

DEPARTMENT OF DEFENSE DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	ISCR Case No. 09-08105
SSN:)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel For Applicant: *Pro se*

October 20, 2010

Decision

LAZZARO, Henry, Administrative Judge

Applicant has a history of accumulating excessive debt. He filed for Chapter 13 bankruptcy protection in 1992, and his house was foreclosed on in 2008. Applicant failed to mitigate the financial considerations security concerns alleged in this case. Clearance is denied.

On April 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR alleges a security concern under Guideline F (financial considerations). Applicant submitted a response to the SOR that was dated May 7, 2010, but notarized on May 10, 2010. He admitted the allegations alleged in subparagraphs 1.a and 1.c, denied the allegation alleged in subparagraph 1.b, and requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on July 13, 2010. A notice of hearing was issued on July 27, 2010, scheduling the hearing for August 18, 2010. The hearing was conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6. GE 1-5 were admitted into the record without objection. Applicant's objection to GE 6 was overruled and it was admitted into the record. Applicant testified and submitted one documentary exhibit that was marked as Applicant's Exhibit (AE) 1. Department Counsel's objection to AE 1 was overruled and it was admitted into the record. The transcript was received on August 27, 2010.

Findings of Fact

Applicant's admissions to SOR allegations 1.a and 1.c are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 62-year-old man who has been employed as a customer service engineer by a defense contractor since 1974. Applicant graduated from high school in 1969. He served on active duty in the U. S. Army from February 1969 until January 1971. He has held a security clearance since 1978 and no adverse action was ever taken to revoke or downgrade that clearance.

Applicant has been married since March 1978. He has one adult child and two adult step-children from this marriage. He was previously married from 1969 until that marriage ended in divorce in 1974. He has one adult child from that marriage.

Applicant filed for Chapter 13 bankruptcy protection in April 1992. The bankruptcy petition lists 13 credit card debts totaling \$37,015.27, and two other unsecured debts totaling \$5,926.16. In addition to a \$115,000 home mortgage debt, the bankruptcy petition lists three secured vehicle debts totaling \$29,562.97. Applicant testified that two of the vehicle debts were not actually included in the bankruptcy, but he did not submit any documentation in support of that testimony. Applicant obtained a discharge in the bankruptcy in December 1997. Applicant wrote in his answer to the SOR that he had to seek bankruptcy protection because he overused credit cards to resolve unexpected debt and because of expenses he incurred in connection with an adoption.

Applicant purchased a home in October 1998, and he obtained a mortgage on that property originally owing in the amount of \$150,400. He testified the purchase price for the home was \$188,500, and the down payment came from the approximate \$70,000 proceeds he had received from the sale of another residence. His monthly mortgage payment was approximately \$1,300.

Applicant refinanced his home in December 2001, and he thereby increased his mortgage debt to \$168,250. He refinanced the home again in October 2002, and he thereby increased his mortgage debt to \$175,000. He refinanced the home again in July 2003, and he thereby increased his mortgage debt to \$189,000. He refinanced the home again in June 2004, and he thereby increased his mortgage debt to \$247,750. Finally, he refinanced the home again in March 2006, and increased his primary mortgage debt to

\$301,600, while also taking out a second mortgage in the amount of \$75,400. The combined monthly mortgage payment on these final two loans was \$2,817.

Applicant testified that he was using the funds he was receiving from the various refinances to either make improvements on the home or repay his 401k account for funds he had withdrawn to make improvements on the home. The mortgage company provided Applicant a 1099-A for tax year 2008 that listed the fair market value of the residence as \$217,500.

Applicant testified he decided to offer his house for sale in December 2007, in anticipation of having a reduced income in a few years when he planned on retiring due to poor health. He purchased a second residence in April 2008 for \$175,000 without the first house having been sold. He reduced the asking price on the first house several times, but it still failed to sell. He stopped making payments on the first house in July 2008, and the mortgage company foreclosed on the residence in September 2008.

Applicant testified that the first and second mortgages on the foreclosed home were initially held by the same company, but were subsequently sold to separate companies. The primary mortgage holder has now sold the home and is not seeking any further payment from Applicant. However, the second mortgage holder has not forgiven the debt and Applicant has had discussions with the company in an effort to resolve the reported delinquent account. He submitted an unsigned concurrent funding agreement pertaining to the two mortgage loans that deals with concurrent closing, cancellation, and/or rescission of the loans. Applicant testified that under state law that debt is uncollectible.

Applicant purchased a new Nissan Xterra in July 2007 for \$9,861 with a monthly payment of \$189. He purchased a new GMC Envoy in September 2008 for \$39,000 with a monthly payment of \$739. He purchased a yard tractor in April 2007 for \$16,567 with a monthly payment of \$230. He also testified he purchased a Chevrolet Avalanche in 2008 by trading in two other vehicles and taking money from his 401K account.

Applicant prepared a personal financial statement in March 2010. He listed at least eight credit card debts totaling approximately \$30,000, and two credit union debts totaling \$18,800. He has also cosigned on student loans for his daughter owing in the amount of \$31,340. He listed a net monthly remainder of \$1,054, although he could not explain where that money is spent other than to assert that he actually pays more on his debts than he listed in the financial statement. He testified that, as of the date of the hearing, he had about \$2,500 in his 401K account and less than \$100 in his checking account.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon relevant and material facts and circumstances, the whole-person concept, and the factors listed in \P 6.3.1 through \P 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be

followed whenever a case can be measured against this policy guidance. Guideline F (financial considerations) with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The Government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the Government is required to present substantial evidence to meet its burden of proof.⁵ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁶ Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline F, Financial Considerations

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. . . . (Adjudicative Guideline [AG] 18)

² ISCR Case No. 96-0277 (July 11, 1997) at 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁴ Department of the Navy v. Egan 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ Egan, 484 U.S. at 528, 531.

¹⁰ Id. at 531.

¹¹ Egan, Executive Order 10865, and the Directive.

Applicant sought Chapter 13 bankruptcy protection in 1992, in part, due to his reliance on credit cards to satisfy unexpected expenses. Thirteen credit card debts totaling, \$37,015.27, and two other unsecured debts, totaling \$5,926.16, were listed in his bankruptcy petition. His residence was foreclosed on in 2008 after he had refinanced it several times, thereby more than doubling his mortgage debt and his monthly payments. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and 19(c): a history of not meeting financial obligations apply.

Applicant's bankruptcy pleadings establish he accumulated excessive credit card debt that he could not service. The multiple refinances of his home by which he drew out over \$200,000 in equity that was acquired simply by a supposed increase in market value was of his own making. He effectively built himself the proverbial house of cards which cannot be said to have been beyond his control. His actions in purchasing a second home before the first one sold and purchasing multiple vehicles while burdened with large mortgage payments are not responsible actions.

Applicant's personal financial statement discloses he has once again accumulated substantial credit card debt. He claims to have over \$1,000 in disposable income each month that he cannot account for other than to assert it is being applied to debts contrary to what he listed in the financial statement. He claims to have applied some of the money he acquired from the home refinances to repay his 401K account, but he testified he only had about \$2,500 in that account as of the date of the hearing. The only other funds he had available to him as of the date of the hearing was less than \$100 in his checking account.

I have considered the following Mitigating Conditions and conclude they do not apply: (MC) 20(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; MC 20(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; MC 20(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: and MC 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant claims the debt owing on the second mortgage has been negated by operation of state law. He submitted a document that he believes supports his claim that the second loan became uncollectible when the first mortgage holder foreclosed on his home. Accepting his assertion that the second mortgage is uncollectible by operation of state law as true, he is entitled to some consideration on that debt under MC 20(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. However, application of that mitigating condition does nothing to mitigate his conduct in obtaining loans secured by mortgages that he was unable to service when coupled with his purchase of a second home and multiple vehicles.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant failed to mitigate the financial considerations security concern. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline F is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegation 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

Subparagraph 1.a-c: Against Applicant

Conclusion

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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro Administrative Judge