



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-06448
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

September 8, 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 denied.

Statement of the Case

Applicant submitted a security clearance application on May 4, 2009. On April 9, 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 May 1, 2010, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 18, 2010, and

the case was assigned to me on May 20, 2010. DOHA issued a notice of hearing on May 24, 2010, scheduling the hearing for June 24, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through P, which were admitted without objection. I kept the record open until July 23, 2010, to enable Applicant to submit additional documentary evidence. He timely submitted AX Q, which was admitted without objection. DOHA received the transcript (Tr.) on June 30, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 40-year-old operations specialist employed by a defense contractor. He served as an enlisted sailor in the U.S. Navy from 1992 to July 1994 and participated in a baccalaureate completion program. He graduated from college in December 1993. He served as an officer from July 1994 to February 2005. After he left active duty, he was unemployed until he began working for a defense contractor in May 2005. He has worked for his current employer since April 2006. He held a security clearance in the Navy.

In November 2005, Applicant purchased a residence for about \$750,000, and rented out his previous residence that he had purchased in 1997. He purchased a large home because his fiancée, trained as a social worker, wanted to have foster children in addition to her three children from a previous marriage. (Tr. 31.) He made a down payment of about \$100,000 on the new residence, using part of his \$70,000 separation pay from the Navy, cash generated by a second mortgage on his previous residence, and the savings he and his fiancée had accumulated. (Tr. 61, 80.) Applicant is the sole owner of the residence and the sole obligor on the mortgage. (Tr. 66.)

When Applicant purchased the new residence, he was earning about \$60,000 per year. Applicant and his fiancée received additional income for foster children placed in their home. The amounts varied, depending on the number of children and their special needs, but they were sometimes as much as \$5,000 per month. (Tr. 93.) With his income, his fiancée's income from a commercial daycare facility, the foster-care payments, and the rental income from his previous residence, he was able to make all his mortgage payments. His monthly mortgage payments on the new residence were about \$5,000. In 2006, he refinanced the property for \$810,000, and took out his equity, increasing the monthly mortgage payments to about \$5,500. (GX 2 at 6; Tr. 82-83.) He later refinanced again, increasing the monthly payments to about \$6,600. (Tr. 91-92.)

At about the same time he purchased the new residence in November 2005, he also purchased a one-year-old Cadillac Escalade. He borrowed \$40,000 to purchase it and had monthly payments of \$670 on it. (Tr. 90.)

Applicant's tenant in his previous residence stopped making payments in January 2006. He evicted his tenant and was able to sell the property after making the mortgage payments for about three months. (GX 2 at 6; AX N.) Also in January 2006, his fiancée's daycare facility was shut down for violations of state regulations.

Applicant and his wife married in March 2006. (Tr. 31.) As a result of complications associated with pregnancy and child birth in 2007, Applicant's wife was unable to find other employment. The five foster children were transferred to another home in February 2007. They became foster parents to another family in August 2007.

When they purchased the new residence, Applicant and his fiancée agreed that she would pay the mortgage from her income and Applicant would pay the other expenses. After their child was born, Applicant discovered that his wife had not been making the mortgage payments. (Tr. 95.)

Applicant received a foreclosure notice on the new residence in April 2008. He attempted a short sale of the house, but did not receive any offers acceptable to the lender. He requested a loan modification, but he had not received a response from the lender as of the date the record closed. (Tr. 98.)

Judgments were entered against Applicant in September 2007 and February 2009 for delinquent homeowners' association assessments. The judgments are alleged in SOR ¶¶ 1.a and 1.b. Both judgments have been satisfied. (AX B.) He failed to pay a \$75 medical bill and a \$484 bill for cable service, alleged in SOR ¶¶ 1.c and 1.d. Both bills have been resolved. (AX C and D.)

Applicant also fell behind on his student loan payments, alleged in SOR ¶¶ 1.e-1.h and 1.j-1.m. As of the date of the hearing, he was in a rehabilitation program for his delinquent student loans and had made six of the nine payments required to rehabilitate the loans. (AX E through K.) The payments are being made by direct deductions from his pay. (Tr. 102-103.)

Applicant and his wife separated in July 2008 and divorced in April 2010. (Tr. 95-96.) He pays her \$1,200 per month in child support, and he pays \$600 per month in child support for another child from a previous relationship. (Tr. 100-101.) His ex-wife has the Cadillac Escalade and is making the monthly payments on it. (Tr. 101.) In June 2009, his wife filed a Chapter 7 bankruptcy petition in her own name, but Applicant did not know whether she received a discharge. (Tr. 99.)

Applicant's ex-wife now lives in the new residence with her children and foster children. He testified his ex-wife wants to stay in the house and is considering assuming the mortgage in her name. (Tr. 98.) The past due mortgage payments on the new residence are alleged in SOR ¶ 1.i.

Applicant lives with his 92-year-old grandmother. He does not pay rent, but he cares for her in return for rent-free lodging. (Tr. 39.) He drives a 16-year-old car that is fully paid for, and he has a second job delivering pizzas in the evening.

Applicant enrolled in a consumer credit counseling program in May 2010. The program encompasses five debts totaling \$18,000 (Tr. 37-38; AX L.) The plan requires Applicant to pay \$472 per month. None of the debts in the program were alleged in the SOR. Under the budget proposed under the plan, Applicant will be able to pay current expenses, including the \$472 paid to the program, but will have no monthly remainder. The program does not include any payments on the foreclosed residence.

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 two unsatisfied judgments (¶¶ 1.a, 1.b), a delinquent medical bill (¶ 1.c), a delinquent cable service bill (¶ 1.d), a delinquent home mortgage (¶ 1.i), and eight delinquent student loans (¶¶ 1.e-1.h and 1.j-1.m). 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.

Applicant’s financial record raises the following disqualifying conditions under this guideline: AG ¶ 19(a) (“inability or unwillingness to satisfy debts”), 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”).

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”) is not raised. It was irresponsible for Applicant to purchase an expensive home and a luxury car on his limited income. However, he has demonstrated willingness to pay his debts, even though he is currently unable to resolve the delinquent mortgage. Thus, the second prong of AG ¶ 19(b) (absence of willingness or intent to pay the debt) is not established.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), 19(c) and 19(e), the burden shifted to 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).

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 recent, numerous, and did not occur under circumstances making them unlikely to recur. His decision to incur heavy debt on limited income with no fall-back plan for unforeseen circumstances raises questions about his reliability, trustworthiness, and good judgment. I conclude AG ¶ 20(a) is not 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 encountered several conditions beyond his control: a downturn in the housing market, his tenant’s failure to pay rent, the failure of his spouse’s daycare business, his spouse’s medical problems and inability to work outside the home, and the breakup of his marriage. His purchase of an expensive home and a luxury automobile at the same time was irresponsible, but he acted responsibly after his financial house of cards collapsed. He has resolved all the delinquent debts alleged in the SOR except the delinquent mortgage. He has sought to resolve the mortgage through a short sale or a loan modification but has been unsuccessful. He is living frugally and working a second job in an attempt to satisfy his financial obligations. I conclude AG ¶ 20(b) is 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). Applicant belatedly sought counseling, and he has resolved several delinquent debts. He is on his way to rehabilitating his delinquent student loans. However, his delinquent mortgage -- the root of his financial problems -- is not resolved. He has a realistic plan to resolve several debts not alleged in the SOR. I conclude that this mitigating condition is established for all the debts alleged except the delinquent mortgage.

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). 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 has taken significant actions to implement that plan. ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008).

Applicant resolved the debts alleged in SOR ¶¶ 1.a-1.d, and he has made significant progress toward rehabilitating his student loans alleged in SOR ¶¶ 1.e-1.h and 1.j-1.m. However, he has made no progress in resolving the delinquent home mortgage alleged in SOR ¶ 1.i. His attempts at a short sale or loan modification have not been successful. Although he testified his ex-wife wants to stay in the house and take over the mortgage obligation, he presented no evidence that any steps by his ex-wife to relieve him of his mortgage obligation have occurred. I conclude that AG ¶ 20(d) is established for all the debts alleged in the SOR except ¶ 1.i.

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 as a Navy officer for almost 11 years, held a clearance in the Navy, and was honorably discharged. He was candid and sincere at the hearing. However, with his background, experience, and education, it is difficult to understand his poor judgment in purchasing a \$750,000 home and borrowing \$40,000 to buy a luxury automobile on his limited income. 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 continue his eligibility for access to classified information.

Formal Findings

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

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

Subparagraphs 1.a-1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraphs 1.j-1.m:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge