



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-07857
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

April 27, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant resolved or successfully disputed all the delinquent debts alleged in the Statement of Reasons (SOR). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 11, 2007. On December 31, 2008, the Defense Office of Hearings and Appeals (DOHA) made a 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 January 12, 2009; answered it on January 26, 2009; and requested a hearing before an administrative judge. DOHA received the request on January 27, 2009. Department Counsel was ready to proceed on February 11, 2009; and the case was assigned to me on the following day. 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 5 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. The record closed upon adjournment of the hearing on March 27, 2009. DOHA received the transcript (Tr.) on April 2, 2009.

Findings of Fact

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

Applicant is a 60-year-old specialist in artificial intelligence employed by a federal contractor. He has worked for his current employer since August 2004. He was born and educated in a foreign country, and he became a U.S. citizen in September 2005. He holds doctoral degrees in biochemistry and mathematics (Tr. 5). He has never held a security clearance.

Applicant was married in December 1974. He, his wife, and their son came to the U.S. in 1995, and they all became U.S. citizens in September 2005 (Tr. 25-26). His son attended college in the U.S. and he obtained a bachelor's degree and a master's degree in business administration (Tr. 26).

Applicant's father had two successive strokes in 1999 while visiting Applicant in the U.S., after which he suffered from severe dementia. His mother had heart disease and was unable to care for her husband. As a result, Applicant's parents stayed in the U.S. and were cared for by Applicant and his wife (Tr. 26).

In 2005, Applicant's mother suffered a heart attack and passed away six days later. Three or four weeks later, his father passed away. Applicant paid his parents' medical expenses and their funeral expenses, using credit cards (Tr. 27). Part of Applicant's income was in stock options; and when his employer collapsed financially, the stock options were worthless (Tr. 41). As a result of his parents' unexpected medical and funeral expenses and the devaluation of his stock options, Applicant fell behind on his credit card payments. Applicant's credit bureau reports (CBR) dated October 1, 2008, and November 22, 2007, reflected the five delinquent debts alleged in the SOR (GX 2; GX 4).

Applicant made numerous telephone calls in an effort to negotiate payment plans on the delinquent credit cards, but the creditors would not agree to long-term payment

plans. The best settlement Applicant could negotiate was to pay off the delinquent debts in one or two installments (Tr. 32).

The debt alleged in SOR ¶ 1.a is a credit card account that Applicant closed. He received a settlement offer in January 2009 (AX G), and he paid the agreed amount in two installments (AX H).

The debt alleged in SOR ¶ 1.b is a credit card account that Applicant disputed on the ground that he never had an account with that creditor (GX 5 at 22). The dispute was resolved in his favor and the information deleted from his credit history (AX A).

The debt alleged in SOR ¶ 1.c is a credit card account that was referred for collection. Applicant received a settlement offer in January 2009 (AX B), and he paid the agreed amount in two installments (AX C; AX I).

The debt alleged in SOR ¶ 1.d is a debt for telephone services. Applicant disputed this debt, and it no longer appears on his CBR (AX J).

The debt alleged in SOR ¶ 1.e arose from an early termination of a lease. Applicant settled the debt in January 2009, and it has been deleted from his credit history (AX D; AX E; AX F).

Applicant is now finally stable. After paying all monthly expenses, he has a net monthly remainder of about \$4,000 (Tr. 38). He has accumulated between \$10,000 and \$12,000 for emergencies (Tr. 39).

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 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 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 AG ¶¶ 19(a) and (c), shifting the burden to him to 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 (“so long ago” and “so infrequent”) are not established, because Applicant’s delinquent debts were recent and numerous. The third prong is established, however, because his parents’ illnesses and untimely deaths, and the financial collapse of his previous employer are unusual circumstances that are unlikely to recur. The final prong (“does not cast doubt”) also is established by Applicant’s methodical, persistent, and ultimately successful efforts to overcome his financial problems. I conclude AG ¶ 20(a) is 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. The illness and untimely deaths of Applicant’s parents and the financial collapse of his previous employer were conditions beyond his control, and his response was reasonable and responsible. I conclude AG ¶ 20(b) is established.

Security concerns under this guideline can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(c). 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). “[A]n applicant is not required, as a matter of law, to establish that [he/she] 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 produced evidence he had resolved three debts and successfully disputed the remaining two debts. He did not present documentary evidence showing

the basis for disputing the debt in SOR ¶ 1.d, but his testimony is corroborated by his updated credit report showing the entry had been deleted. Since less than seven years had elapsed from the time the debt was placed for collection, the most likely reason for its deletion was favorable resolution of Applicant's dispute. See Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(4) (credit report may not contain information on accounts placed for collection that antedate the report by more than seven years).

Security concerns under this guideline also can be mitigated by showing "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." AG ¶ 20(e). This condition is established for the debts alleged in SOR ¶¶ 1.b and 1.d.

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 adult. He presented himself at the hearing as articulate, very intelligent, sincere, and very methodical. His testimony was plausible and credible.

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 mitigated the security concerns based on financial considerations. Accordingly, I conclude he has 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 on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.e: For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge