



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



In the matter of:)
)
) ISCR Case No. 09-03521
)
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn MacKinnon, Esq., Department Counsel
For Applicant: *Pro se*

August 16, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has established a plan to resolve his financial problems and has taken significant actions to implement his plan. He mitigated the financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On March 23, 2009, Applicant submitted a security clearance application. On December 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive (DOD) 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised; and the adjudicative guidelines (AG) implemented within DOD on September 1, 2006.

The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary

affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

Applicant's answer to the SOR was received by DOHA on March 4, 2010. He requested a hearing before an administrative judge. The case was assigned to me on April 5, 2010. DOHA issued the notice of hearing on April 29, 2010, convening a hearing on May 13, 2010. The hearing was convened as scheduled. The Government offered Government Exhibits (GE) 1 through 6, which were admitted without objections. GE 7 is Department Counsel's comments to Applicant's post-hearing exhibits. Applicant testified and submitted Applicant Exhibits (AE) 1 through 81, which were admitted without objection. AE 30 through 81 were received post-hearing. DOHA received the transcript (Tr.) on May 25, 2010.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.c, 1.h, 1.j, 1.p, and 1.t. He denied the remaining allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 37-year-old software program analyst employed by a defense contractor. He completed a bachelor's degree in electrical engineering in 1996. He married his wife in September 2009. They have a daughter who was born in January 2010.

From 1998 until 2007, Applicant worked for a private company as a software engineer. His annual salary was approximately \$70,000. Additionally, he had a second job that increased his income to \$90,000 a year. Around 2001, Applicant and two uncles started a business purchasing distressed properties to rehabilitate them and set them up as rental properties or to sell them for profit. Uncle A contributed financially to the venture and assisted in the management of the business. At the time, he was fully employed with an income of around \$90,000. Uncle B was retired, and contributed to the business by making the repairs on the houses.

Between 2001 and 2006, Applicant purchased around 14 real estate properties for their business venture.¹ Most of the properties were purchased for less than \$20,000. They initially used their own savings to purchase the first two properties. Then they mortgaged most of the properties for around \$40,000 each. Half of the money was used to pay the initial investment and to rehabilitate the properties. The other half of the money was used to purchase additional properties. In addition to the mortgage loans, Applicant took home equity loans against most of the properties to pay for the improvements. Applicant's initial business model was to rehabilitate the properties and

¹ Three of the properties were unimproved lots of land which the Applicant still owns. According to Applicant, he owns the three lots outright and they have doubled in value.

sell them as soon as possible. Applicant changed his mind and decided to establish a retirement portfolio composed of the rental properties.

In 2007, Applicant's business took a downturn because Uncle A was laid off and he was hired by Applicant's business to assist in managing the properties. This brought additional expenses to the business. Applicant also was laid off and was unemployed or underemployed from February 2007 until December 2007. The company he worked for was bought out by another company and his services were no longer needed. Uncle B became sick and was not able to repair the houses.

Applicant hired outside construction companies to rehabilitate the properties and he obtained two construction loans. Applicant had problems with the construction companies not complying with the contracts which increased the cost of the business expenses. Applicant rented some of the houses to family members and these and other tenants were not paying the rent. Finally, Applicant and Uncle A parted ways because of their different investment philosophies. Uncle A took three properties to manage. Applicant retained the remainder of the properties. Additionally, Applicant's grandmother passed in April 2007, and he had to use some of his savings to assist with the funeral expenses.

Although the business was a "family business," because Applicant had good credit, all the loans and property purchases were made only in Applicant's name. Thus, he is individually financially responsible for all of the accounts alleged in the SOR. There is no evidence Applicant (or the business) had any financial problems before he and Uncle A were laid off. When Applicant started to have financial problems, he tried to sell several of the properties. He was not able to sell any of the properties because of the downturn of the real estate market. As a result of his financial problems, Applicant's mortgage and home equity loans, as well as his credit cards and consumer retail cards became delinquent. Most of his accounts were delinquent from around 2007 until 2009-2010. Applicant lost two real estate properties to foreclosure. He has not been notified that he owes money after the foreclosures, but he expects that will be the case. He intends to establish a loan repayment plan to pay the debts.

