



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 10-01996
)
Applicant for Security Clearance)

Appearances

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

February 8, 2011

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 13, 2009. On August 2, 1010, the Defense Office of Hearings and Appeals (DOHA) issued 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*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated 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.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on August 25, 2010, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated September 30, 2010, was provided to him by cover letter dated October 1, 2010. Applicant received his copy of the FORM on October 11, 2010. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. He did submit additional information within the 30-day period. The case was assigned to me on December 15, 2010.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1a to 1d and 1g. He denied the remaining allegations. He explained in his response to SOR that the debt in SOR ¶ 1e was a duplicate of the debt in 1g and the debt in SOR ¶ 1a was also a duplicate of the debt in 1f. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 33-year-old senior systems field engineer, who has been employed by a defense contractor since October 2009.¹ He graduated from high school in June 1995. His e-QIP does not reflect military service or that he pursued higher education. Applicant has never married and has no dependents.

Applicant's SOR lists eight debts, totalling approximately \$139,947. (Items 5 – 8.) Applicant indicated in his SOR answer that debts in SOR ¶¶ 1a and 1h, as well as 1e and 1g, respectively, are duplicates. He corroborated this assertion with documentation attached to his SOR answer. If the two duplicate debts are excluded, that still leaves Applicant owing six debts totalling approximately \$128,096. Applicant denied one other debt, the foreclosure deficiency balance for his mortgage of \$92,500. (SOR ¶ 1f.) Applicant claims that he does not owe this debt because he, "never received a letter or anything referring to me owing anything for this property, as I'm sure it was sold for a profit." He further states that his original loan was for \$92,500 and that he had paid that amount down to \$70,000 at the time of his foreclosure in 2006. (Item 4.) Applicant submitted an August 2010 credit report indicating that, "Credit Grantor reclaimed collateral to settle defaulted mortgage." His credit report reflects this account is closed and does not reflect any amount past due. (Item 4, p. 16.) The remaining debts are established through Applicant's admissions and evidence presented. (Items 4 – 8.)

¹ Background information is derived from Applicant's e-QIP unless otherwise stated.

Applicant worked in the automobile industry and was “doing great” until 2006. He was a home owner at age 20, had a new automobile and a new motorcycle, and was current on his bills. In mid-2005, his hours and corresponding income were reduced significantly and, after six months of less income, he began augmenting his income with credit cards. (Item 4.)

Recognizing the automobile industry was declining, he relocated to another part of the country in mid-2006 where he held a series of jobs until he secured his present position. (Item 4.) He claims that he has about \$10,000 saved to pay his debts once his current job is “permanent.” (Items 6, 7.) His monthly budget submitted in March 2010 reflects a net remainder of \$2,267.88. (Item 7.) He stated most recently in his March 2010 response to interrogatories that he is not paying his creditors because he does not have a secure job. He explained:

Nothing has been secure and with that I have not begun to negotiate with my creditors. The reason being I have done my research and once I agree to a payment plan with a creditor and I happen to fail on following through with the agreement then the statute of limitations can begin from the date of the new agreement. If I didn't get this job I would not be able to follow through with that agreement and it would then allow the creditor keep it on my credit report for another 7 years. (Item 7.)

Applicant has the ability and means to pay his creditors, in whole or in part, but has taken the position that he will not do so until he has a “secure” job. His ability to obtain a “secure” job appears to be contingent on whether he is granted a security clearance.

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).

Conclusions

Under Guideline F, the Government’s 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.

Since 2006, Applicant accumulated eight debts totaling \$139,947, which were alleged in the SOR. Upon further review and based on evidence submitted by the Applicant, two of those debts appear to be duplicates and his foreclosure deficiency appears to be resolved. The remaining debts remain delinquent. His 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(a) through (e) 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 the underemployment that he experienced following the downturn of the automobile industry was largely beyond his control. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the

circumstances. There is no evidence in the record that Applicant remained in contact with his creditors or tried to make minimum payments during this time.²

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).³ Despite having \$10,000 set aside and a net monthly surplus of \$2,267, Applicant has opted not to pay or attempt to pay his remaining valid debts because he is waiting to see if his job is secure. AG ¶ 20(e) is applicable to two of his debts because Applicant has established that they are duplicates. Additionally, the arrearage amount owed on the foreclosure of his mortgage appears to have been resolved in the foreclosure process.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I applied the whole-person concept. I specifically considered Applicant's age, education, his valued service as a defense contractor employee, and other limited evidence contained in the record. Unfortunately, Applicant has the "horse before the cart" in his approach to obtaining a security clearance. As indicated, he must demonstrate financial responsibility before being granted a clearance. I believe he is capable of reaching his goal, however, as things stand now, I am unable to grant him a security clearance.

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.

² "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 he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

³ 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)).

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 - 1d:	Against Applicant
Subparagraphs 1e. - 1f:	For Applicant
Subparagraph 1g:	Against Applicant
Subparagraph 1h:	For 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