



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 10-00557
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

June 15, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines F (financial considerations) and E (personal conduct). Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on November 12, 2008. On August 2, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in an undated response, which DOHA received on September 7, 2010. Department Counsel was prepared to proceed on January 13,

2011. The case was assigned to me on February 1, 2011. DOHA issued a notice of hearing on February 16, 2011, scheduling the hearing for March 3, 2011. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through G, which were received without objection, and testified on his own behalf.

I held the record open until March 17, 2011, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE H through J, which were received without objection. DOHA received the hearing transcript (Tr.) on March 14, 2011.

Findings of Fact

Applicant admitted SOR ¶¶ 1a and 1g, and denied the remaining allegations under ¶ 1. He did not provide written answers to allegations under ¶ 2, which dealt with falsifying his e-QIP. During the hearing, Applicant augmented his SOR Answer by orally denying SOR ¶¶ 2a and 2b. His answers are incorporated herein as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact. (SOR Answer, Tr. 11-12, 14-16.)

Background Information

Applicant is a 52-year-old operations analyst, who has worked for a defense contractor since November 2008. He seeks to retain his top secret security clearance, which is a requirement of his continued employment. Applicant has continuously and successfully held a security clearance since he enlisted in the U.S. Army in September 1979, discussed *infra*. (GE 1, Tr. 33-34, 37-38.)

Applicant graduated from high school in May 1977. Since graduating from high school, Applicant has earned an associate's degree in business administration and has completed approximately 90 hours of online college credits towards a bachelor of arts degree. (GE 1, Tr. 34-37.) Applicant served in the U.S. Army from September 1977 to August 2005, having served 25 years, 8 months of active duty. He retired as a master sergeant (pay grade E-8). He served the majority of his Army career with Special Forces and Special Operations forward deployed. (AE G, Tr. 18-19, 34, 38-39.)

Applicant married his first wife in November 1981, separated from her in approximately 2000, and divorced her in April 2005. He has two adult daughters from his first marriage, who are independent. Applicant remarried in May 2007, and has three minor stepchildren with his second wife. (Tr. 20, 37.)

Financial Considerations

The SOR alleges eight separate debts totalling \$96,567. These debts are a combination of credit card debt, a cell phone bill, a student loan, and a mortgage deficiency. (SOR ¶¶ 1a – 1h., Tr. 17.)

Applicant had paid, made payment arrangements, or successfully disputed all debts alleged. A summary of their disposition follows: (1) charged-off cell phone bill for \$445 – paid in full (SOR ¶ 1a) (AE I, Tr. 49, 62); (2) charged-off credit card for \$32,713 – disputed because he did not apply for account, disposition pending (SOR ¶ 1b) (GE 3, Tr. 50, 64-65); (3) three charged-off credit card accounts to same creditor in the amounts of \$1,568, \$8,794, and \$2,747 – set up payment plan with creditor making \$900 monthly payments (SOR ¶¶ 1c, 1d, and 1f) (AE C - AE E, Tr. 51, 66); (4) charged-off mortgage payment for \$23,030 – home awarded to former wife in divorce decree, former wife was to assume possession and payments (SOR ¶ 1e) (GE 4, Tr. 51-52, 60-68); (5) collection account for education loan for \$2,598 – settled and paid in full (SOR ¶ 1g) (AE B, AE H, Tr. 52, 54, 68-69) and (6) charged-off credit card for \$24,672 – successfully disputed because he did not apply for account, creditor removed from credit report (SOR ¶ 1h) (GE 3, AE G, Tr. 55, 69-70).

Applicant's financial problems stem primarily from a failed marriage, separation, and divorce. He was forward deployed and away from his family the majority of his Army career. During Applicant's deployments and separations, he relied on his former wife to manage the family finances. Applicant had provided his wife with an allotment for family support and to cover household expenses. That arrangement failed and led to his current difficulties. (Tr. 32-33.)

Applicant has paid, settled, or successfully disputed overdue creditors or resolved all debts alleged. Applicant submitted a budget post-hearing that reflects a net monthly remainder of \$3,076. This budget demonstrates that Applicant is living within his means and takes into account the salary of his second wife. (AE J.)

Personal Conduct

The SOR alleges that Applicant failed to disclose debts over 180 days old in the seven years preceding the completion of his November 2008 e-QIP and debts currently over 90 days delinquent. (SOR ¶¶ 2a – 2b.) During the time Applicant was married to his first wife, they had joint credit card accounts; however, he did not use them. At the time Applicant completed his e-QIP, he and his former wife were living in separate states and not communicating. With the exception of the cell phone bill for \$445 alleged in SOR ¶ 1a, all of the statements were going to his former wife's home. Applicant acquired the cell phone in his name during a nine-month temporary assignment. He had family in the area and when he finished his assignment, he gave his cell phone to a family member to close out. Applicant was current on his cell phone bill the entire time he had possession of the phone. Unfortunately, his family member did not close out the cell phone and used the phone running up charges. Applicant

was not aware that his cell phone had not been returned to the cell phone company or that the family member had run up charges when he completed his November 2008 e-QIP. (Tr. 40-46.)

Applicant had never looked at his credit report until he went to buy a car in 2010 and the salesman informed him, “your credit’s so bad.” (Tr. 46-48.) He testified that he had been through the security clearance application process several times during his Army career. He credibly testified that he had no intention to deliberately provide false information with the intent to deceive and that his failure to accurately respond to questions regarding his financial situation was caused by oversight or lack of situational awareness.

Character Evidence

Applicant submitted documentation of numerous awards and decorations that he received during an extraordinary 25-plus year active duty Army career. Those awards and decorations include the Legion of Merit, Bronze Star, Meritorious Service Medal with Two Oak Leaf Clusters, Joint Commendation Medal, Army Commendation Medal with Two Oak Leaf Clusters, Army Achievement Medal with Four Oak Leaf Clusters, Good Conduct Medal with Eight Oak Leaf Clusters, NATO Medal, Two Combat Infantry Badges, and various campaign and service awards. (AE G.)

Applicant also submitted nine reference letters from senior officers, senior non-commissioned officers, and civilians who commented on his active duty years as well as his current duties as a defense contractor. All of these individuals know Applicant well and have observed him primarily in a professional capacity; however, several individuals know him in a personal capacity. The overwhelming sense of these reference letters is that Applicant is loyal, honest, hard working, and trustworthy. All of these individuals strongly recommend Applicant for a security clearance. Applicant’s current civilian performance evaluation as well as his NCO Evaluation Reports document sustained superior performance and extraordinary potential for future service. (AE G.)

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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines F (financial considerations) and E (personal conduct).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems, “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 ¶ 19 provides two conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts”; and “(c) a history of not meeting financial obligations.” ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, “Applicant’s credit report was sufficient to establish the Government’s prima facie case that Applicant had . . . delinquent [SOR] debts that are of security concern.” Applicant’s history of delinquent debt is also documented in his Responses to DOHA interrogatories, his SOR response, and his oral statement at his hearing. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c). Further inquiry about the applicability of mitigating conditions is required.

Five 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)).

Applicant receives credit under AG ¶ 20(b) because his financial problems resulted when his former wife diverted household income from its intended purpose. Applicant divorced his former wife in April 2005; however, the financial fallout from this experience lingers.¹ He established that he acted with sufficient initiative and resolve to address his delinquent debts. Applicant provided documentation about his income and expenditures to receive full credit under AG ¶ 20(b).

AG ¶ 20(c) partially applies. Although Applicant did not seek financial counseling, he has submitted evidence that there are clear indications that the problem is being resolved and is under control. Moreover, he demonstrated a firm grasp of budgeting, payment plans, and expense reduction. He leads a lifestyle consistent with his income level and within his means, and manages to remain current on his present obligations yet still manages to make payments to former creditors. He has the self-discipline necessary to reduce and resolve his debts. There are "clear indications that the problem is being resolved or is under control." He has also established full mitigation under AG ¶ 20(d) because he showed good faith² in the resolution of his SOR debts.

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] 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 the Applicant maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

²The 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 (such as bankruptcy [or statute of limitations]) 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)).

Applicant contested the validity of two SOR debts. He submitted documentation supporting the basis of his disputes with creditors. One of the creditors has removed the debt from Applicant's credit report and the results of the second disputed account are still pending. He receives full credit under AG ¶20(e) in regard to SOR ¶¶ 1b and 1h. I am further convinced if the second creditor establishes that the debt is valid, Applicant will repay them. In sum, Applicant has acted responsibly under the circumstances.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating, "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false security clearance application:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

A false statement raises a concern when it is made knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or honestly thought the information did not need to be reported.

The issue here is Applicant's truthfulness when answering two e-QIP questions regarding past and present delinquent accounts. Applicant was not aware his debts were delinquent. Having had the opportunity to listen to his testimony and observe his demeanor, his explanations as noted in the findings of fact are accepted as credible. The evidence is not sufficient to show that he made deliberately false statements when he answered these two questions.

AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f) fully applies to SOR ¶¶ 2a – 2b. Although Applicant acknowledged his answers regarding his financial situation were incorrect, he honestly and reasonably believed that the information he provided was correct at the time.³ To

³The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

conclude, Appellant presented evidence to explain, extenuate, or mitigate this security concern.

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 the 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 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). I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is evidence against mitigating Applicant's conduct. His debts have been ongoing for a number of years. His efforts to resolve his delinquent debt raise security concerns. Applicant's record of good employment weighs in his favor. There is no evidence of any security violation. Aside from the delinquent debt (which is a civil, non-criminal issue), he is a law-abiding citizen. The Appeal Board has addressed a key element in the whole person analysis in financial cases stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has ‘ . . . established a plan to resolve his financial problems and taken significant actions to implement that plan.’ The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (‘Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.’) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Once Applicant became aware of the extent of his adverse credit, he took prompt and appropriate corrective action. As in the case of many deploying service personnel, the spouse who remains behind typically manages the family budget. Applicant was providing his former wife with the funds to pay the bills; however, as their marriage deteriorated, so did their financial situation. Unfortunately for Applicant, he did not realize his financial situation had deteriorated until his credit was significantly damaged. The record supports the fact that Applicant has paid numerous debts over the years. He has established a “meaningful track record” of debt payment sufficient to trust his promise to pay or otherwise resolve his remaining debts. These factors show responsibility, rehabilitation, and mitigation.

Applicant has demonstrated his loyalty, patriotism, and trustworthiness through his 25 years of distinguished military service and more recently as a defense contractor employee. Noteworthy is the fact that he has successfully held a security clearance for 32 years.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole-person, I conclude Applicant has mitigated financial considerations and personal conduct security concerns.

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 Guidelines. Applicant has fully mitigated or overcome the Government’s case. For the reasons stated, I conclude he is 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:	FOR APPLICANT
Subparagraphs 1a – 1h:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2a – 2b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is granted.

ROBERT J. TUIDER
Administrative Judge