From the beginning of his financial problems, Applicant maintained communication with the banks and his other creditors concerning his delinquent accounts. At his hearing, Applicant submitted documentary evidence showing his efforts to resolve (payments, settlement negotiations, contract modifications) most of the delinquent accounts alleged in the SOR and many other legal obligations not alleged in the SOR. The status of the accounts alleged in the SOR is as follows:

SOR ¶¶ 1.a, 1.b, and 1.r. These accounts have been paid. See AE 14, AE 11, and AE 8, respectively.

SOR ¶¶ 1.c (\$4,471), 1.h (\$23,818), and 1.p (\$2,051). These three loans are connected to Uncle A's residence and other properties under his management. Applicant is financially responsible because he obtained the loans on the properties.

These loans are unresolved. Uncle A has not been able to modify the mortgage contracts or establish payment plans. Applicant is allowing Uncle A a period of time to resolve the delinquent accounts. If Uncle A cannot do so within a reasonable period, Applicant will take control of the property or sell it to resolve the delinquent accounts.

SOR ¶¶ 1.d (\$1,916), 1.e (\$4,536), 1.f (\$4,617), 1.l (\$4,104), 1.m (\$2,121), 1.n (\$2,124), 1.o (\$1,792), and 1.q (\$2,717). These accounts involved mortgages and home equity loans connected to Applicant's business properties and his home. All of these loans were delinquent and some properties were pending foreclosure. Applicant rehabilitated these loans by entering into loan modifications and loan repayment programs. The foreclosures have been closed. He is making payments on the loans which are now current and in good standing. For SOR ¶ 1.d, See AE 10, 42-45. For SOR ¶ 1.e, See AE 38-41. For SOR ¶ 1.f, See AE 6, 35-37, 46. For SOR ¶ 1.l, See AE 58-59. For SOR ¶ 1.m, See AE 35-37, 46. For SOR ¶ 1.n, See AE 38-41. For SOR ¶ 1.o, See AE 10, 42-45. For SOR ¶ 1.q, See AE 12, 47-50.

Concerning SOR ¶¶ 1.i (\$2,856), 1.j (\$3,470), and 1.k (\$8,783), Applicant attempted to modify these loans, but they did not qualify for a modification program. He is working with the lenders attempting to set up a loan repayment program to rehabilitate the loans. (AE 79.)

SOR ¶ 1.g (\$2,374) is a delinquent credit card account. (GE 3.) Applicant used the credit card to pay for his day-to-day expenses and to keep his business afloat. Applicant settled the account in 2008-2009, and he is making payments on it. He claimed he is current on his payments. He did not submit documentary evidence to support his claims.

Concerning SOR ¶ 1.s (\$8,000), Applicant owes his state approximately \$10,000 in taxes as a result of his real estate transactions. He intends to pay the debt by applying his Federal tax return to the debt and setting up a payment plan with the state.

SOR ¶ 1.t (\$4,500) alleges a delinquent utility debt for services provided to one of Applicant's rental properties that was foreclosed. Applicant disputes part of the debt. He intends to establish a payment plan and start making payments in the near future.

Applicant disclosed his financial problems in his November 2008 security clearance application. He provided detailed information about his business and finances in response to DOHA financial interrogatories and at his hearing. He has been forthright and honest during the security clearance investigation process.

Applicant has worked for his current employer since February 2009. He is considered to be dependable, responsible, and dedicated. He is an asset to his employer. His current net monthly salary is \$3,370. He receives from his tenants net monthly rent of \$6,050. His spouse is working and contributes financially to the business. He testified they do not live a lavish lifestyle. He and his wife are modifying their lifestyle to reduce expenses so that they can address their financial obligations.

Applicant acknowledged his financial mistakes and his inability to resolve his delinquent debts. He made the mistake of becoming financially overextended in part because of the number of his investments and the optimistic view of the real estate market, which was widespread when he purchased the properties.

Applicant's financial situation has improved substantially since he started his current job. He provided documentary evidence showing that, in addition to resolving many of the SOR debts (making payments, settling some debts, and making loan modifications), he has paid or resolved numerous other debts. (AE 17-22, 27-29, 54-57, 76, 80, and 81.)

Applicant and his wife have a budget and they try to follow it. He plans to bring the properties out of foreclosure, finish the renovation of three properties to rent or sell them, and ultimately sell them to cover the outstanding loans.

Applicant expressed remorse for his financial problems and for not being more responsible addressing his debts. With his wife's assistance, he is now in a better financial position to address his past debt. He complied with his promise to a government investigator to make payment arrangements with his creditors and to modify his real estate loans to bring the loans current. His diligent efforts to resolve his debts show considerable fortitude and financial responsibility.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required 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 controlling 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence.”² Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. 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).

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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 ¶ 18.

The SOR alleged 20 delinquent debts totaling approximately \$92,000, which were delinquent for a number of years. Applicant resolved 12 of the alleged delinquent debts. However, SOR ¶¶ 1.c, 1.h-1.k, 1.p, 1.s, and 1.t (\$57,949) remain unresolved. AG ¶ 19(a): inability or unwillingness to satisfy debts; and AG ¶ 19(c): a history of not meeting financial obligations, apply.

² See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant presented documentary evidence to show that he has settled, paid, or brought to current status 12 of the alleged SOR debts. His documentary evidence shows that from the beginning of his financial problems he maintained contact with his creditors and attempted to resolve his debts. Applicant stopped the foreclosures that were pending on most of his real estate rental properties. Most of his loans are now current. Although he also has other delinquent debts not alleged in the SOR, his evidence shows he has been addressing most of his debts and that he has resolved other debts in addition to the ones mentioned above.

Applicant's conduct does not warrant full application of AG ¶ 20(a) because his financial problems are ongoing. He established some circumstances beyond his control, which contributed to his inability to pay his debts, i.e., his and his uncle's period of unemployment, the current downturn in the real estate market, and the expenses associated with the illness of Uncle B and the death of his grandmother. I find Applicant acted with initiative and that he acted responsibly under all the circumstances of his situation in his efforts to resolve his delinquent debts. AG ¶ 20(b) partially applies.

AG ¶ 20(c) fully applies. Although Applicant has not participated in financial counseling, he demonstrated he has the self-discipline necessary to reduce and resolve his debts. He followed a budget, settled and established payment plans with creditors,

and substantially reduced his debts. He has also established partial mitigation under AG ¶ 20(d) because he showed good faith³ in the resolution of his SOR debts. He receives only partial credit because he should have been more circumspect in the acquisition of his properties and debts, and he should be more aggressive with his uncle who has the properties related to three substantial debts. AG ¶ 20(e) does not apply.

Considering the evidence as a whole, there are clear indications that his financial problems are being resolved or are under control. Applicant's evidence shows he maintained contact with his creditors, he paid, settled, or resolved 12 of his delinquent debts. He has a viable plan to resolve his financial predicament and I believe that he will be able to avoid similar financial problems in the future. Although Applicant should have been more circumspect in his investments and he still has unresolved debts, his past behavior and current financial situation do not raise doubts about his current reliability, trustworthiness, and judgment. Financial considerations concerns are mitigated.

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

³The 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)).

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Applicant should have been more careful in his investments. He overextended himself financially and that contributed to his accounts becoming delinquent. He also was irresponsible when he failed to plan or ignored his obligation to pay his county property taxes. Notwithstanding, he has been diligent and aggressive in his efforts to modify his loans, establish payment plans, and to pay his delinquent debts. Considering his current salary, rent income, and his wife's financial assistance, Applicant appears to have sufficient income to make progress in his delinquent debt resolution. These factors show some financial responsibility and judgment. 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).

The mitigating evidence under the whole-person concept is sufficient to warrant granting Applicant's security clearance. He has worked for a government contractor since February 2009. He has worked well for his employer. There is no evidence he has ever compromised or caused others to compromise classified information. He has a reputation as a law-abiding citizen and a family man. He is considered to be honest and trustworthy. His financial problems were caused, in part, by factors beyond his control. Moreover, he has taken control of his financial situation, and has made significant progress in resolving his debts. He has established a plan to resolve his financial

problems and has taken significant actions to implement his plan. He understands what is required of him to be eligible to possess a security clearance. These factors show responsibility, good judgment, and mitigation. On balance, I conclude that Applicant has mitigated the financial considerations security concern.⁴

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.t: 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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge

⁴ Of course, Applicant is aware that the government can re-validate his financial status at any time through credit reports, investigation and/or additional interrogatories. Approval of a clearance now does not bar the government from subsequently revoking it, if warranted. Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance.