



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 09-03474
SSN: XXX-XX-XXXX)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

July 14, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On December 23, 2008, Applicant submitted a Questionnaire for Investigations Processing (e-QIP). On September 25, 2009, 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 (DoD) 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 after September 1, 2006.

Applicant answered the SOR in writing on October 1, 2009, and DOHA received his answer on October 5, 2009. Department Counsel was prepared to

proceed on November 9, 2009. The case was assigned to me on November 17, 2009. DOHA issued a notice of hearing on January 12, 2010, scheduling the hearing for January 27, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 6, which were received into evidence. The Applicant offered Applicant Exhibit (AE) A, which was received into evidence, and he testified on his own behalf.

I held the record open until February 12, 2010, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE B through L, which were received into evidence. Applicant subsequently submitted AE M and N on March 3, 2010, which were forwarded by Department Counsel on March 5, 2010, without objection, and received into evidence. DOHA received the hearing transcript (Tr.) on February 4, 2010. The record closed on March 5, 2010.

Findings of Fact

Applicant denied the sole SOR allegation with explanations. His answer with explanations is 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 52-year-old principal subsystems engineer, who has worked for his defense contractor employer since July 2008. He is a first-time applicant for a security clearance. Successfully vetting for a security clearance is a condition of his continued employment. (GE 1, Tr. 22-24, 28.)

Applicant graduated from high school in June 1976. He attended community college from January 1977 to June 1979, and was awarded an Associate's Degree in Engineering in June 1979. Applicant transferred to and attended a four-year university from August 1979 to December 1982, and was awarded a Bachelor of Science degree in Electrical Engineering Technology. He later attended graduate school on a part-time basis from April 1999 to December 2002, and was awarded a Master's Degree in Project Management in December 2002. (GE 1, Tr. 24-26.)

Applicant married his wife in May 1981. They have two children, a 24-year-old daughter and a 21-year-old son. Their daughter lives independently and their son is attending college and lives at home. (GE 1, Tr. 26-27.)

Financial Considerations

The sole allegation in this case consists of a \$57,809 residual debt on a second mortgage after Applicant executed a deed in lieu of foreclosure on an investment home he purchased in 2006. (SOR ¶ 1.a.)

For the past 28 years, Applicant has had a successful career. Except for three brief periods of unemployment in the last ten years, he has been fully employed. Throughout this time, Applicant and his wife have enjoyed a middle class lifestyle, have lived conservatively, and have raised two successful children. They have an unblemished history of paying their bills on time, were responsible and prudent in their savings and investments, and maintained excellent credit ratings.

In June 2005, Applicant saw a television ad for an investment real estate program that offered investors a “win-win” program promising substantial returns. Looking for additional funds to underwrite his son’s college education, Applicant chose to participate in the program. Essentially, the investment “strategy” was based on identifying individuals such as the Applicant with excellent credit history and qualifying income to purchase a home for a buyer unable to qualify for a home purchase. The buyer would select a home in concert with the investment program, which the investor purchased. The buyer would then rent the home for one year from the investor. During the one-year period, the buyer would undergo credit enhancement to improve their credit, which theoretically would qualify the buyer to purchase the home from the investor. The investment program vetted prospective investors and buyers and found suitable matches. It was represented to Applicant that he could make up to \$20,000 or 7% profit, if everything went well during the course of the year.

Consistent with applicable guidelines, the investment program found a buyer (a couple) to match with the Applicant. The Applicant purchased a home for the buyer, the buyer moved into their new home in January 2006, and began making payments as agreed. The real estate market then collapsed and in March 2007, the value of the investment home had decreased to the point that financing became out of reach for the buyer. To make matters worse, the lender who was to loan money to the buyer to purchase the home went out of business. Negotiations ensued and the buyer decided to “walk away” from the deal and vacated the house. Applicant consulted with 14 different subject matter experts to include realtors, mortgage bankers, attorneys, financial planners, and even the past president of the board of realtors. The collective wisdom and advice Applicant received from these subject matter experts was to let the property go into foreclosure.

Applicant did not want his property to foreclose and against the advice of the subject matter experts decided to renovate the property with the hope of renting his home until the real estate market recovered. Applicant’s documented efforts to renovate the property were in a word, remarkable. When the renovations were complete, the home was truly show-worthy. Unfortunately, while the renovations were ongoing, the market continued to deteriorate and the market became flooded with rental homes. Applicant was unable to get a rental income sufficient to allow him to keep the home. He then tried unsuccessfully to refinance the loan on his investment property, and even explored a short sale. The record is replete with Applicant’s exhaustive efforts and consultations with subject matter experts to do everything possible to keep the property and avoid foreclosure. His investment property was depleting his savings and there was no hope in sight of a successful outcome. To

avoid complete financial ruin and only after extensive discussions with his lender and consultations with the subject matter experts previously discussed, Applicant executed a deed in lieu of foreclosure with his lender. The end result was that Applicant was left with a deficiency as alleged in the SOR after the property was sold. Applicant submitted documentation that he was not liable for the deficiency owed based on his state's anti-deficiency statute. The foregoing is a summary of what occurred and is thoroughly documented in exhaustive detail in AE A through L.

Per the advice of his attorney, Applicant did not contact or make any payments to the lender for the deficiency in question. However, in an attempt to resolve this matter, Applicant contacted the lender post-hearing and negotiated a one-time payment settlement. The lender has submitted verification to the credit reporting agencies reflecting Applicant owes a zero balance on the alleged debt and the account as being closed. The debt in question is resolved. (AE M, AE N.) Applicant is current on all his monthly bills and has a net remainder of \$420 to \$680 depending on his wife's hourly work schedule. (AE B).

Character Evidence

Applicant provided five reference letters. These letters cover a range of personal and work-related sources. The collective sense of these letters depicts Applicant as a very honorable and trustworthy individual. They describe Applicant as diligent, competent, and someone whose character warrants the granting of a security clearance. (AE A(16)). Applicant also submitted work performance evaluations from 2003 to 2009. These evaluations reflect sustained above-average performance and note his potential for future service in the defense industry. (AE A(17)). Additionally, Applicant submitted copies of numerous awards, citations, letters, and e-mails that span his working career and further reflect his professionalism as well as his community involvement. (AE A(18)).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 overarching 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, including those described briefly above, I conclude one relevant security concern is under 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 financial considerations disqualifying 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.” Applicant’s history of delinquent debt is established by the evidence presented. As indicated in SOR¶ 1.a., he had a delinquent debt of \$57,809 that was delinquent since 2007. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20(a)-(e) 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.

All of the foregoing mitigating conditions apply in whole or in part. The circumstances and conditions under which this sole debt arose are unique, isolated, unlikely to recur, and directly attributable to real estate conditions and the market downfall. Applicant exercised due diligence before, during, and after the purchase of his investment property. AG ¶ 20(a) fully applies.

Under AG ¶ 20(b), Applicant receives full credit because the market forces which brought about the deterioration of the real estate market were beyond his control. He remained in constant contact with his creditor. Again, Applicant acted responsibly under the circumstances as discussed *supra*.¹

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

As discussed *supra*, Applicant consulted with no less than 14 subject matter experts and sought their counsel to resolve his dilemma to include bankers and financial planners. The debt in question is resolved and therefore under control AG ¶ 20(c) fully applies.

Although belated in approaching the creditor, Applicant's reticence in doing so was based on the advice of his attorney. The debt has since been settled. The credit reporting agencies have been contacted to show that Applicant has a zero balance and the account in question is closed. There is sufficient information to establish full mitigation under AG ¶ 20(d).²

Under his state's anti-deficiency statute and upon the advice of counsel, Applicant reasonably and honestly believed that he had a basis to dispute the debt in question. However, once it was made clear to him that he would be unable to rely on such a defense under DOHA case law, he reevaluated his position and approached the creditor and settled the debt. Applicant's documentation supports a reasonable basis to dispute the debt in question, lending credence to his failure to act until recently. AG ¶ 20(e) partially applies.

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

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 he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

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)).

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.

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).

There is evidence against mitigating Applicant's conduct. The SOR lists a \$57,809 debt that has been in arrears since 2007. Although recently settled, his lack of success in resolving this delinquent debt until recently raises sufficient security concerns to merit further inquiry.

The mitigating evidence under the whole-person concept is more substantial. Applicant's record of employment and sound financial history weighs in his favor. He is a law-abiding citizen. His debt is settled and resolved. His monthly expenses are current. 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) (internal citations omitted). Applicant is making a significant contribution to the national defense. His company fully supports him and recommends him for a security clearance. He had an isolated real estate investment that went bad. There is, however, simply no reason not to trust

him. Furthermore, he has established and maintained a “meaningful track record” of financial responsibility. These factors show responsibility, rehabilitation, and mitigation. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the financial considerations 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.: For Applicant

Conclusion

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

Robert J. Tuidor
Administrative Judge