



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



In the matter of:)
)
-----) ISCR Case No. 08-07284
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

April 30, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations), based on a past due utility bill, a delinquent home mortgage, and a delinquent student loan. All three debts have been or are being resolved. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 14, 2008. On November 3, 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 December 2, 2008; answered it on January 2, 2009; and requested a hearing before an administrative judge. DOHA received the request on January 5, 2009, and the case was assigned to me on February 17, 2009. DOHA issued a notice of hearing on March 3, 2009, scheduling the hearing for March 27, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Department Counsel also submitted Hearing Exhibit (HX) I, a demonstrative exhibit summarizing the documentary evidence. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I granted Applicant's request to keep the record open until April 10, 2009, to enable him to submit additional documentary evidence. DOHA received the transcript (Tr.) on April 2, 2009. On April 14, 2009, I extended the deadline for submission of additional evidence until April 20, 2009. Applicant timely submitted AX C through J, which were admitted without objection. Department Counsel's comments regarding AX C through J are attached to the record as HX II. The record closed on April 20, 2009.

Findings of Fact

In his answer to the SOR, Applicant denied the allegation in SOR ¶ 1.a, but he admitted the allegations in SOR ¶¶ 1.b and 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 39-year-old radar applications engineer employed by a federal contractor. He has worked for his current employer since March 2008. He has worked for several federal contractors since August 2001, except for a three-month period of unemployment in 2004. He was granted a clearance in July 2002, but it was administratively terminated when he changed jobs.

Applicant was married in April 1996. They have no children from their marriage, but his wife has two children from a previous relationship, for whom she voluntarily pays child support of \$200 per month (Tr. 58).

Applicant attended college from September 1989 to May 1992. He worked in private industry from June 1993 to April 2001, was laid off for three or four months, and then worked for a federal contractor from August 2001 to February 2004, when he was laid off again. He was unemployed from February to May 2004, and then worked for another federal contractor until March 2008, when he began working for his current employer. He resumed college classes in May 2005, and he completed his college degree requirements in September 2006.

Applicant's wife became ill in 2003. She required extensive surgery, was hospitalized for about six months, and unable to work for about nine months, reducing the monthly family income by about \$1,000 (Tr. 43-45).

The first debt alleged in the SOR is a past due utility bill for \$128. The bill became due while Applicant was traveling for his employer, and he forgot to pay it. He

testified the account is now current (Tr. 21). His testimony was corroborated by his bank statement showing recent payments (AX D at 1).

The second debt alleged in the SOR is a home mortgage that became delinquent around August 2007. Applicant was unable to keep his payments current because his father passed away in July 2007 and his brother passed away a month later, causing Applicant to spend about \$20,000 for overseas travel and funeral expenses (Tr. 32-34). He testified the deaths of his father and his brother “took its toll” on him financially and emotionally (Tr. 26). He failed to make his monthly mortgage payments of \$1,000.32 for about five months (Tr. 39). In May 2008, he started making payments of \$1,500 to make up for the delinquent payments (Tr. 35-37; GX 3 at 4). He stopped making payments after September 2008, because the lender initiated foreclosure proceedings and refused to accept his payments (Tr. 37). He then negotiated a loan modification agreement providing for monthly payments of \$692.63, starting on April 1, 2009 (Tr. 34; AX B). Although the copy of the loan modification agreement submitted by Applicant was unsigned, he produced documentary evidence that he had made one payment in accordance with the agreement and the payment check had been cashed by the lender (AX J).

The third debt alleged in the SOR is a student loan with a balance of about \$36,000 that became delinquent around August 2006. Applicant admitted his payments on this loan were “on and off,” but he testified he could not recall why he fell behind on his payments on this loan (Tr. 42). He stopped making payments when collection agencies started demanding \$800 or \$900 a month instead of the payments of about \$300 he had been sending to the original creditor (Tr. 41).

In September 2008, Applicant entered a loan rehabilitation program for his student loan, and initiated an automatic debit from his checking account of \$300 per month (GX 3 at 9-11; AX D at 2). On March 27, 2009, he was notified his student loan had been sold and the payment terms changed. Starting on May 16, 2009, his payments will be \$374.67 (AX F, G, and H).

At the hearing, it was clear that Applicant was embarrassed by his history of delinquent debts. When advised of his right to have a personal representative assist him, he responded that the inquiry into his financial history was “a real personal matter,” and he did not want to involve any of his friends in it (Tr. 4).

Applicant and his wife do not have a family budget (Tr. 50-51). He testified his net family income is about \$5,400 per month, with living expenses and debt payments totaling about \$3,000, leaving a remainder of around \$2,000. He testified he has retirement funds of about \$15,000 to \$20,000, and his wife has retirement funds of about \$4,000 to \$5,000 (Tr. 52).

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

Guideline F, Financial Considerations

The SOR alleges a past due utility bill (SOR ¶ 1.a), a delinquent home mortgage debt (SOR ¶ 1.b), and a delinquent student loan (SOR ¶ 1.c). 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.

Two potentially disqualifying conditions under this guideline are relevant. 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 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. 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 two prongs of AG ¶ 20(a) (“so long ago” and “so infrequent”) are not established because Applicant had multiple debts that were only recently resolved. The third prong (“occurred under such circumstances that it is unlikely to recur”) applies to the delinquent home mortgage, because it was triggered by the deaths of Applicant’s father and brother, but it does not apply to the utility bill or student loan. Applicant’s periods of unemployment occurred well before any of the debts alleged in the SOR became delinquent. Applicant attributed the past due utility bill to forgetfulness, and he

offered no cogent or plausible explanation for falling behind on his student loan. Although he testified about his wife's illness and loss of income, that event preceded the delinquent student loan by about three years. The final prong ("does not cast doubt") is established because Applicant has taken significant steps to resolve his financial problems and his financial situation is under control.

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). This mitigating condition is established for the delinquent mortgage but not the other two debts, 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 individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting 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 is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. "All that is required is that an applicant demonstrate that [he/she] has . . . established a plan to resolve [his/her] financial problems and taken significant actions to implement that plan." ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). Applicant's utility account appears to be current. He has renegotiated payment schedules for his home mortgage and his student loan, and he appears to be complying with the new payment schedules. I conclude this mitigating condition is established for all three debts.

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

