



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 09-05096
)
 Applicant for Security Clearance)

Appearances

For Government: William T. O’Neil, Esq., Department Counsel
For Applicant: *Pro se*

May 12, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on April 7, 2009. On June 30, 2010, 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 answered the SOR on August 18, 2010. He initially requested an administrative determination on the record, but he later requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 1, 2011,

and the case was assigned to an administrative judge on January 12, 2011. It was reassigned to me on February 3, 2011. DOHA issued a notice of hearing on February 14, 2011, scheduling the hearing for March 9, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. DOHA received the transcript (Tr.) on March 17, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.g, 1.j, 1.l, and 1.n, and he explained that each of the debts alleged was included in a Chapter 7 bankruptcy petition. He admitted the debts alleged in SOR ¶¶ 1.k and 1.m, but contended that they were duplicates of other debts alleged in the SOR, and he explained that they were included in a Chapter 7 bankruptcy petition. He admitted the previous Chapter 7 bankruptcy petition alleged in SOR ¶ 1.o. He denied the debts alleged in SOR ¶¶ 1.h and 1.i. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 43-year-old employee of a defense contractor, working as a ship designer. He has worked for his current employer since March 2, 2009. (Tr. 21.) He has never held a security clearance.

Applicant served in the U.S. Marine Corps from November 1980 to October 1990 and received an honorable discharge. After his discharge from the Marine Corps, he earned associate's degrees in computer animation and computer design. (Tr. 50-51.)

Applicant's supervisor describes him as a team player with a positive attitude and pride in his work. He regards Applicant as reliable, responsible, and honest. (AX H at 2; Tr. 37-44.) Applicant's friend and former supervisor describes him as a talented mechanical designer, loyal, trustworthy, hard working, dedicated, and honest. (AX H at 3.) A coworker describes him as honest, trustworthy, and dedicated. (AX H at 4.) Applicant's performance appraisal for 2010 rated him as meeting expectations in all performance categories. (AX I.)

Applicant married in November 1998. He and his wife have a five-year-old daughter.

Applicant and his wife filed a joint petition for Chapter 7 bankruptcy in January 2000. They received a discharge in May 2000. (GX 9.) They resorted to bankruptcy after they incurred uninsured medical bills in excess of \$6,000 due to food poisoning. (GX 3 at 7.) He was working as a computer repairman and making insufficient income to pay the medical bills. The medical creditors would not agree to payment plans and insisted on full payment. (Tr. 56-57.)

Applicant's wife was trained as a paralegal, and she started a business doing real estate closings in 2002, but it failed in 2007 due to the downturn in the housing market. Before the business began to decline, his wife was earning about \$80,000 per year. Applicant and his wife depended on her business as their primary source of income. Applicant worked intermittently as a contractor, but his contract expired and he was laid off at about the time his wife's business failed. (Tr. 59-62; Answer to SOR.)

Applicant and his wife purchased a home in 2002 for about \$155,000. They refinanced the house, increasing the loan to about \$330,000, and used the equity for improvements to the house. (Tr. 62-64.) After Applicant's wife's business failed in 2007, he was unemployed for about six months. They tried to sell the house, without success. After about six months, they moved in with family members and rented the house. (Tr. 22.) After their tenants stopped paying rent, Applicant evicted them, spent additional funds to refurbish the property, and tried again to sell it. (Tr. 47.) They fell behind on their house payments, and the lender started foreclosure proceedings. The delinquent mortgage, alleged in SOR ¶ 1.h, was resolved in June 2010 by a short sale. (Answer to SOR; AX C; Tr. 47.)

Applicant testified the auto loan alleged in SOR ¶ 1.i is current and will be paid off in one year. (Tr. 47.) He did not submit any documentation about the auto loan, but his most recent credit report (GX 4) does not reflect any delinquent auto loans. Applicant and his wife have lived in a rented home since March 2009, and their rent is current. (AX B; Tr. 47.)

Applicant testified that he contacted his other creditors, primarily credit card account holders. He testified that he was not able to negotiate any payment agreements because of his limited income and the high interest rates and large payoff amounts demanded by his creditors. (Tr. 23.) He did not submit any documentary evidence showing the extent of his efforts to settle the other debts.

Applicant and his wife filed a second joint petition for Chapter 7 bankruptcy in September 2010. (GX 7; GX 8.) The petition was delayed because the United States trustee determined that the debtors' case should be presumed to be an abuse of the bankruptcy process. The record does not reflect the specific basis for the trustee's concern. In December 2010, the United States trustee determined that a motion to dismiss the petition was not appropriate. (AX D at 3-4.)

Applicant's bankruptcy petition lists \$26,104 in assets and \$187,703 in total liabilities. All the creditors alleged in the SOR are included in the bankruptcy petition, except the creditors alleged in SOR ¶¶ 1.h and 1.i. The schedule of creditors includes Applicant's two student loans, each in the amount of \$45,464, and his wife's two student loans totaling \$4,522. He testified that he believed his student loans totaled about \$60,000 and his wife's about \$10,000. (Tr. 69.) Their student loans (not alleged in the SOR) are in deferment based on hardship. (Tr. 48, 70.) The schedule of personal property includes a seven-year-old luxury SUV with 100,000 miles and a six-year-old economy car with 76 thousand miles. Applicant has paid for the economy car, but the

loan alleged in SOR ¶ 1.i is for the SUV. As of the date the record closed, the bankruptcy petition was pending a decision.

Applicant's bankruptcy petition reflects that he has net monthly income of \$3,531, and his wife has net monthly income of \$2,654. It lists average monthly expenses totaling \$6,960, leaving a shortfall of about \$775. The expenses include parents' car payments, insurance, and credit cards (GX 8 at Schedules I and J.). Applicant and his wife were both working for the same employer when they filed their bankruptcy petition. At the hearing, Applicant testified that his wife is no longer employed, but the record does not reflect the reasons for her unemployment or the circumstances surrounding her change of employment status. (Tr. 71.)

In January 2008, Applicant attempted to enroll in a credit counseling and debt consolidation program, but he was not accepted because he had insufficient income. (AX A; Tr. 46-47.) He has completed the credit counseling and personal finance education required by the bankruptcy court. (AX E.)

Applicant and his wife recently adopted a budget and established a system for paying bills and accumulating savings. Their budget reflects monthly net income of \$3,800, expenses of \$3,611, and monthly savings of \$189. (AX F-G; Tr. 48.) Although their budget does not list expenses incurred on behalf of parents, the record does not fully reflect why the expenses in their monthly budget are so much lower than the expenses they reported in their bankruptcy petition.

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.

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, an administrative judge applies these guidelines 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 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).

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 14 delinquent debts (SOR ¶¶ 1.a-1.n), including a home mortgage in foreclosure (SOR ¶ 1.h) and a delinquent car loan (SOR ¶ 1.i). It also alleges a Chapter 7 bankruptcy discharge in May 2000 (SOR ¶ 1.o). The concern under this guideline is 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.

Applicant's financial history establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). Thus, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts established by the evidence.

"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).

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 mitigating condition is not established, because Applicant's delinquent debts are numerous, recent, and did not occur under circumstances making them unlikely to recur.

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 and his wife experienced loss of employment and a business downturn. In hindsight, it was bad business judgment for Applicant and his wife to gamble their future on the real estate market. However, AG ¶ 20(b) focuses on whether they acted responsibly after encountering conditions beyond their control. The evidence reflects that they acted responsibly to resolve the delinquent home mortgage and the past-due payments on the auto loan. Applicant testified that they contacted the other creditors alleged in the SOR, but there is no documentary evidence in the record reflecting the extent of their efforts to negotiate settlements or payment agreements. I conclude that AG ¶ 20(b) is established for the home mortgage and automobile loan, but not for the other delinquent debts alleged in the SOR.

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 sought counseling from his credit union. He and his wife have completed the counseling required by the bankruptcy court. They have adopted a budget and new financial management practices. They have resolved the delinquent home mortgage and the past-due car payments. Their bankruptcy petition is pending, but the United States

trustee has expressed concerns about their entitlement to another Chapter 7 discharge. Even if a Chapter 7 bankruptcy discharge is granted, Applicant will be living on the financial edge, vulnerable to economic downturns, unexpected unemployment, or unanticipated expenses such as repairs on his aging automobiles. I conclude that the second prong AG ¶ 20(c) (“clear indications” that debts are being resolved or are under control) is not established.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Chapter 7 bankruptcy is a legally permissible remedy for indebtedness, but it does not necessarily establish good faith. Even if a delinquent debt is legally unenforceable, the Government is entitled to consider the facts and circumstances surrounding an applicant’s conduct in incurring and failing to satisfy the debt in a timely manner. See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). Applicant must do more than show that he relied on a legally available option, such as bankruptcy, in order to claim the benefit of AG ¶ 20(c). See ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007).

Applicant’s bankruptcy in 2000 should have taught him about the dangerous consequences of not planning for the unexpected, but he apparently did not learn from that experience. Instead, he and his wife purchased a home two years later, gambling that her new business venture, their primary means of support, would be successful. They gambled on the housing market by borrowing heavily against their home equity for home improvements, purchasing an expensive luxury car, and incurring substantial credit card debt. To their credit, they responded responsibly to avoid foreclosure of their home and repossession of their automobile, but there is no evidence of actions to resolve their other delinquent debts. I conclude that AG ¶ 20(c) is established for the delinquent mortgage alleged in SOR ¶ 1.h and the delinquent auto loan alleged in SOR ¶ 1.i, but not for the other delinquent debts alleged in the SOR.

Security concerns under this guideline also can be mitigated by showing “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.” AG ¶ 20(e). In his response to the SOR, Applicant asserted that the delinquent debt alleged in SOR ¶ 1.k is a duplicate of the debt alleged in SOR ¶ 1.a. He also asserted that the debt in SOR ¶ 1.m is a duplicate of the debts alleged in SOR ¶¶ 1.b and 1.c. He provided no

documentation to show that the debts are duplicates, nor did he provide any evidence that he disputed the duplicate debts or asked the credit reporting agencies to delete them from his credit reports. I conclude that AG ¶ 20(e) is not established.

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 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, intelligent adult. While he demonstrated responsible conduct regarding his defaulted mortgage and delinquent automobile loan, he has fallen short in exercising prudence and good judgment. He has been financially reactive rather than proactive. He is able to meet his current expenses, but he has no resources for unexpected expenses. He has not yet demonstrated a track record of responsible financial management.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

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

Subparagraphs 1.a-1.g:	Against Applicant
Subparagraphs 1.h-1.i:	For Applicant
Subparagraphs 1.j-1.n:	Against Applicant
Subparagraph 1.o:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge