



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 10-06392
)
Applicant for Security Clearance)

Appearances

For Government: William O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

January 27, 2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On April 20, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On December 6, 2010, 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* (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 issued after September 1, 2006.

Applicant answered the SOR by two separate responses, the first on May 17, 2011, received by DOHA on May 19, 2011, and the second on June 15, 2011, received by DOHA on June 17, 2011. Department Counsel was prepared to proceed

on August 10, 2011. The case was assigned to me on August 23, 2011. DOHA issued a notice of hearing on August 23, 2011, scheduling the hearing for September 14, 2011. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, and offered Applicant Exhibits (AE) A through E, which were received into evidence without objection.

I held the record open until September 30, 2011, to afford the Applicant the opportunity to submit additional documents. Applicant requested an extension and for good cause shown, I granted Applicant an extension until October 11, 2011 to submit additional documents. Applicant timely submitted AE F through P, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on September 20, 2011. The record closed on October 11, 2011.

Findings of Fact

Applicant admitted the debt alleged in SOR ¶ 1a, and denied the remaining allegations, with explanations. His answers and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 47-year-old engineer, who has worked for a defense contractor since September 2005. He seeks to reinstate his secret security clearance, which is a requirement of his continued employment. He was initially granted a security clearance in 1982 when he enlisted in the U.S. Army, discussed below, and has successfully held a security clearance at various levels for the past 29 years. (Tr. 13-16, GE 1.)

Applicant graduated from high school in May 1982. He was awarded a Bachelor of Science Degree in electronics engineering and communications in May 2003, and was awarded a Master of Science Degree in computer information technology in December 2005. Applicant served on active duty in the Army from July 1982 until February 1987, and was honorably discharged as a specialist 4 (pay grade E-4). He then served in the Puerto Rico Air National Guard (ANG) from March 1989 until April 2006, and was honorably discharged as a master sergeant (pay grade E-7). He was placed in a retired reserve status after 22 years of service. Applicant attended numerous service schools while in the Army and ANG. (Tr. 16-27, GE 1, AE I - M.)

Applicant married in October 1984. He described his marriage as “we look like honeymooners.” They have four children -- 23-year-old twin sons, a 16-year-old son, and a 14-year-old daughter. Applicant’s two oldest sons are married and one of his sons has two children making Applicant and his wife grandparents. His two youngest

children live at home. Applicant's wife is an independent contractor and works full-time as a caretaker for handicapped children earning approximately \$900 per month. (Tr. 27-31, GE 1.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his April 2010 e-QIP, two sets of October 2010 DOHA Interrogatories, as well as his May 2010 and November 2010 credit reports. (GE 1 – 5.) Applicant's SOR alleges four separate debts consisting of a mortgage foreclosure with a balance of \$246,000, and three small consumer debts in the amounts of \$207, \$207, and \$50. (SOR ¶¶ 1a – 1d.)

Applicant purchased his home in January 2006 for \$246,000, financing the entire amount with Bank A using his VA loan. After he made ten payments, he was approached by a representative of Bank A offering to refinance his home at the current market value of \$140,000 under a federal program and thereby reduce his monthly payments. However, in order to qualify for the program Applicant had to miss three payments. Applicant following the advice of the Bank A representative stopped making his house payments. While he was in a non-payment status, Bank A was purchased by Bank B. Not surprisingly, the representative from Bank A was no longer available and Bank B did not "honor" what Bank A's representative counseled Applicant to do. Bank B immediately began foreclosure proceedings and turned the matter over to a law firm. Applicant attempted to negotiate with the law firm representing Bank B, however, Applicant was unable to reach a settlement with that law firm. In September 2008, Applicant wrote a letter to the law firm summarizing what had occurred and requested that they delay foreclosure proceedings to allow him time to sell his home. The law firm did not respond to him. (Tr. 36- 41, 50-59, SOR answer, GE 3, AE A.)

Applicant continued his attempts to negotiate with Bank B, to include, sending them house payments and was notified by Bank B to stop making payments because his home was in foreclosure. For a short time, he attempted to sell his home. In August 2011, a VA representative contacted Applicant offering him assistance in resolving his dispute with Bank B. The VA representative advised Applicant to seek mediation. Applicant desires to stay in his home and settle with Bank B; however, he is not willing to accept their latest offer that requires him to come up with approximately \$40,000 "on the spot." His monthly house payments are \$1,806. (Tr. 41-48, SOR Answer, AE B.) Unable to reach an acceptable agreement with Bank B, Applicant retained an attorney to represent him in October 2011. Applicant remains willing and able to resolve his differences with Bank B, but on terms that he considers fair and reasonable. Results are pending. (Tr. 48, AE F.)

Applicant paid the other three small debts alleged in the SOR and provided proof of payment. (AE G – H, AE P.) He remains current on all of his other debts and

monthly expenses. (Tr. 48-49, 59-60, SOR Answer.) Applicant's budget reflects that he lives a modest lifestyle within his financial means. (GE 2.)

In short, apart from his dispute with Bank B regarding his delinquent mortgage, Applicant is "debt free." Applicant sought counsel from a VA representative and is following the advice his attorney as he navigates his ongoing dispute with Bank B. He has not participated in formal financial counseling, but participated in financial planning training online. (Tr. 35-36.)

Character Evidence

Applicant submitted a copy of a letter from his company president promoting him to manager of network operations, with an annual salary of \$77,000, effective August 22, 2011. The president noted in his appointment letter, "[w]e are very confident that you will meet the new responsibilities which accompany the position with the same level of enthusiasm and diligence you have exhibited since you came to work with [defense contractor]." (AE E.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The

applicant has the ultimate burden of persuasion in seeking to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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 financial considerations disqualifying 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.” Applicant’s history of delinquent debt is established by his admissions and the evidence presented. His debts were in various states of delinquency for several years. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

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. 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)). Nevertheless, he receives partial credit under AG ¶ 20(a) because the debt occurred under circumstances that are unlikely to recur and it does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant receives partial credit under AG ¶ 20(b) because the direct and indirect impact of the declining housing market contributed, in part, to Applicant's current difficulties with Bank B. Applicant has remained in contact with Bank B throughout this process; however, his attempts to resolve the matter on his own have been unsuccessful requiring him to retain counsel.¹

AG ¶ 20(c) is partially applicable. Even though Applicant did not seek formal financial counseling, he is living within his means and demonstrated financial responsibility. There are clear indications that his financial problems are being resolved. Furthermore, there is sufficient information to establish partial if not full mitigation under AG ¶ 20(d).² Applicant has paid his three small SOR debts and is

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

²The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

attempting in good-faith to resolve his differences with Bank B. Given his financial situation, Applicant has done all that can reasonably be expected of him to resolve his debt. AG ¶ 20(e) is applicable. Applicant receives credit under this mitigating condition because he has a reasonable basis to dispute his remaining debt to Bank B. He has hired an attorney to resolve his differences with Bank B.

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). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's military service record, his service as a defense contractor, and his successfully holding a security clearance for 29 years, weigh heavily in his favor. He is a law-abiding citizen and a productive member of society. He is current on his day-to-day expenses, lives within his means, and his SOR debts have been or are being

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) 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)).

addressed in a meaningful and responsible manner. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

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) (internal citations omitted).

Applicant paid three of the four alleged SOR debts. He is attempting to resolve the last debt with the help of his attorney. He is doing all that he can do within his financial means to resolve this debt. Applicant remains willing to comply with whatever terms his attorney negotiates on his behalf. His company fully supports him and recommends him for a security clearance. Due to circumstances partially beyond his control, discussed above, he accrued a debt with Bank B. Despite Applicant’s recent financial setback, it is clear from his actions that he is on the road to a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant’s military service and work for a defense contractor, his 29 years of successfully holding a security clearance, his years of financial responsibility before falling into debt, his plan for financial recovery, the substantial steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, the mature and responsible manner in which he dealt with adversity, his employer’s confidence in him, his stable family life, and his testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the financial considerations 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 adjudicative 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 to 1d: For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge