



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-05536
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

November 24, 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 2, 2007. On June 3, 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 June 8, 2010, and answered it on June 25, 2010. He did not state whether he requested a hearing before an administrative judge. On

June 30, 2010, he telephonically requested a hearing. (Hearing Exhibit (HX) I.) Department Counsel was ready to proceed on July 29, 2010, and the case was assigned to me on August 23, 2010. DOHA issued a notice of hearing on September 2, 2010, scheduling it for September 20, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on September 28, 2010.

I kept the record open until October 8, 2010, to enable Applicant to submit additional documentary evidence. On October 5, 2010, I granted his request to extend the deadline for submission of additional evidence until October 15, 2010. (HX II.) He timely submitted AX B through D. Department Counsel's comments regarding AX B through D are attached to the record as HX III.

Findings of Fact

In his answer to the SOR, Applicant admitted the all allegations in the SOR and explained that he was making payments on all the debts alleged in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old quality assurance inspector employed by a defense contractor providing communications services for the U.S. Navy. He has worked for his current employer since September 2006. He served on active duty in the Navy from March 1992 to February 2006 and received an honorable discharge. He received a security clearance while in the Navy. (GX 1 at 31.) He was a first class petty officer when he was discharged. (GX 6; Tr. 34.) He was unemployed after his discharge until he began working at his current job. (Tr. 42.)

Applicant married in August 1994, separated in February 2006, and divorced in December 2008. No children were born during the marriage. He remarried in May 2010. (GX 3 at 9-11; Tr. 31.) His current wife is a retired Navy chief petty officer. They live in a house she owns and they drive her car. (Tr. 51-52.) In addition to her retired pay, his wife also earns about \$45,000 per year from her post-retirement job. (Tr. 54.)

In July 2005, Applicant was charged with aggravated sexual battery and indecent liberties with a child by a custodian. The charges alleged that he took liberties with a child whom he was baby-sitting. Applicant denied the charges. He was tried in February 2006, pleaded not guilty, but was convicted. His conviction was overturned on appeal. Upon retrial in October 2008, he was acquitted of all charges. (AX C.) The record does not reflect what evidence was presented at his two trials.

Applicant testified at the hearing that his initial conviction was overturned based on evidence that was not presented at the trial. (Tr. 29.) No further evidence concerning the basis for the appellate court's decision was submitted by either party.

Applicant left the Navy at the end of his enlistment while pending trial. He testified that he decided not to reenlist to protect his honorable discharge, fearing that a criminal conviction would result in an other than honorable discharge. (Tr. 25, 56.)

Applicant spent about \$40,000 in legal fees to defend himself against the charges. As a result of these legal fees, as well as about \$1,200 in legal fees for his divorce, Applicant experienced financial problems. (AX B, E, and F; Tr. 28-30, 33.) The SOR alleges four delinquent debts totaling about \$24,770. All four debts were incurred to pay his legal expenses. (Tr. 38-50.)

Starting in October 2009, Applicant began making payments on the debts alleged in SOR ¶¶ 1.b-1.d. He is making monthly payments of \$200 directly to the creditor on the debt in SOR ¶ 1.c, and he is making monthly payments totaling \$356 on the debts in SOR ¶¶ 1.b and 1.d through a debt management company. (GX 3 at 3, 8; Tr. 43-44, 48.) He testified he has received financial counseling from the debt management company. (Tr. 50.) In July 2010, he paid in full the debt alleged in SOR ¶ 1.a. (AX A.)

Applicant submitted a personal financial statement (PFS) in October 2009 reflecting net monthly income of \$2,517, expenses of \$1,800, debt payments of \$505, and a remainder of \$212. The PFS was submitted before he remarried, and it does not reflect his wife's income. It includes the creditors alleged in SOR ¶¶ 1.b-1.d, but does not include the management fees paid to the debt management company. (GX 3 at 7.)

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 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”), shifting the burden 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 delinquent debts are numerous and ongoing, but they occurred under circumstances making them unlikely to recur, *i.e.*, substantial legal expenses defending a criminal charge. Applicant’s acquittal and his responsible efforts to repay the debts for legal expenses have dispelled any reasonable doubts about his current reliability, trustworthiness, and 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’s period of unemployment after leaving the Navy was not beyond his control, because he voluntarily chose to terminate his Navy career in order to avoid the risk of an other than honorable discharge. Nevertheless, this mitigating condition is established because Applicant’s criminal prosecution and the break-up of his marriage were circumstances beyond his control, and he has acted responsibly to resolve his delinquent debts.

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 testified that he received counseling from his debt management company, but his testimony is not corroborated by documentary evidence. Nevertheless, the second prong of this mitigating condition is established because his financial problems are being resolved.

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 each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also 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. *Id.*

Applicant incurred legal expenses of more than \$40,000 for his criminal trial and his divorce. As of the date of the SOR, his delinquent debts had been reduced to about \$24,770, and he has further reduced his indebtedness since receiving the SOR. I conclude that AG ¶ 20(c) is 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 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 served honorably in the U.S. Navy for 14 years and held a security clearance for all his Navy service. He was sincere, candid, and credible at the hearing. He has remarried, established a sound plan to resolve his indebtedness, and put his life back together.

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.d:

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