



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 09-07683
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

May 24, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On April 20, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On June 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) 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 (AG) effective within the Department of Defense for SORs after September 1, 2006.

Applicant answered the SOR on August 2, 2010, which DOHA received on August 5, 2010. On August 27, 2010, Department Counsel forwarded Applicant a Request for Supplemental Answer to Statement of Reasons, which Applicant received on September 4, 2010. Applicant requested additional time until October 1, 2010 to respond to Department Counsel's request. Applicant did respond to Department

Counsel's request; however, his response was not received by DOHA until October 12, 2010, the date of his hearing. See Exhibits I through IV, and Government's Filing Regarding Applicant's Response to Government's Request for Supplemental Answer to Statement of Reasons dated November 1, 2010.¹

Department Counsel was prepared to proceed on August 31, 2010. The case was assigned to me on September 1, 2010. DOHA issued a notice of hearing on September 20, 2010, scheduling the hearing for October 12, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 7, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through D, which were received without objection, and he testified on his own behalf. The record was closed at the conclusion of the hearing; however, Applicant submitted four separate post-hearing submissions on October 17, 2010, January 25, 2011 April 1, 2011, and May 16, 2011. Department Counsel objected to the first three submissions as being untimely and forwarded the fourth submission without comment. The post-hearing documents were marked AE E through AE Q, and were received over Department Counsel's objection. DOHA received the hearing transcript (Tr.) on October 20, 2010.

Findings of Fact

As noted *supra*, Department Counsel sought clarification of Applicant's SOR Answers before the hearing commenced. Before proceeding on the merits of the case, Department Counsel clarified each of Applicant's SOR Answers with him on the record. Applicant admitted SOR ¶¶ 1d and 1j; and denied the remaining SOR allegations. (Tr. 20-26.) His admissions are incorporated as findings of fact.

Background Information

Applicant is a 52-year-old senior technician, who has been employed by a defense contractor since June 2006. He seeks a security clearance to enhance his position within his company. (GE 1, Tr. 29-32, 41.)

Applicant was born in Guyana and lived there until he immigrated to the United States when he was ten years old.² He graduated from high school in June 1978. He has accumulated 158 college credit hours from two different colleges, but does not have a degree. (GE 1, Tr. 32-34.) Applicant married his wife in September 1989. He has a 28-year-old stepson, a 23-year-old stepdaughter, and two daughters born during his marriage, ages 21 and 18. Applicant's two stepchildren are independent and self-supporting, and his two biological children are in college and dependent upon Applicant and his wife for support. (GE 1, Tr. 34-40.)

¹ All correspondence between Department Counsel and the Applicant, discussed *supra*, is part of the record and is contained in the case file.

² Applicant became a naturalized U.S. citizen in March 1979. (GE 1.)

Financial Considerations

Applicant's SOR alleges 12 debts totalling \$56,724. (Tr. 14.) Summarized, the debts are broken down as follows: (1) state A tax lien filed against Applicant in February 2008 for \$1,256; (2) judgment filed against Applicant in state B for \$10,797; (3) state A judgment filed against Applicant in August 2006 for \$5,005; (4) Internal Revenue Service (IRS) lien filed against Applicant in state C for \$23,630; (5) collection account for medical services for \$1,017; (6) collection account for medical service for \$35; (7) past-due account for medical service for \$15; (8) past-due account owed to utility company in state A for \$1,528; (9) collection account for credit card company for \$11,788; (10) collection account for medical service for \$441; (11) collection account for medical service for \$144; and (12) collection account for medical service for \$1,018.

Applicant attributes his financial difficulties to several factors to include: (1) an unplanned move in 2003 from the East Coast to the West Coast after his oldest stepson was severely injured on the job; (2) problems he encountered in severing his relationship with an East Coast investment property in which he was a part owner; (3) problems he encountered when leaving his East Coast employer when he moved to the West Coast; and (4) uncovered medical bills or medical bills in error for medical treatment he received on the West Coast.

After Applicant was notified that his eldest stepson was injured, he left his East Coast employer, a national company, in November 2003. Applicant claims that around this time his East Coast employer was offering him early retirement. However, his East Coast employer was conducting an internal investigation involving time card irregularities and required Applicant to return to the East Coast to participate in the investigation. Applicant declined to return to the East Coast due to his son's condition and his East Coast employer terminated him. Applicant successfully contested his termination and loss of retirement benefits and was awarded all of his back benefits and severance package. (AE F, AE G, Tr. 45-49.)

After arriving on the West Coast, Applicant was unemployed from November 2003 to January 2004. From January 2004 to October 2005, Applicant worked for his wife's clothing company which sells jeans and urban clothing. From October 2005 to June 2007, Applicant worked as a telecom technician for another company until he started his current job. While working for his wife's company, Applicant had to augment his income from his 401k retirement plan. (GE 1, AE C, Tr. 49-51.) In December 2003, Applicant developed a kidney stone problem and was unable to work full-time until the "summer of 2004." (Tr. 52-53.) Applicant has been employed full-time in the telecom industry since about October 2005. (Tr. 54.)

All of the debts alleged have been established by the Government's evidence. (GE 1-7.) Furthermore, Applicant was interviewed in June 2009 by an Office of Personnel Management (OPM) investigator and was made aware of the Government's concerns regarding his indebtedness. During that interview, he indicated that he "intended" to make an appointment with a credit counselor "to resolve his financial problems and sort things out." He also indicated during that interview that he and his

wife were working to resolve all financial issues as soon as possible. (GE 5.) When Applicant appeared at his hearing, he offered no evidence of having consulted with a credit counselor.

Applicant appeared at his hearing with little or no documentation to substantiate that he had paid, was engaged in a good-faith dispute with his creditors, or was attempting to resolve his debts. His explanations regarding debt status were at times quite lengthy; however, with minor exceptions his case failed due to lack of follow through or lack of documentation. Applicant did provide documentation that he was making \$75 monthly payments to the IRS for his \$23,630 tax lien. See SOR ¶ 1D or Debt 4, *supra* p.3. With regard to this debt, he submitted a record of payments covering two years from July 2008 to July 2008 and from July 2009 to July 2010. Applicant's total documented payments to the IRS for those two years was \$1,245. (GE 5 (63-64), AE D, Tr. 76-80.) Applicant pays this monthly amount to the IRS by check. (Tr. 122-123.)

Applicant acknowledged that he needs to get his debts "taken care of, the judgments in particular." He testified that after he meets all of his monthly expenses, he has a net remainder of "maybe about a hundred, a hundred to 200, somewhere in there." (Tr. 118, 129-130.)

Applicant's numerous post-hearing documents were of little probative value inasmuch as they either did not pertain to SOR debts or they were submitted without an explanation linking them to specific debts. (AE E – Q.)

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Financial Considerations

Under Guideline F, the concern is that an Applicant’s 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. (AG ¶ 18.)

Applicant accumulated 12 debts totaling \$56,724 as alleged in the SOR. Of those debts, he provided documentation that he is in the process of resolving only one debt. That one debt is a \$23,630 IRS tax lien that he had been making \$75 monthly payments for two years. The remaining 11 debts have not been satisfactorily addressed.

Applicant's history of indebtedness is well documented. AG ¶ 19(a): "inability or unwillingness to satisfy debts" and AG ¶ 19(c): "a history of not meeting financial obligations" apply.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

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

(e) 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.

Applicant's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant receives partial credit because of his three-month period of unemployment from November 2003 to January 2004. His stepson was also severely injured in 2003 which prompted him to move from the East Coast to the West Coast to be reunited with his family. He also experienced difficulties in severing his relationship with his East Coast investment property when he moved. These events no doubt impacted his household directly and indirectly. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time. I also note that

Applicant has been employed full-time since October 2005, five years before his hearing.³

AG ¶ 20(c) is not applicable because Applicant did not seek financial counseling. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d).⁴ Despite being employed for the five years preceding his hearing, Applicant offered little or no evidence that he had made or is making a good-faith effort to repay his creditors or otherwise resolve his debts. Applicant receives some credit for attempting to pay down his \$23,630 IRS lien. However, Applicant's overall response to his indebtedness has been disappointing, especially since being put on notice that his financial history was a concern during his June 2009 OPM interview. In short, his actions do not rise to the level of a "good-faith" effort. Applicant's promises to resolve his debts ring hollow in light of his subsequent actions. Although Applicant disputes the validity of many of his debts, his lack of documentation again does not cut in his favor, precluding application of AG ¶ 20(e).

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

³ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

⁴ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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.

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. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial indebtedness is ongoing. His failure to address his debts for the five years preceding his hearing is troubling, especially after his financial history was brought to his attention as early as his June 2009 OPM interview. He did not follow through on his assurances that he was going to make an appointment with a credit counselor and "sort things out." Had he done so, his financial situation may well have improved. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated security concerns pertaining to financial considerations.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

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

| | |
|---------------------------|-------------------|
| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1a – 1c: | Against Applicant |
| Subparagraph 1d: | For Applicant |
| Subparagraphs 1e – 1l: | Against Applicant |

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge