



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-02160
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esq., Department Counsel
For Applicant: *Pro se*

March 19, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on October 17, 2008. On November 6, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him 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 November 10, 2009; answered it on November 19, 2009; and requested a hearing before an administrative judge. DOHA received the

request on November 23, 2009. Department Counsel was ready to proceed on December 31, 2009, and the case was assigned to me on January 4, 2010. DOHA issued a notice of hearing on January 6, 2010, scheduling the hearing for January 21, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and presented the testimony of one witness.

I kept the record open until February 2, 2010, to enable Applicant to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. Applicant's cover letter for AX A through H is attached to the record as Hearing Exhibit (HX) I, and Department Counsel's comments regarding AX A through H are attached as HX II. DOHA received the transcript (Tr.) on January 27, 2010.

Findings of Fact

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

Applicant is a 33-year-old business analyst employed by a federal contractor. He was hired in December 2009, but he has not begun working because his job requires a clearance (Tr. 34, 49). He graduated from college in December 1999, and he worked in various banking and financial institutions from 2002 to 2008 (Tr. 33). He has never held a security clearance.

Between December 2005 and July 2006, Applicant borrowed about \$1.8 million to purchase seven investment properties that were then worth about \$2.3 million (GX 2 at 4-13; Tr. 30). He had ten loans, seven first mortgages and three home equity lines of credit (GX 2 at 3; Tr. 40). He borrowed 100% of the purchase price for his first four properties and 90% for the last three (Tr. 52). He relied on rental income to make the mortgage payments, which totaled about \$14,000 per month.

After several properties became vacant, Applicant used personal savings to make the mortgage payments. By December 2006, he had exhausted his savings and fell behind on his payments (GX 4 at 3; Tr. 28). His credit reports in June and October 2009 reflected that foreclosure proceedings had been started on all the properties (GX 2 at 2; GX 5; GX 6; Tr. 30). Applicant believes all the properties are now worth less than the amounts of the loans (Tr. 54).

At the time Applicant purchased the properties, he was earning about \$80,000 per year. He changed jobs in October 2007 and began working solely on a commission basis. His employer went bankrupt in September 2008, and since then he has been earning less than \$500 per month for intermittent accounting and marketing work (Tr. 32, 35-36). He lives with his parents. He is unmarried and not responsible for supporting anyone but himself. His only expense is his car payment of \$261 per month, which is current (AX H; Tr. 47, 57).

The SOR alleges two delinquent medical debts for \$75 (SOR ¶ 1.a) and \$228 (SOR ¶ 1.d). Applicant paid the \$75 debt in January 2010 (AX D). He produced evidence that he had a zero balance with two hospitals (AX C and D), but he produced no evidence connecting those hospitals with the medical debt alleged in SOR ¶ 1.d.

The SOR alleges a delinquent credit card balance of \$6,267 (SOR ¶ 1.c). In response to DOHA interrogatories, Applicant produced evidence that the debt was resolved in February 2009 (GX 3 at 6-7).

The SOR alleges seven delinquent home mortgages and three delinquent home equity lines of credit, totaling more than two million dollars (SOR ¶¶ 1.e-1.m). These debts are not resolved.

The SOR alleged a delinquent water bill for one of Applicant's rental properties (SOR ¶ 1.n). Applicant paid this debt on February 1, 2010, after the hearing (AX E, F, and G).

The hiring official for Applicant's employer testified he learned about Applicant's financial situation when his security clearance application was preliminarily denied. He considers Applicant a person of good character, notwithstanding his financial situation. He advised Applicant to resolve some of his smaller delinquent debts before the hearing. Based on his own extensive experience in the mortgage business, he does not believe that the lenders will pursue a deficiency judgment against Applicant on any of the foreclosed properties (Tr. 67-74).

Applicant produced no evidence of the terms of the security instruments involved in his real estate transactions or the law of the jurisdiction pertaining to the right of a lender to obtain a deficiency judgment after foreclosure. In response to DOHA interrogatories, he indicated he was trying to reach settlements with the various lenders (GX 3 at 2-4), but no settlements had been reached when the record closed.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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 made "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.

This case involves an applicant's inability to pay debts, arising from a series of reckless investment decisions. Appellant's financial history raises two disqualifying conditions: AG ¶ 19(a) (inability or unwillingness to satisfy debts) and AG ¶ 19(c) (a history of not meeting financial obligations), shifting the burden to him to produce evidence 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). Applicant's debts are numerous, and all the large debts are unresolved. They were incurred during a real estate boom followed by a market downturn, circumstances that may well occur again. While speculative investment is not necessarily an indicator of bad judgment, the level of Applicant's speculation -- trying to leverage two million dollars in debt on an annual income of about \$80,000 -- suggests bad judgment. I conclude AG ¶ 20(a) is not 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 person's control and responsible conduct, must be established. Applicant intentionally put himself in a position where he was subject to the vagaries of the real estate market. Nevertheless, the market downturn was beyond his control. Once his investment plan collapsed, he reacted responsibly by trying to negotiate with the lenders and exhausting his personal savings in an effort to make the payments. I conclude AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). Neither prong of this mitigating condition is established, because Applicant has not sought or received counseling and his financial situation is not under control.

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). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant's employer testified, based on his experience in the mortgage business, that it is unlikely that the lenders will seek deficiency judgments on the foreclosed mortgages. However, even if a delinquent debt is legally unenforceable under state law, an administrative judge should consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003).

Applicant testified that he contacted the lenders in an effort to settle the defaulted mortgages, but he presented no documentary evidence of negotiations or offers of settlement. He presented no evidence showing that the lenders' rights to collect the deficiencies were limited by the terms of his mortgages, that they were willing to forego efforts to collect the mortgage deficiencies, or that a deficiency judgment was precluded by local law. While his testimony is some evidence of a good-faith effort to resolve the debts, he has not shown that he is pursuing a course of action that has a reasonable chance of success. I conclude that AG ¶ 20(d) is not fully established for the delinquent mortgages and lines of credit.

The delinquent credit card debt, medical debts, and utility bill were resolved after Applicant applied for his clearance and was advised by his employer that he should resolve as many debts as possible in order to obtain a clearance. Although the resolution of the debts alleged in SOR ¶¶ 1.a, 1.c and 1.n allays the underlying security concern that Applicant will resort to illegal means to pay them, it does not show good faith, because the motivation was not a sense of duty or obligation, but his need for a clearance. I conclude AG ¶ 20(d) is not established for these debts.

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 mitigating condition is not established because Applicant has not disputed any of the 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 relevant 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 commonsense 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 relatively young, but well educated and intelligent. He was candid and sincere at the hearing, but he remains delinquent on debts totaling about \$2 million. He has no savings, no income, and no plan to resolve his debts. It is unclear whether he has learned his lesson, because he has not yet established a track record of financial responsibility. He has not dispelled the concerns about his judgment.

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 not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not 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 in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.m:	Against Applicant
Subparagraph 1.n:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge