



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 09-03661
SSN: XXX-XX-XXXX)
)
Applicant for Security Clearance)

Appearances

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

April 14, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to financial considerations and personal conduct (falsification). Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on August 27, 2008. On June 16, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct) 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.

On July 14, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. On July 28, 2009, Department Counsel notified Applicant that he had requested that this matter be converted to a hearing. Department Counsel was prepared to proceed on July 28, 2009. The case was assigned to me on August 13, 2009. DOHA issued a notice of hearing on August 21, 2009, scheduling the hearing for September 22, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant offered Applicant Exhibit (AE) A, which was received without objection, and he testified on his own behalf.

I held the record open until September 25, 2009, and at Applicant's request extended the due date to October 2, 2009, to afford him the opportunity to submit additional documents on his behalf. Applicant timely submitted AE B through H, which were received without objection. DOHA received the hearing transcript (Tr.) on September 30, 2009. The record closed on October 2, 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 49-year-old security site associate, who has worked for his defense contractor employer since August 2008. (GE 1, Tr. 15, 17.) He is a first-time applicant for a security clearance. (Tr. 20-22.)

Applicant graduated from high school in June 1979. He attended a community college and was awarded an associate in applied science degree in broadcast communications in June 1999. Applicant worked as a security officer for a Midwestern state from September 1984 to December 2004, and took an early retirement. (GE 1, Tr. 55.) He is currently taking college level courses pursuing a degree in liberal arts. (GE 1, Tr. 19-20.)

Applicant was previously married from July 1990 to March 1996. That marriage ended by divorce. He remarried in March 2004, and has a 14-year-old stepson from his second marriage. Applicant contributes to the support of his stepson. Other than his stepson, Applicant has no other dependent children. (GE 1, Tr. 14-16.) Applicant's wife works full-time as a teacher's aide earning \$8 per hour; however, she is only paid when school is in session. (Tr. 65.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his October 2008 e-QIP, as well as his October 2008, May 2009, and July 2009 credit reports. GE 1 – 4.

Applicant's SOR identified seven separate debts – five charged off accounts and two collection accounts, totaling \$27,102. Applicant's financial problems stem from debts carried over from his 1996 divorce, assuming his second wife's debt when he remarried in 2004, costs associated with a move from the midwest to a western state, and two periods of unemployment from August 2005 to April 2006 and January 2007 to August 2008. Applicant relocated based on the representation that he would have employment with a state university system. After relocating his family, he discovered the funding for his position "fell through," and he was without a job. It was not until he secured his present position that he found stable employment. (Tr. 26-35, 53-55.)

The financial fallout from this collective experience had lingering effects. After evaluating his options, Applicant filed for Chapter 13 bankruptcy protection in September 2009. With the exception of the debt in SOR ¶ 1.a., which is paid, the remaining debts in SOR ¶¶ 1.b. through 1.g. are included on Applicant's Schedule F, and are being repaid. Applicant is on a five-year or 60 month repayment plan, and is current on his payments to the trustee. (SOR ¶¶ 1.a. – 1.g.)(AE A, AE D-G, Tr. 45-50.)

Additionally, Applicant and his wife recently qualified to purchase a home, and are current on their house payments and other monthly expenses. (Tr. 60-61.) In conjunction with filing Chapter 13 bankruptcy, Applicant attended the required financial counseling, which he completed on August 14, 2009. (AE C.) Given Applicant's financial resources and obligations to his family, it has taken time for him to recover. Applicant has paid, or is in the process of repaying all debts alleged.

Applicant submitted a budget with his monthly expenses that demonstrates that he is living within his means, and has a net remainder of \$819. (AE B.)

Personal Conduct

The SOR alleges that Applicant failed to disclose delinquent debts that were over 180 days delinquent in the last seven years, and delinquent debts currently over 90 days when completing his August 2008 e-QIP. (SOR ¶¶ 2.a.) Applicant explained in his Response to SOR, and credibly testified that he was not aware that these accounts were in a delinquent status because he was in direct contact with his creditors trying to work out payment plans. He added that none of these creditors were contacting him by telephone calls or sending him bills giving him the mistaken belief that he was not in arrears. (Response to SOR, Tr. 42-43.)

Character Evidence

Applicant provided written comments from his supervisor. His supervisor described Applicant as an employee, who has a very positive attitude towards his job. He added that Applicant is a “self motivator who can work with limited supervision,” and anticipates that he can begin building a career path for him in 2010 and assist him with his willingness to grow within the company. His supervisor noted that Applicant has shown motivation for self-improvement by taking college courses and completed work-related training. (AE H.)

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 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 over-arching 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, I conclude the relevant security concerns are under Guidelines F (financial considerations) and E (personal conduct).

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 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.” ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, “Applicant’s credit report was sufficient to establish the Government’s prima facie case that Applicant had . . . delinquent [SOR] debts that are of security concern.” Applicant’s history of delinquent debt is also documented in his responses to DOHA interrogatories, his SOR response, and his oral statement at his hearing. He failed or was unable to ensure his creditors were paid as agreed. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c). Further inquiry about the applicability of mitigating conditions is required.

Five mitigating conditions under AG ¶ 20 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 full application of AG ¶ 20(a). His debts were incurred following a divorce, taking on his second wife's debt, a cross-country move, and two periods of unemployment. With the exception of one debt, the remaining debts are included in a Chapter 13 repayment plan. Applicant is involved in a stable relationship and has made substantial progress in resolving his debts. Apart from these "old debts," he remains current on all of his bills and lives within his means. He is committed to repaying his creditors, and future indebtedness is unlikely to recur. His old debts do not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant receives credit under AG ¶ 20(b) because his financial problems resulted primarily from two significant periods of unemployment. Applicant had the misfortune of making a cross-country move to accept a job that did not materialize. He struggled and has regained control of his finances now that he has stable employment that pays a livable salary.¹ He receives full mitigating credit because he established that he acted with sufficient initiative and resolve to address his delinquent debts. Applicant provided sufficient documentation about his income and expenditures to receive full credit under AG ¶ 20(b).

AG ¶ 20(c) applies. Applicant was required to attend financial counseling in conjunction with filing for Chapter 13 bankruptcy, and has prepared a detailed budget.

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 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 the Applicant maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

Moreover, he demonstrated a firm grasp of budgeting, payment plans, and expense reduction. He leads a modest lifestyle, lives within his means, and manages to remain current on his present obligations yet still managed to make payments to former creditors. He has the self-discipline necessary to reduce and resolve his debts. There are “clear indications that the problem is being resolved or is under control.” He has also established full mitigation under AG ¶ 20(d) because he showed good faith² in the resolution of his SOR debts.

AG ¶ 20(e) is not applicable. Applicant has not contested the validity of his debts. Rather, he has included his debts on his Schedule F.

In sum, Applicant has acted responsibly under the circumstances. He is current on his payment plans. He took the honorable route of validating his debts and is in the process of repaying his creditors. While his journey to financial responsibility is not yet complete, I am confident he will remain current on his payments and continue his progress on SOR debt resolution.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false security clearance application:

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 [or statute of limitations]) 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)).

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

The SOR alleges that Applicant deliberately provided false information or omitted required information on his August 2008 e-QIP. Applicant's alleged falsification of Questions in Section 28 of his e-QIP is not substantiated. AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f) fully applies to SOR ¶ 2.a. Although he admitted preparing his e-QIP, and answering incorrectly, he honestly and reasonably believed he was not in arrears as a result of his ongoing direct contact with creditors and absence of telephone calls or statements.³

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,

³The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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). I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is evidence against mitigating Applicant's conduct. His debts have been ongoing for a number of years. His delinquent debts raise security concerns. However, the mitigating evidence under the whole-person concept is more substantial. Applicant's record of good employment weighs in his favor. There is no evidence of any security violation. Aside from the delinquent debt (which is a civil, non-criminal issue), he is a law-abiding citizen. The overall amount of debt is relatively low. The Appeal Board has addressed a key element in the whole person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an 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 has ' . . . established a plan to resolve his financial problems and taken significant actions to implement that plan.' The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ('Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.') There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). The Applicant had the misfortune of falling victim to a faltering economy. His biggest problems arose when his anticipated job following a cross-country move did not materialize. He sustained two periods of unemployment, but is recovering now that he is earning a sustainable wage. He sought the honorable route of repaying his creditors through Chapter 13 bankruptcy. There is no reason not to trust his promise to pay his creditors. The record supports the fact that he has paid numerous debts over the years. He has established a "meaningful track record" of debt payment sufficient to trust his promise to pay or

otherwise resolve his debts. These factors show responsibility, rehabilitation, and mitigation. Applicant has demonstrated his loyalty, patriotism, and trustworthiness through his service as an employee of a defense contractor.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole-person, I conclude Applicant has mitigated financial considerations and personal conduct 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.g.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

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