankruptcy. He decided that if she filed bankruptcy and he did not, he would be solely responsible for all their debts.³

Applicant and his wife filed a Chapter 7 bankruptcy on August 1, 2002. Under Schedule D – Creditors Holding Secured Claims, he listed a mortgage and two equity loans on his house totaling \$209,222, and a car loan with a balance of \$13,198. Schedule F – Creditors Holding Unsecured Nonpriority Claims, listed 18 debts, totaling \$67,428. He retained the car and reaffirmed the car loan. He filed that he would

¹ Tr. at 22, 25, 31-32, 35-36, 44, 55-56; GE 1.

² Tr. at 23-24; Applicant's response to SOR; GE 2.

³ Tr. at 25-31.

surrender the house. The mortgage company filed a motion with the bankruptcy court to permit the company to proceed with foreclosure. The bankruptcy court permitted the foreclosure to proceed, and the house was lost to foreclosure. There is no deficiency owed on the mortgage. Applicant's dischargeable debts were discharged on November 23, 2002.⁴

Applicant's employment was sporadic. He had periods of unemployment and underemployment. He again fell behind on a mortgage, and lost his house to foreclosure in February 2007. There is no deficiency owed on the mortgage. His car was also repossessed. The financial institution reported in July 2007, that the amount due on the loan was \$10,601, minus \$3,500 obtained for the car at auction, plus \$948 in attorneys' fees, for a balance of \$8,050. Applicant settled this debt in full on January 26, 2009, for \$2,895.⁵

The only other delinquent debt alleged in the SOR is a \$20 debt to a collection company, collecting on behalf of a cable provider. The March 9, 2008 credit report listed the original amount of the debt at \$283, and a balance of \$20. Applicant disputed owing the debt, but paid the creditor to resolve the debt. The debt is listed on the December 9, 2008 credit report with a zero balance.⁶

Applicant sought financial counseling from a credit counseling company. He also sought advice from financial planners. He obtained a job with a defense contractor in about June 2007. He was deployed to Kuwait and Afghanistan in support of defense contracts from about August 2007 through December 2008. Applicant was able to put his finances in order and save money while he was deployed. He has no delinquent debts, and he estimated that he has about \$45,000 to \$50,000 in his 401(k), cash, and certificates of deposit (CDs), with about \$30,000 of that amount in cash and CDs.⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision.

⁴ Applicant's response to SOR; GE 5.

⁵ Tr. at 33-39, 51; Applicant's response to SOR; GE 6-9; AE C, E, F.

⁶ Applicant's response to SOR; GE 7, 8; AE A.

⁷ Tr. at 39-43, 49-51, 54-57; GE 1.

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, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Section 7 of Executive Order 10865 provides that adverse 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 *a/so* 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his obligations for a period of time. The evidence is sufficient to raise the above disqualifying conditions.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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 financial problems go back more than 20 years, and he only recently paid the last remaining delinquent debt. AG ¶ 20(a) is not applicable. He attributed his financial problems to his former wife's actions and employment issues. These are conditions that were largely beyond his control. To be fully applicable, there must be a correlation between the unforeseen circumstances and the person's financial problems. AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant handled his financial issues by filing bankruptcy in 1988 and 2002. That is an acceptable legal option to address one's burdensome debts. However, Applicant does

not receive full credit under either AG ¶¶ 20(b) or 20(d) for resolving his old debts through bankruptcy.⁸ To address his recent delinquent debts, Applicant obtained a job with a defense contractor, and spent much of the last year and a half in Kuwait and Afghanistan. He built up a reserve of cash and other assets, and paid off all his delinquent debts. He acted responsibly by making a good-faith effort to repay his overdue debts acquired since his last bankruptcy. AG ¶¶ 20(b) and 20(d) are applicable to his recent financial issues.

Applicant received financial counseling from a credit counseling company, and advice from financial planners. He is now financially solvent, with a reserve of available assets. All his delinquent debts have been paid. His financial problems have been resolved and are under control. AG ¶ 20(c) is applicable.

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.

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.

⁸ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

