



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-04609
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

July 28, 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 granted.

Statement of the Case

Applicant submitted a security clearance application on May 9, 2008. On December 8, 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. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on December 17, 2009; answered it on December 29, 2009; and requested a hearing before an administrative judge. DOHA received the

request on January 4, 2010. Department Counsel amended the SOR on January 19, 2010, by adding three additional allegations (SOR ¶¶ 1.c-1.e), and Applicant received the amendment on January 23, 2010. Department Counsel was ready to proceed on February 16, 2010, and the case was assigned to me on March 16, 2010. DOHA issued a notice of hearing on April 20, 2010, scheduling the hearing for May 11, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on May 21, 2010.

I kept the record open until May 31, 2010, to enable Applicant to submit additional documentary evidence. He timely submitted AX E. Department Counsel's comments regarding AX E are attached to the record as Hearing Exhibit (HX) I. On June 3, 2010, he submitted AX F. Department Counsel did not object to the untimely submission (HX II), and it was admitted. The record closed on June 3, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b. In his answer to the amendments to the SOR, he denied SOR ¶ 1.c and admitted SOR ¶¶ 1.d and 1.e. His admissions in his answers to the SOR and its amendments are incorporated in my findings of fact.

Applicant is a 54-year-old employee of a defense contractor. He has worked for his current employer since September 2008. He was the president of his own auto parts company from May 2003 to May 2008. He worked for another defense contractor from September 2000 to April 2004.

Applicant served in the U.S. Navy from October 1975 to June 1978, attended the U.S. Merchant Marine Academy from June 1978 to June 1982, and served in the U.S. Marine Corps from July 1982 to August 2000, retiring as a major. While on active duty, he earned a master's degree in public administration in December 1998. (AX B-6.) He was granted a security clearance during his military career and retained it when he was employed by a defense contractor after his retirement. His clearance was administratively terminated when he left his job with the defense contractor in April 2004.

Applicant was married in October 1988 and divorced in February 1993. He married his current spouse in September 2004. He has no children, but his current wife has two adult children, one of whom lives with them (Tr. 30.)

In 2002, before their marriage, Applicant and his future spouse purchased a vacation rental property and future retirement home for about \$495,000, and they spent about \$50,000 for upgrades on the property. They paid only about \$15,000 at the time of purchase and financed the remainder. They rented the property to vacationers from 2002 to 2009, and it generated between \$26,000 and \$32,000 per year in gross income.

(Tr. 52-53.) Their monthly payments on the vacation rental property were \$4,803. (GX 6 at 3.)

Applicant began looking for a private business venture while he was employed by a defense contractor. His interest in collecting and restoring older automobiles led him to investigate an auto parts store. He discovered a store that had a reputation as the "place of last resort" for auto aficionados looking for hard-to-find parts. After interviewing the owners and some of their clients and examining the business records of the store, he concluded that the store was well run, well staffed, and stable. It had been in business since January 1970. After negotiating for eight to ten months, he purchased the store in May 2003 for \$835,000, including all inventory. He financed the purchase with a \$100,000 profit he made on the sale of a house, a Small Business Administration (SBA) loan of \$500,000 payable over ten years, and a five-year loan of \$225,000 from the sellers. (Tr. 36-40.)

Applicant continued to work full-time for a defense contractor, and he worked at the store in the early morning and the evenings. (Tr. 40.) He had eight employees, including the former owner, the former owner's spouse, and the former owner's son, who agreed to work for one year to help him learn the business. In February 2004, Applicant left his job with the defense contractor in order to work full time at the store. (Tr. 41-43.)

Applicant and his spouse purchased their primary residence in December 2004 for \$1,050,000. They were able to accumulate enough cash to make an initial payment of about \$450,000 for the residence, and they financed the remainder. Their monthly mortgage payment was about \$5,500 (Tr. 113.)

During the first year of Applicant's ownership, the gross income from the auto parts store was \$4,000 to \$4,300 per day, seven days a week, totaling about \$1.3 or \$1.4 million annually. These earnings were consistent with the earnings for the two years preceding the transfer of ownership. In 2004, the annual gross income declined to about \$1.15 million, and it continued to decline until 2008, when the income did not cover daily expenses. (AX A-14; Tr. 43-45.) As the business declined, Applicant reduced his workforce and began stocking and selling parts of lower quality and lower price. (Tr. 54-58.) The decline in business was due to the economic decline in the store's marketing area and the rapidly rising cost of gasoline (Tr. 46.)

In 2006, Applicant decided it would be financially prudent to use the equity in their home to reduce the store's operating expenses by paying off the SBA loan, on which the monthly interest was about \$3,000. In July 2007, Applicant and his spouse refinanced their primary residence, which was then worth about \$1.5 million, and used some of their equity to pay off the SBA loan, which then had a balance of about \$353,000. They also invested \$40,000 of their equity as operating capital for the store and used about \$10,000 to \$15,000 to pay off a credit card debt. (Tr. 50-51.) After refinancing, Applicant's monthly mortgage payments for his primary residence were

\$7,636 on the first mortgage and \$1,247 on the second mortgage. The first and second mortgages were from the same lender.

In 2006, Applicant and his spouse withdrew funds from various retirement accounts in an effort to continue operating the parts store. The taxes and early-withdrawal penalties on the funds totaled about \$53,000. Because of the declining income from the store, they were unable to pay the taxes due on the withdrawals. (Tr. 60-61.) The Internal Revenue Service (IRS) applied tax refunds for subsequent years to this debt. As of March 2010, the balance due was \$16,676.70. (AX A-5.) For tax year 2009, Applicant and his spouse expected a federal income tax refund of \$17,185 and a state income tax refund of \$8,564. (AX A-3; AX A-4.) In May 2010, the IRS notified Applicant that his federal income tax refund had been applied to his 2006 debt, fully satisfying the amount due, and that \$472.21 would be refunded to him. (AX F.)

Applicant closed the auto parts store in April 2008 and auctioned the inventory and fixtures for about \$13,200. (Tr. 65.) He did not draw a salary for the last six months, and his only income was his military retired pay and his spouse's income. He had been required by suppliers to personally guarantee payment, and he owed them about \$550,000. He still owed the sellers about \$75,000 plus interest, and they sued him for the balance due. (Tr. 71-73.) He was unsuccessful in his attempts to negotiate settlements with his various business creditors. In July 2009, Applicant filed a petition for Chapter 7 bankruptcy, listing all his business and personal debts. (GX 7.) He received a discharge in November 2009. (AX E.)

In his Chapter 7 bankruptcy petition, Applicant listed his primary residence and his rental property as exempt properties and stated his intention to continue making payments on the mortgages. (GX 7 at 48-49.) He testified he "didn't want a free ride on the mortgage debts." (Tr. 111.) In August 2009, Applicant and his spouse hired a law firm specializing in assisting homeowners with delinquent mortgages. (Tr. 79.) They received a letter from the mortgage holder for his primary residence, informing him that it had abandoned its efforts to collect payments on the second mortgage. (Tr. 106.) In December 2009, they executed a three-month forbearance agreement for the first mortgage on their primary residence, providing for three monthly payments of \$2,305. They received an offer of a second three-month forbearance agreement, but it provided for three monthly payments of \$6,412. They rejected this offer as unaffordable. (AX A-8.) Had they accepted the second forbearance agreement, their monthly payments on their primary residence and the vacation rental property would have exceeded their monthly income. They were unsuccessful in their efforts to negotiate a modification of the mortgage on the vacation rental property.

Shortly after Applicant closed his business in April 2008, he was offered a position by his former employer, but the position required a security clearance. Applicant submitted his security clearance application in May 2008, but the funding for the job was withdrawn while the security clearance application was being processed. (Tr. 94-95.) Applicant was hired by his current employer in September 2008, and his current employer agreed to sponsor his application for a clearance. (Tr. 96.)

Applicant and his spouse listed the vacation rental property for sale in 2006, but took it off the market in September 2006 because of hurricane damage. They rented the property in 2007 after repairing the damage at a cost of \$45,000, but they did not list it for sale because of the depressed market. They listed the property for sale again in early 2008 and reduced the asking price by \$250,000, but they still were unable to sell it. They continued to rent the property to vacationers through the fall of August 2009. The property was foreclosed in February 2010. Applicant has been advised by his attorney that the state where the rental property was located is a non-recourse state, in which the lender has no recourse for any deficiency after it forecloses the property. (Tr. 89-91.)

In May 2010, Applicant and his spouse listed their primary residence for sale, asking \$875,000, less than the amount of the loan. As of the day of the hearing, they had an offer for \$875,000 and a \$10,000 earnest-money deposit, pending the bank's approval of the short sale. (Tr. 76-77.) When the record closed, no further evidence regarding the short sale had been submitted.

Applicant and his spouse currently have net monthly income of about \$12,516 and expenses of \$4,199, leaving a remainder of \$8,317. (AX A-2.) They are not making payments on their primary residence, pending a decision on the short sale. Applicant drives an eight-year-old truck with 174,000 miles, and his spouse drives a car provided by her employer. (Tr. 92.) They intend to live in a rental home for several years after their primary residence is sold. They are committed to living a modest lifestyle until they regain their financial footing. (Tr. 87-88, 120.)

Applicant submitted six character references from friends, colleagues and his current supervisor. (AX D-1 through AX D-6.) One reference was from a Marine Corps colonel on active duty, two were from retired Marine Corps officers, and one was from a retired Navy officer. All six individuals were familiar with Applicant's financial problems and the allegations in the SOR. All describe Applicant as honest, straightforward, trustworthy, and reliable.

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 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 about 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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 SOR alleges Applicant is indebted to the IRS in the approximate amount of \$34,266 for tax year 2006 (SOR ¶ 1.a). It also alleges he filed for Chapter 7 bankruptcy in July 2009 and received a discharge in November 2009 (SOR ¶ 1.b). Finally, it alleges his payments on the first mortgage on his primary residence are past due in an amount of at least \$7,636 (SOR ¶ 1.c), his payments on the second mortgage on his primary

residence are past due in an amount of at least \$1,247 (SOR ¶ 1.c), and his payments on his vacation rental home are past due in an amount of at least \$4,803 (SOR ¶ 1.e).

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.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." AG ¶ 19(b) is a two-pronged condition that is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis." Applicant's financial history raises AG ¶¶ 19(a), (c), and (e).

AG ¶ 19(b) is not raised. Although Applicant purchased a vacation home with a minimal down payment, purchased a business, and purchased an expensive primary residence within a three-year period, the purchases were not frivolous or irresponsible. Both Applicant and his spouse were employed and had substantial financial assets. They purchased the vacation home at a favorable price in a rising market and were able to cover a substantial portion of the mortgage payments with rental income. Applicant purchased the business after careful research and on reasonable terms. Applicant and his spouse purchased their primary residence at a fair price and were able to make a substantial down payment. Applicant did not leave his job with a government contractor until he was confident that the auto parts business would continue to thrive. Even when the auto parts store began to fail, he exhausted every possible resource in an effort to meet his financial obligations.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), the burden shifted to Applicant 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). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

Applicant's delinquent debts were numerous, and the delinquent mortgage payments on his primary residence are not yet resolved; but all of his delinquent debts were caused by circumstances making them unlikely to recur. He is again employed by a defense contractor. Based on his age, financial situation, unfortunate experience with private enterprise, and his reputation for reliability and trustworthiness, he is not likely to experience another business failure. He and his spouse are committed to living a modest lifestyle until they regain their financial footing. He has been candid with his employer, his supervisors, and everyone involved in processing his application for a clearance. In light of the responsible manner in which he responded to his financial difficulties, his diligent efforts to satisfy his financial obligations, and his current financial situation, the evidence does not cast doubt on his current reliability, trustworthiness or good judgment. I conclude AG ¶ 20(a) is 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 was caught in a business downturn and a precipitous decline in the housing market. He incurred repair expenses and loss of rental income due to hurricane damage to his rental property. He did not draw a salary for the last six months before he closed his business, and he was unemployed after he closed down his business until he began his current job. He reacted responsibly by negotiating with his creditors, obtaining legal advice, complying with the three-month forbearance agreement on his primary residence, and attempting to sell both his primary residence and the vacation rental property. He resorted to bankruptcy only after negotiations with his business creditors failed. He continued in his efforts to resolve his mortgage debts even after his Chapter 7 bankruptcy discharge. I conclude AG ¶ 20(b) is established for the debts alleged in SOR ¶¶ 1.a and 1.c-1.e and for the bankruptcy alleged in SOR ¶ 1.b.

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). Applicant did not obtain traditional debt counseling because it was not applicable to his situation, but he sought the assistance of a bankruptcy attorney and an attorney specializing in

delinquent mortgage situations. His past-due taxes have been paid, and the delinquent mortgage payments on the vacation rental property have been resolved by the foreclosure on that property. His business debts were discharged in bankruptcy. His only remaining delinquent obligations are the two mortgages on his primary residence. I conclude AG ¶ 20(c) is established for the debts alleged in SOR ¶¶ 1.a and 1.e, but not the debts for the mortgages on his primary residence alleged in SOR ¶¶ 1.c and 1.d.

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). 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.” ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

“A security clearance adjudication is not a proceeding aimed at collecting an applicant’s personal debts. Rather, a security clearance adjudication is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness in order to make a decision about an applicant’s security eligibility.” ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. However, he must demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008).

Applicant has resolved the tax debt alleged in SOR ¶ 1.a. His income was rapidly declining and he was not in a good position to make a payment agreement. Rather than try to negotiate a payment plan with the IRS, he decided to rely on the IRS to seize his tax refunds. He accurately calculated that the tax debt would be resolved in this manner within five years. There is no evidence, such as a tax lien, indicating that the plan was not acceptable to the IRS.

When Applicant could not make full payments on the mortgage for his vacation rental property, he contacted the lender and attempted to renegotiate the loan, without success. The delinquent mortgage on the vacation rental property, alleged in SOR ¶ 1.e, was resolved by foreclosure.

Applicant contacted the lender regarding the delinquent first and second mortgages on his primary residence, alleged in SOR ¶¶ 1.c. and 1.d, and he fulfilled the terms of the three-month forbearance agreement. He could not afford the payments required by the second three-month forbearance agreement tendered by the lender, and he had no assurance that his loan would be modified if he made the payments. Instead, he listed his home for sale, found a buyer, and presented the short-sale offer to the lender. Although the debts alleged in SOR ¶¶ 1.c and 1.d were not resolved as of the date the record closed, Applicant made good-faith efforts to fulfill these obligations. He had a reasonable plan to resolve his financial problems, and he took substantial steps to implement it. Based on his long record of dedicated service, his reputation for reliability and trustworthiness, his candor and sincerity at the hearing, and his track record during his period of financial distress, I am satisfied that Applicant will

responsibly address any remaining debts related to his residence, whether the mortgages on his primary residence are resolved by a short sale or by foreclosure. I conclude that AG ¶ 20(d) is established for the debts alleged in SOR ¶¶ 1.a and 1.c-1.e.

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 a mature, well-educated adult. He served honorably as an enlisted sailor in the Navy and as an officer in the U.S. Marine Corps. He has held a clearance and occupied positions of trust for many years. He was the victim of a confluence of events beyond his control. He was candid, sincere, and credible at the hearing. He reacted to his financial problems with integrity, candor, and a strong sense of duty.

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 mitigated the security concerns based on financial considerations. Accordingly, I conclude he has 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): FOR APPLICANT

Subparagraphs 1.a-1.e:

For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge