



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 08-08689
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

August 17, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to financial considerations. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on April 10, 2008. On December 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations) 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 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 in writing on January 8, 2009. Department Counsel was prepared to proceed on May 18, 2009. On May 21, 2009, the case was assigned to me. DOHA issued a notice of hearing on May 30, 2009, scheduling the hearing for June 10, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 4, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through Z, which were received without objection, and testified on his own behalf.

I held the record open until June 22, 2009 to afford the Applicant the opportunity to submit additional evidence on his behalf. Applicant timely submitted AE AA through EE, which were received without objection. DOHA received the hearing transcript (Tr.) on June 17, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are accepted as findings of fact.

Applicant is a 33-year-old associate engineer senior employed by a defense contractor since March 2003, GE 1, Tr. 14, 16. He has successfully held a secret security clearance since April 2002. He seeks to retain his security clearance to enhance and maintain the flexibility to work on different projects. Also, he is required to have a security clearance for his current long-term project. Tr. 16-17, 74, GE 1.

Applicant graduated from high school in May 1994, and graduated from college in December 1998 with a Bachelor of Arts degree in Computer Science Information Systems. GE 1, AE E, AE F, Tr. 15. He married in July 1999. He and his wife have two sons, ages eight and four. Tr. 14-15, GE 1, AE A.

Applicant's background investigation addressed his financial situation and included the review of his April 2008 e-QIP; his May 2008 and December 2008 credit bureau reports; and his October 2008 Response to DOHA Financial Interrogatories. GE 1 - 4.

Applicant's SOR identified six separate line items, four of which were debts totaling \$57,461. The two remaining items reflect a home foreclosure and a Personal Financial Statement identifying income insufficient to meet monthly expenses. As noted *supra*, Applicant admitted all allegations, which are further corroborated by the government's evidence. SOR ¶¶ 1.a. through 1.f., Response to SOR, GE 1 - 4.

Applicant attributes his financial problems to a loss of dual income. Applicant's wife was working as loan processor in 2005, and with their combined income, they earned \$104,664. With the decline of the housing market in 2006, Applicant's wife was demoted and left her job with the goal of finding a comparable or better job in an attempt to regain her former income level. Her efforts were unsuccessful and their

combined income decreased in 2006 to \$95,534. In 2007, Applicant's wife earned her real estate license with the goal of selling one house a month, which she calculated would approximate the income she lost when she was demoted. Her new-found career as a real estate agent failed to generate income as the housing market continued to "bottom out." Their combined annual income declined even further in 2007 to \$60,831. Tr. 22-24, AE H, AE I.

With the loss of income, Applicant and his wife were unable to remain current on their house payments and monthly bills. As the housing market continued to decline, their house eventually became "upside down." Using her real estate license, Applicant's wife unsuccessfully tried to sell their home on a short sale. In January 2008, their home went into foreclosure and the bank took possession of it. Their home eventually did sell at auction for \$374,000 in April 2008 – Applicant and his wife originally paid \$489,000 for their home in January 2006. Tr. 24-25, AE I, AE J, AE K, AE L. Applicant left his home in good order following foreclosure. Tr. 25, AE M.

During this time, Applicant's wife began experiencing medical problems of a neurological nature. In 2008, she sought treatment for this condition 66 times. During the first five months of 2009, she sought medical treatment 25 times. Tr. 26-27, AE N, AE O. In early 2008, Applicant's wife filed a social security disability claim claiming she had a displaced disc in the neck, complex regional pain syndrome, two fractured feet, depression, migraines, rapid heart beat, high cholesterol, and anxiety. In October 2007, the Social Security Administration denied her claim. Tr. 27-28, AE P. Applicant's wife retained counsel to appeal her disability claim denial. Her counsel filed an appeal in November 2008, and a decision is currently pending. Tr. 28-29, AE Q, AE R.

Throughout this entire process, Applicant and his wife maintained regular contact with their creditors, which is documented. They advised their creditors of their situation, and attempted to negotiate alternate payment arrangements. In 2008, they retained the services of a debt consolidation company for about four months, and discovered to their disappointment, that the debt consolidation company had not contacted their creditors. Tr. 29-34, GE 2. In October 2008, Applicant and his wife sought counsel with a bankruptcy attorney and decided to file chapter 13 bankruptcy. Applicant made a hardship withdrawal from his 401k account to pay his bankruptcy attorney fees. In December 2008, Applicant's attorney filed a chapter 13 petition. In January 2009, Applicant began making payments to the bankruptcy trustee and remains current on his payments. All four debts listed in the SOR are included on Applicant's chapter 13 Schedule F – Creditors Holding Unsecured Nonpriority Claims. The total amount of claims itemized on Applicant's Schedule F is \$106,118.20. Tr. 34-46, GE 2, AE S, AE T, AE V, AE AA, AE BB.

Applicant completed the mandatory financial counseling that accompanies the bankruptcy process. He submitted a Certificate of Debtor Education dated May 31, 2009. Tr. 38-39, AE U. Applicant's Schedule J – Current Expenditures of Individual Debtor(s) reflects a net monthly remainder of \$26.55, and a monthly rent of \$1,438 (first rental property was \$1,895). However, he has since reduced his monthly rent to

\$1,200 by moving to a less expensive property. Tr. 46-48, AE X, AE W, AE X, AE Y, AE BB. Applicant's monthly budget reflects that he is living within his means and has taken reasonable, responsible and measured steps to reduce expenses. Tr. 48-50, AE Z.

Three witnesses testified on behalf of the Applicant. Two witnesses were work-related, his supervisor and a co-worker. They both hold security clearances, have known the Applicant since he began working for the company, and observe him on a daily basis. They both confirmed he is truthful, honest, hard working, is making a contribution to the defense industry, and recommended him for a security clearance. Tr. 69-82. His third witness was his neighbor, whose family interacts with Applicant and his family two-to-three times a week. He testified Applicant is trustworthy and dependable. His trust in Applicant is such that he depends on him to watch his house while gone and allows his children to go to Applicant's house without an escort. Tr. 83-87.

Applicant provided his annual performance evaluations from 2006 to 2008. The evaluations document his valuable service to the defense industry, and how he consistently meets or exceeds employer expectations. AE CC, AE DD, AE EE. His performance was such that he has consistently received merit increases since 2004. AE G. Applicant submitted a perfect attendance award from high school, and a letter from a woman to his grocery store employer while in high school. The letter commends Applicant for turning in her wallet after finding it in a shopping cart. Contained in the wallet was a large sum of cash that was her son's missionary money. The same woman also wrote a letter to the local newspaper bringing Applicant's honesty to the attention of the community. Tr. 19-20, AE B, AE C, AE C.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 an Applicant's 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 overarching 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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

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). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Upon consideration of all the facts in evidence and after applications of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline F (financial considerations). AG ¶ 18 articulates the security concern relating to financial considerations:

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 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." The government established these conditions through Applicant's admissions and evidence presented.

Four conditions under AG ¶ 20 may mitigate security concerns and 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

All of the mitigating conditions *supra* fully apply. Up until Applicant and his wife became victims of the recent downturn in the economy, they were current on their monthly bills and living within their means. Applicant's financial problems began in 2006 when his wife was demoted. This triggering event and her inability to find a comparable replacement job were not of her own doing. These events are unlikely to recur and do not cast doubt on Applicant's "current reliability, trustworthiness, or good judgment."

Concomitant with Applicant's wife losing her job, she began to experience health problems of a neurological nature. She incurred health problems prompting 66 doctor visits in 2008 and 25 doctor visits in the first five months of 2009. She filed a disability claim with the Social Security Administration in early 2008, which was denied, and is pending appeal. Applicant submitted documentation of his efforts to keep the lines of communication open with their creditors throughout this entire

process. Applicant and his wife underwent the painful process of losing their home, keeping the lender fully apprised of their situation, and upon foreclosure left their home in good repair. These facts warrant application of AGs ¶¶ 20(a) and 20(b).

Feeling overwhelmed and frustrated following a bad experience with a debt consolidation company, Applicant sought counsel with a bankruptcy attorney. The bankruptcy attorney advised him to seek protection under chapter 13. Applicant filed his petition in December 2008, and his repayment plan became effective in January 2009. He remains current on his repayment plan and has a budget and lifestyle commensurate with his current income. Applicant completed the required financial counseling associated with filing chapter 13, and is making a good-faith effort to repay his creditors through his repayment plan. He is committed to maintaining and achieving financial responsibility and has his finances under control. He is continually looking for ways to reduce his monthly expenses. AGs ¶¶ 20(c) and 20(d) fully apply.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the financial considerations security concerns. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I also gave considerable weight to his service in the defense industry, his seven years of successfully holding a secret clearance, his honesty and integrity, dedication to his family, and sincere desire to resolve his debts honorably and responsibly. In reaching this conclusion, I gave the whole person concept due consideration and that analysis does support a favorable decision.

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”¹ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has 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
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Subparagraph 1.a. through f.:	For Applicant
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¹ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is granted.

ROBERT J. TUIDER
Administrative Judge