



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 08-06100
SSN: XXX-XX-XXXX)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

April 28, 2010

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 November 7, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F for Applicant. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on May 13, 2009, and DOHA received his answer on May 15, 2009. Department Counsel was prepared to proceed on July

28, 2009. The case was assigned to me on July 30, 2009. DOHA issued a notice of hearing on August 21, 2009, scheduling the hearing for September 25, 2009. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 13, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through K, which were received without objection, and he testified on his own behalf.

I held the record open until October 9, 2009, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant submitted AE L through N, which were received without objection. DOHA received the hearing transcript (Tr.) on October 2, 2009. The record closed on October 9, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His answers with explanations are incorporated herein as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 52-year-old process technician, who has worked for his defense contractor employer since November 1985. He seeks to retain his secret security clearance, which is a requirement for his continued employment. Applicant has successfully held a clearance for the majority of his employment with his company. (GE 1, Tr. 29, 32-36.)

After graduating from high school in approximately May 1975, Applicant attended college for three years, but did not graduate. He later attended a community college from August 1994 to May 1995, and was awarded a certificate as a licensed practical nurse. (GE 1, Tr. 39-42.)

Applicant did not serve in the armed forces. He was married from June 1989 to March 1995. That marriage ended by divorce. Applicant has an eight-year-old son from a previous relationship for whom he pays \$800 monthly in child support. (GE 1, Tr. 30-32, 36-38.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his March 1997 Questionnaire for National Security Positions (SF-86), his November 2007 Electronic Questionnaire for Investigations Processing (e-QIP), DOHA's September 2008 Interrogatories, his November 2008 Response to Interrogatories, his August 1996 Chapter 13 bankruptcy record, his August 2002 Defense Security Service signed, sworn, statement, as well as his June 1997,

December 2007, July 2008, December 2008, January 2009, and July 2009 credit reports. GE 1 – 12.

Applicant's SOR identified 12 separate debts -- one voluntary repossession, four charged off accounts, and seven collection accounts, totaling about \$26,000.

SOR ¶ 1.a. alleged that Applicant filed Chapter 13 bankruptcy in August 1996 and was awarded a discharge in August 2002. Applicant was unable to remain current on his debts after his 1995 divorce. Particularly challenging was going from a two-income household to a one-income household. After evaluating his options, Applicant filed Chapter 13 bankruptcy protection and repaid his creditors in accordance with his repayment plan. (GE 11, Tr. 42-45.)

In October 2006, Applicant had knee surgery and went on a six-week medical leave. During this time, he was on disability and his pay was reduced by 25%. Then, from November 2006 to January 2007, his union went on strike, requiring their members to join the picket line. On the advice of Applicant's physician, he did not picket, fearing that day-long picketing would hinder his recovery. Applicant testified union representatives were sympathetic to his dilemma; however, they informed him if he did not join the picket line, he would not receive subsistence payments from the strike fund.

During this time, Applicant's living expenses continued to include paying his parents approximately \$500 per month in rent. Applicant also chose to loan money to a colleague and friend of his, who also was on strike and a single mother. She stated Applicant "helped me out quite a bit, he paid a couple of my car payments and my electric bill, he also helped me several times buy food for me and my children." When Applicant went back to work in January 2007, he was seriously in arrears on his debts and "the damage was done." In February 2007, he injured his arm and was out of work for another six weeks. (GE 7, pgs. I-6 through I-9, Tr. 47-50, 69-75.)

Applicant consulted a bankruptcy attorney, who advised him to file Chapter 7 bankruptcy. Reluctantly, Applicant did so "as my last resort." He filed his Chapter 7 petition in April 2009 and was awarded a discharge in September 2009. All 12 of the debts alleged in the SOR were included on Applicant's Schedule E and were discharged. (GE 7, I-6, AE A, Tr. 42-69, 78.) Excluding debts listed on his Schedule E, Applicant has been current on his bills for "about a year." (Tr. 80-81.) Applicant completed the mandatory financial counseling required in conjunction with filing bankruptcy. (AE L.)

In conclusion, Applicant has resolved all of the debts alleged. He submitted a budget with his monthly expenses that reflects a net remainder of \$1,200. His budget further demonstrates that he maintains a modest lifestyle and is living within his means. (AE M.)

Character Evidence

Applicant provided three personal reference letters from friends. A 30-year friend, who is an elementary school principal, described Applicant as “honest, dependable, reliable, and hard working.” Another friend said “[Applicant] would never do anything to compromise his position” Lastly, a five-year friend described Applicant as “. . . a valuable friend and asset to his job and community.” (AE B, AE F, AE H.)

Applicant provided two reference letters from family members. His sister said Applicant “has taken the responsibility of looking after our parents,” and added that he is “honest and reliable.” His parents said “[w]e just want you to know that we are most grateful that we have a son that was and still is there for us,” adding “[w]e now know that bankruptcy was never his first choice, we saw him exhaust all avenues trying to resolve all this.” (AE E, AE G.)

Applicant’s most recent work performance evaluation for 2008-2009 describes Applicant’s solid performance and contribution to the defense industry. (AE N.) All persons submitting reference letters recommend that Applicant be granted a security clearance.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 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 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude one relevant security concern is under Guideline F (financial considerations). 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 his admissions and evidence presented. As indicated in SOR ¶¶ 1.b. to 1.m., he had 12 delinquent debts totaling about \$26,000 that have been in various states of delinquency since at least 2005. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

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 conduct warrants partial application of AG ¶¶ 20(a) because he did not act more aggressively and responsibly to resolve his delinquent debt. Because there is more than one delinquent debt, his financial problems are not isolated. It was not until 2009 that these debts were resolved. Therefore, 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)). He receives partial credit under AG ¶ 20(a) because the debt "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." His 12-year-old Chapter 13 bankruptcy lacks security significance because of the passage of time and because all debts were repaid.

Under AG ¶ 20(b), Applicant receives full mitigation because of wages lost during his 2006 six-week medical leave, wages lost during his company strike from October 2006 to January 2007, and financial help given to his aged parents and to a lesser extent his friend. Applicant's medical situation and the union strike were beyond his control. Applicant's conduct towards his parents was selfless and most likely spared them significant adverse consequences in their advanced years.¹

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

AG ¶ 20(c) applies. Applicant was required to attend financial counseling in conjunction with filing for Chapter 7 bankruptcy. He prepared a detailed budget and demonstrates a firm grasp of budgeting, payment plans, and expense reduction. He leads a modest lifestyle, lives within his means, and remains current on his present obligations. Furthermore, there is sufficient information to establish mitigation under AG ¶ 20(d) because Applicant has resolved his debts.² I recognize that Applicant explored his options to repay his creditors with his limited funds before filing bankruptcy. Applicant has also been current on his non-bankruptcy debts for approximately one year. AG ¶ 20(e) is not 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.

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.

²The 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 [the "good-faith" mitigating condition], 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 [the "good-faith" mitigating condition].

(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)).

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).

There is evidence against mitigating Applicant's conduct. The SOR lists 12 debts approximating \$26,000 that were at one time or another in various states of delinquency. For several years, he failed to keep his accounts current showing financial irresponsibility and lack of judgment. His lack of success resolving delinquent debt until recently raises sufficient security concerns to merit further inquiry.

The mitigating evidence under the whole-person concept is more substantial. Applicant's 25-year record of employment working for a defense contractor weighs heavily in his favor. There is no evidence of any security violation during this lengthy time. He is a law-abiding citizen. His debts are current and his SOR debts are resolved. Applicant did not seek Chapter 7 bankruptcy as a first course of action, but rather chose it as a "last resort." His monthly expenses are current.

Applicant is making a significant contribution to the national defense. His company fully supports him and recommends him for a security clearance. He made mistakes, and debts became delinquent. There is, however, simply no reason not to trust him. Furthermore, he has established a "meaningful track record" of debt payments, having remained current on his monthly debts for one year. He also showed considerable character helping his elderly parents at great personal expense to himself. These factors show responsibility, rehabilitation, and mitigation. 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. Applicant has fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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. - 1.m.: For Applicant

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. Eligibility for a security clearance is granted.

Robert J. Tuider
Administrative Judge