



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-05468
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: William J. Holmes, Esq.

November 4, 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 November 6, 2003. On March 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 received the SOR on April 1, 2010; answered it on April 12, 2010; and requested a hearing before an administrative judge. DOHA received the request on

April 15, 2010. Department Counsel was ready to proceed on July 20, 2010, and the case was assigned to me on July 23, 2010. After coordinating with Applicant's attorney, DOHA issued a notice of hearing on September 2, 2010, scheduling it for September 21, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 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 September 30, 2010.

Findings of Fact

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

Applicant is a 43-year-old engineering designer employed by various defense contractors since August 1991. He has held a security clearance since September 1999. (GX 1 at 1-2, 7.) He was hired by his current employer in July 2009. Shortly before the hearing, he completed an anti-terrorism awareness course in preparation for an overseas deployment. (AX H; Tr. 56-57.) He submitted his security clearance application while working for another employer, but his application is now sponsored by his current employer.

In January 1992, Applicant filed a Chapter 7 bankruptcy petition, alleged in SOR ¶ 1.a, and he received a discharge in May 1992. His bankruptcy petition listed assets of \$5,668 and liabilities of \$10,420. (GX 2.) Applicant was 24 years old when he filed for bankruptcy, and he attributed his financial problems to youth and irresponsible spending. He had grown up in a poor family, was earning more money than he had ever earned before, and found himself overextended with credit card debt. (Tr. 44-45, 63.)

In February 2000, Applicant filed another Chapter 7 bankruptcy petition, alleged in SOR ¶ 1.b, and he received a discharge in July 2000. The record does not reflect the amounts of his assets and liabilities covered in the second bankruptcy. (GX 3.) The financial difficulties leading to this bankruptcy started when Applicant bought a townhouse in 1995, lived in it for a year, and discovered that it was in an undesirable neighborhood. He bought another house in a better neighborhood and rented out his first house. His tenants damaged the property and moved out without paying their rent, leaving Applicant with two mortgage payments, limited income, and significant repair bills. (Tr. 68.) At the same time, he was diagnosed as HIV positive and began having multiple health problems requiring hospitalization. Although he had health insurance, he was liable for the 20% copayments. He decided the only solution was another Chapter 7 bankruptcy. (Tr. 44-48, 71.) He moved into his first house, the townhouse that he had been renting out, and surrendered the second house. (Tr. 70.)

In May 2006, Applicant filed a Chapter 13 bankruptcy petition, alleged in SOR ¶ 1.c. (GX 4.) Applicant had a hip replacement and was unable to work for a couple of months, during which he received short-term disability payments of 80% of his pay. He

obtained a second mortgage on his house to build a deck and a fence, increasing his mortgage payments from \$900 to \$1,200. He purchased a vacation time share, which turned out to be a bad investment. (Tr. 83.) He continued to incur medical expenses related to his HIV-position condition. (Tr. 73.) He sold the townhouse and moved into a rental property with a roommate, but could not pay his bills. He elected to file a Chapter 13 petition with a three-year repayment plan to show that he could be financially responsible. He received the debt counseling required by the bankruptcy court. (Tr. 77.) He completed the Chapter 13 payment plan in June 2009. In August 2009, the case was closed and the trustee discharged.

The SOR alleges two past due debts for \$583 and \$8,935 (SOR ¶¶ 1.d and 1.e). These debts were reflected on his credit reports dated November 20, 2009 and January 26, 2010. (GX 8; GX 9). Applicant denied these debts, stating that they were included in his Chapter 13 bankruptcy. He disputed the credit bureau report entries listing these debts, and the dispute was resolved in his favor. His credit file now reflects that these two debts were resolved through his Chapter 13 bankruptcy. (AX G.)

Applicant is unmarried and has no children. (GX 1 at 3-4.) Both of his parents are disabled, and he helps them financially from time to time. (Tr. 61.) His gross income was \$54,849 in 2006, \$55,238 in 2008, and \$64,347 in 2009. (AX I.) He presented no information about his income in 2007. His rent, car payment, and other bills total about \$700-\$800 per month, leaving a substantial net remainder. (Tr. 50.) He is current on all his financial obligations. (Tr. 54.)

Applicant's coworker for almost 20 years, who is now his supervisor, was aware of Applicant's prior bankruptcies when he hired him. He described Applicant as a reliable, dependable, responsible person, an "exemplary employee," and "a valuable team member." (AX A; Tr. 22-24.) A previous employer describes him as hard working, engaged, conscientious, and a person of good character. (AX B.) A co-worker for four years considers his work habits and work ethics "exceptional." (AX C.) Three long-term friends describe him as trustworthy, loyal, honest, and dependable. (AX D, E, and F.)

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, 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 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 raises four disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"); AG ¶ 19(b) ("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) ("a history of not meeting financial obligations"); and AG ¶ 19(e) ("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"). Thus, the burden shifted to him 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). Applicant's first bankruptcy petition was filed almost 19 years ago, the second was more than 10 years ago, and the third was more than four years ago. I conclude that the first prong of this mitigating condition ("so long ago") is established because Applicant's long course of irresponsible financial conduct ended in May 2006, and he has demonstrated financial responsibility since his last bankruptcy petition. The second prong ("so infrequent") is not established because of his repeated acts demonstrating financial irresponsibility. His track record of responsible behavior since May 2006 establishes the third prong ("unlikely to recur") and the fourth prong ("does not cast doubt"). I conclude that this mitigating condition 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's first bankruptcy was the product of irresponsible conduct and not due to conditions beyond his control. His second bankruptcy was partly the result of an ill-advised purchase of a home in an undesirable neighborhood. This ill-advised purchase was the product of financial naiveté and inadequate market research, and not the result of conditions beyond his control. His purchase of a second home contributed significantly to his financial distress and was not a condition beyond his control. He encountered some conditions beyond his control: his tenants' damage to his rental property, their failure to pay rent, and his medical problems. However, he did not act responsibly. He stopped trying to pay his debts and filed a second Chapter 7 bankruptcy

petition. Applicant's Chapter 13 bankruptcy also was preceded by some conditions beyond his control: a short period of disability, reduced income, and continuing medical expenses. Again, he did not act responsibly. Instead, he obtained a second mortgage to pay for home improvements and purchased a vacation time share. I conclude AG ¶ 20(b) is not established.

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). This mitigating condition is established, because Applicant received counseling in connection with his Chapter 13 bankruptcy, successfully completed the three-year payment plan, and is now current on all his financial obligations.

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). Reliance on a legal bar to collection of a debt, such as bankruptcy, does not constitute a "good-faith effort." See ISCR Case No. 99-2020 at 6 n. 12 (App. Bd. Jun. 4, 2001). When delinquent debts are discharged in bankruptcy, it is appropriate to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy his debts in a timely manner. See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). Thus, I conclude that AG ¶ 20(d) does not apply to the debts discharged in the first two bankruptcies. I also conclude, however, that Applicant's full compliance with the three-year payment schedule under his Chapter 13 bankruptcy demonstrates a good-faith resolution of the debts included in that bankruptcy.

Applicant disputed the credit report reflecting the two debts alleged in SOR ¶¶ 1.d and 1.e, but he did not dispute the underlying debts. Thus, I conclude that AG ¶ 20(e) ("reasonable basis to dispute the legitimacy of the past-due debt") is not applicable.

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 has worked for defense contractors all his adult life. He has held a clearance for 11 years, apparently without incident. In spite of past financial problems, he has earned a reputation for trustworthiness and reliability. His epiphany occurred in May 2006, when he realized the need to change his lifestyle and start being financially responsible. He has demonstrated financial responsibility by timely completing his Chapter 13 payment plan and adjusting his lifestyle to his income. He was candid, sincere, and credible at the hearing.

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 continue his 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

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge