



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 09-05047
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

November 22, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant assumed responsibility for the large majority of the family debt in connection with his separation and divorce. Shortly thereafter, his business failed due to circumstances beyond his control. He found new employment and negotiated settlements for three of the six delinquent debts alleged against him. One of the remaining creditors sued him, so he ultimately had to file for Chapter 13 bankruptcy relief. He has done so, and has both the means and every intention to remain solvent in the future. He is a responsible and trustworthy individual, and met his burden to mitigate security concerns arising from his financial situation. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted a security clearance application (SF 86) on February 24, 2009. On April 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations). 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 for Determining Eligibility for Access to Classified Information* that went into effect within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing (AR) on April 20, 2010, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 19, 2010, and the case was assigned to me on May 27, 2010. DOHA issued a Notice of Hearing on July 9, 2010, and I convened the hearing as scheduled on August 18, 2010. The Government offered exhibits (GE) 1 through 6, which were admitted over Applicant's objection that the credit reports were obtained more than six months before issuance of the SOR. The objection was factually accurate, but went to the weight of the evidence rather than its admissibility. Applicant offered exhibits (AE) A through F, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until September 7, 2010, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on August 26, 2010. Applicant timely submitted AE G through J, which were admitted into evidence without objection, and the record was closed.

Findings of Fact

Applicant is a 42-year-old employee of a defense contractor, where he has worked since October 2008. Before that, he was unemployed for five months after being laid off from a part-time job with a county health district that he held for about seven months. From about October 2000 to October 2007, he owned and operated a storefront computer sales and services business. He earned an associate's degree in electronics, has no military service, and has never held a security clearance. He and his wife separated in 2006 and divorced in 2008. They have two children, ages 14 and 16, of whom they share custody.¹ In his response to the SOR, Applicant denied the factual allegations in SOR ¶¶ 1.a through 1.f, with explanations.² Applicant's explanations and admissions, including his statements in response to DOHA interrogatories,³ are incorporated in the following findings.

Applicant's financial problems began when he and his wife separated in May 2006. Her income was essential to maintaining their family budget, and the \$4,000 per month that Applicant earned from his computer store business was inadequate to meet all of their combined bills, for which he remained responsible. By late summer 2007, due to increased market competition and the loss of several major customers, Applicant's business failed and closed. He was able to obtain a temporary full-time position with a county health district, which became half-time after three months due to budgetary problems. After another three or four months, he was laid off from that job as part of an agency reduction in force. Five months of unemployment while job hunting followed,

¹Tr. 66-67, 122-127; AR; GE 1.

²AR.

³GE 3.

until he was finally hired into his current position. As part of the divorce settlement, Applicant agreed to accept responsibility for the marital debts as listed in the SOR, so that he could keep possession of the home they had purchased.⁴

Once Applicant obtained his current job, he began addressing his delinquent debts. He successfully renegotiated his mortgage loan to reduce his monthly payments to a level he could afford, and he remains current on that loan. He also obtained financial counseling during April 2009, after which he created a budget and contacted four of his outstanding creditors to negotiate settlements.⁵ In May 2009, Applicant sold his truck and used the proceeds to settle the delinquent debt alleged in SOR ¶ 1.e.⁶ In February 2010, he reached a settlement agreement and paid off the delinquency listed in SOR ¶ 1.a, using proceeds from his 2009 income tax refund.⁷ He also settled the debt listed in SOR ¶ 1.d during February 2010, with funds from his tax refund and savings from his reduced mortgage payments.⁸

While Applicant was attempting to negotiate a settlement of the debt alleged in SOR ¶ 1.f, the creditor filed suit against him. He hired an attorney who continued attempting to negotiate a settlement from November 2009 through April 2010. Finally, it became apparent that the creditor would not accept a settlement that Applicant could afford to pay. The creditor reinstated the court action in late April 2010, forcing Applicant to accept his attorney's recommendation to file for bankruptcy protection. He filed a Chapter 13 bankruptcy action on May 3, 2010, and included the debts alleged in SOR ¶¶ 1.b, 1.c, and 1.f, in order to avoid a judgment-based garnishment that would ruin his ability to meet his new mortgage payments and regular living expenses. Applicant had also been actively communicating with the creditors alleged in SOR ¶¶ 1.b and 1.c, since November 2009 and May 2009 respectively, but had not succeeded in negotiating resolution of those debts before his bankruptcy filing.⁹

Applicant has made all of the scheduled \$286 monthly payments to his bankruptcy trustee. The Chapter 13 plan will be completed in July 2013. Although he qualified to file for discharge of his debts under Chapter 7, he chose to file under Chapter 13 so he could repay as much of his debt as possible.¹⁰ His monthly budget reflects sufficient funds, after making bankruptcy and child support payments as well as his mortgage and other regular expenses, for a \$200 retirement contribution and about

⁴AR; GE 2; AE H; Tr. 122-128, 144-146.

⁵AR; GE 3; AE F; 105-112.

⁶AR Ex. 1.e; GE 2; GE 4; GE 5; Tr. 48-55.

⁷AR Ex. 1.a; AE B at 10; Tr. 55-60.

⁸AR Ex. 1.d; Tr. 61-62.

⁹AR Ex. 1.b, 1.c, 1.f; AE C; AE D; AE E; Tr. 63-65, 73-101.

¹⁰AE D; AE E; AE I; Tr. 101-104.

\$500 in personal allowances and other savings. His fiancée works and helps with household expenses as well.¹¹

Nine friends and coworkers, including his fiancée and her parents, wrote letters expressing their high esteem for Applicant's character, dependability, and trustworthiness.¹² He was extremely credible, organized, and well informed about his financial situation during the hearing.

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 (DCs) and mitigating conditions (MCs), which are to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

¹¹AE G; Tr. 112-118, 128-131.

¹²AE J.

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18:

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.

The evidence raised security concerns under two Guideline F DCs, as set forth in AG ¶ 19(a) "inability or unwillingness to satisfy debts"; and ¶ 19(c) "a history of not meeting financial obligations." Applicant's history of delinquent debt stretches back about four years, and continues, in part, at present. The burden accordingly shifts to Applicant to rebut, explain, extenuate or mitigate these facts and the resulting security concerns.

The guideline includes four conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial problems:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's delinquent indebtedness is ongoing in part, albeit under the control and supervision of proper Chapter 13 bankruptcy proceedings. He knowingly incurred most of the debts in question, and was able to meet his financial obligations until his former wife left him and his business failed shortly thereafter. He volunteered to assume responsibility for the large majority of their joint debt in return for being able to keep their home. He found new employment, and successfully negotiated better and affordable new terms on his mortgage. He is current on that and all other debts, except those listed in SOR ¶¶ 1.b, 1.c, and 1.f, which are being resolved through his bankruptcy. Applicant had fully resolved the debts alleged in SOR ¶¶ 1.a, 1.d, and 1.e well before the issuance of the SOR. Applicant has good-paying and steady work, and has surplus income again. He therefore established substantial mitigation under AG ¶ 20(a) because his debts arose under circumstances that are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, or good judgment.

Partial mitigation under AG ¶ 20(b) was also established. Applicant's delinquent debts were not caused by matters outside his control, but his inability to pay them as he originally intended resulted from his separation and divorce, as well as the unforeseen failure of his business. Applicant has acted responsibly throughout these problems, and has filed for bankruptcy relief as a last resort to resolve his remaining unsecured debts. He successfully renegotiated his mortgage loan terms, and is fully current in paying his regular living expenses. He consulted both a credit counseling service and two attorneys for assistance in resolving his debts. Three accounts were resolved by mutual agreement, but one creditor forced him to seek bankruptcy protection by suing him. He is current on all required payments under his Chapter 13 plan, and has sufficient income to avoid any future delinquencies with a comfortable monthly surplus. Thus, additional mitigation was established under AG ¶¶ 20(c) and (d).

As the Appeal Board has ruled concerning the successful mitigation of security concerns arising from financial considerations, "[a]n applicant is not required to show that [he] has completely paid off [his] indebtedness, only that [he] has established a reasonable plan to resolve [his] debts and has 'taken significant actions to implement that plan.'"¹³ This applicant has established and substantially implemented an effective plan to resolve the debts that could formerly have given rise to security concerns. He also demonstrated his commitment to avoiding future financial problems, and a solvent budget that will permit him to do so.

¹³ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006)).

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 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.

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 considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant incurred a moderate amount of delinquent debt in connection with his divorce and the failure of his business. He obtained new employment and actively attempted to negotiate resolution of those debts with his creditors. Three were resolved in that manner, and he was also successful in renegotiating the terms of his mortgage to improve his ability to meet other obligations. One creditor sued him, however, which compelled him to seek bankruptcy protection under advice of his attorney. He chose to file under Chapter 13, rather than Chapter 7 for which he also qualified, in order to repay his remaining creditors as much as he could. He is a mature and responsible individual, and the recurrence of financial problems is quite unlikely. His proactive efforts to achieve resolution of his debts have eliminated any ongoing potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence creates substantial confidence as to Applicant's present eligibility and suitability for a security clearance. He fully met his burden to mitigate the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:

FOR APPLICANT

Subparagraphs 1.a through 1.f:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge