



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 09-08045
)
 Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

December 20, 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 granted.

Statement of the Case

Applicant submitted a security clearance application on August 27, 2009. On June 20, 2011, 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 July 12, 2011; answered it on August 23, 2011; and requested a hearing before an administrative judge. DOHA received the request on August 29, 2011. Department Counsel was ready to proceed on September 13, 2011,

and the case was assigned to me on September 16, 2011. DOHA issued a notice of hearing on September 27, 2011, scheduling it for October 21, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on October 31, 2011.

Findings of Fact

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

Applicant is a 60-year-old systems analyst employed by a defense contractor since October 1999. He served in the U.S. Marine Corps from June 1976 to September 1999, retiring as a master sergeant. He has held a security clearance since the mid-1980s.

Applicant married in September 1976 and divorced in January 1993. He remarried in June 1999. He and his wife separated in January 2009. They have not divorced, but they have no contact. Applicant is not obligated to pay alimony or spousal support. (Tr. 37.)

Before Applicant and his wife separated, he was a "geographical bachelor" for eight years, working away from home and coming home once or twice a week. He relied on his wife to pay their bills, and she assured him that all debt payments were current. Applicant was not involved in detailed household budgeting, but he testified that he made sure that all expenses could be covered by his pay as a contractor employee, with his retired pay being a "luxury." (Tr. 49.)

In the spring of 2008, Applicant came home while his wife was away, opened the mail, and found numerous unpaid bills and collection letters. He contacted his creditors and discovered that they had not been paid for several months. (GX 2 at 3.) He testified that he had signed all their tax returns, and that his wife had mailed the returns but had not included checks for the amounts due. (Tr. 41.) He discovered that his wife was having an affair instead of taking care of the family finances. (GX 3 at 11.)

Because Applicant was unable to resolve the large amount of delinquent debt, he filed a petition for Chapter 13 bankruptcy in May 2008. His payment plan was confirmed in October 2008, and it includes all the creditors alleged in the SOR, except for the creditors alleged in SOR ¶¶ 1.d (home mortgage with loan balance of \$172,000), 1.e (second mortgage on the home), 1.f (telephone bill for \$68), 1.h (cable bill for \$78), and 1.i (cable bill for \$328). (GX 8) The creditors alleged in SOR ¶¶ 1.d, 1.e and 1.f did not file claims with the bankruptcy court. (AX B.) His biweekly \$516 payments to the trustee are automatically deducted from his paycheck. (Tr. 61). As of August 15, 2011, he had paid the bankruptcy trustee a total of \$42,177.58. (AX B at 1.)

Applicant began negotiating a loan modification on his home mortgage (alleged in SOR ¶ 1.d) in late 2008. In April 2010, he was informed by the lender that the modification was approved, but in August 2010 a lender's representative told him that the modification was cancelled because the lender had been unable to contact him after three attempts. (GX 2 at 9-11.) From December 2010 to May 2011, he made four full payments. He testified his loan modification was approved in May 2011, after he gave the lender a copy of the bankruptcy trustee's report of receipts and disbursements. The previous arrearage has been added to the balance due on the mortgage. (Tr. 53-55.) At the hearing, he presented an informational notice from the lender, reflecting a full payment of \$1,430 due during the month after the hearing and a "partial payment balance" of \$1,797. The notice does not reflect a past-due balance. (AX A.)

Applicant testified that he contacted the second mortgage lender alleged in SOR ¶ 1.e about 18 months before the hearing, and he was informed that the debt had been charged off but would be collected if he sold the property. (Tr. 57-58.) His credit report reflects an unpaid balance of about \$45,000 on this mortgage.

The cable service debts alleged in SOR ¶¶ 1.h and 1.i are reported in his October 2010 credit report, and reflected as having become delinquent in August 2009, after Applicant filed his bankruptcy petition. (GX 5 at 1.) Applicant denied these debts, had no explanation for the credit report entries reflecting them, and had not contacted the creditor. (Tr. 60.) The credit report reflecting the cable service debts lists three addresses. The second address is his wife's current residence, where he has never lived, and the third address is his current address. (GX 5 at 1; Tr. 76.) The cable service debts are not reflected on Applicant's most recent credit report. (GX 4.)

Applicant's bankruptcy petition reflects that in May 2008 his net monthly income was \$4,698, his monthly expenses were \$4,479, and his net remainder was \$1,119. His listing of monthly expenses included payments on the first mortgage of \$1,457 and payments on the second mortgage of \$392. (GX 8 at 31-32.) His income and expenses had not significantly changed at the time of the hearing, except for the biweekly payment of \$516 to the bankruptcy trustee. (Tr. 61-63.)¹

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.

¹ Applicant submitted a personal financial statement in November 2010, but it contains mathematical errors, and he was unable to explain several of the calculations. Thus, I have given it little weight. (GX 2 at 8; Tr. 64-65.)

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 that Applicant filed a Chapter 13 bankruptcy petition in May 2008 (SOR ¶ 1.a). It also alleges an unsatisfied judgment for \$8,972 (SOR ¶ 1.b), an unsatisfied federal tax lien for about \$15,452 (SOR ¶ 1.c), a mortgage account that is past due for about \$20,000 (SOR ¶ 1.d), a delinquent second mortgage that is past due for about \$2,000 (SOR ¶ 1.e), an unpaid telephone bill for \$68 (SOR ¶ 1.f), a time-share account that is past due for about \$1,000 (SOR ¶ 1.g), two delinquent cable service accounts for \$78 and \$328 (SOR ¶¶ 1.h and 1.i), and a delinquent medical bill for \$125 (SOR ¶ 1.j.)

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, established by his admissions, credit reports, and bankruptcy petition, establish 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 him to refute, explain, extenuate, or mitigate the facts.

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 and numerous, but they occurred under circumstances making them unlikely to recur. The circumstances under which his financial problems arose and Applicant's responsible behavior after discovering the depth of his financial problems leave no doubt about his current reliability, trustworthiness, or good judgment. I conclude that 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. While Applicant should have been more proactive in managing his finances, his wife's betrayal of his trust in her was

a condition beyond his control. He has acted responsibly to restore his financial stability. I conclude that 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 presented no evidence that he has sought or received financial counseling, except for the legal advice in connection with his bankruptcy. However, he receives some credit under this mitigating condition, 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 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). Applicant chose to pay his debts under Chapter 13, rather than seek to have them discharged under Chapter 7. Applicant’s Chapter 13 bankruptcy, his adherence to the payment schedule, his proactive efforts to modify his home mortgage, and his recent mortgage payments all demonstrate a good-faith effort to resolve his debts. I conclude that AG ¶ 20(d) is established.

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). Applicant denied the two cable bills alleged in SOR ¶¶ 1.h and 1.i, but this mitigating condition is not established because but he did not dispute them with the creditor or the credit reporting agencies. However, the information on his credit reports suggests that the debts may have been incurred by his wife without his knowledge. The absence of those debts on his most recent credit report, long before the Fair Credit Reporting Act requires their deletion,² strongly suggests that they have been resolved.

Whole-Person Concept

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. In applying 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

² The Fair Credit Reporting Act, § 605 (15 U.S.C. §1681c), requires deletion of most delinquent debts after seven years.

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.

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.

A security clearance adjudication is aimed at evaluating an applicant’s judgment, reliability, and trustworthiness, not a debt collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant is a mature adult with a long record of service as a U.S. Marine and as a contractor employee. He has held a security clearance for most of his adult life. He was resentful, embarrassed, and occasionally indignant at the hearing, but he was also candid and sincere. He was remorseful about his failure to monitor his finances more carefully, and he has aggressively acted to restore his financial stability. His response to his wife’s misconduct and neglect has demonstrated his current reliability, trustworthiness, and good judgment.

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.j: 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