



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 10-09069
)
Applicant for Security Clearance)

Appearances

For Government: William O’Neil, Esq., Department Counsel
For Applicant: Stephen E. Spira, Esq., and Jack B. Spira, Esq.

January 26, 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 November 3, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On April 22, 2011, 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 after September 1, 2006.

Applicant answered the SOR on May 27, 2011, and DOHA received his answer on June 6, 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 12, 2011. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 6, which were received into evidence without objection. Applicant offered Applicant Exhibits (AE) A through T, which were received into evidence without objection, and he testified on his own behalf.

I held the record open until September 30, 2011, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE U through Y, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on September 20, 2011. The record closed on September 30, 2011.

Findings of Fact

Applicant admitted all of the SOR 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. I found Applicant's testimony to be credible.

Background Information

Applicant is a 52-year-old engineer, who has worked for a defense contractor since February 1997. He seeks to retain his top secret security clearance, which is a requirement of his continued employment. He was initially granted a security clearance in 1979 as a Department of the Navy civilian employee, and has successfully held a security clearance at various levels for the past 32 years. (Tr. 18-20, 25, 29-30, GE 1.)

Applicant was awarded a Bachelor of Science degree in engineering with a specialty in aircraft engineering in May 1982. He was later awarded a Master's Degree in engineering in August 1991. He married in August 1987, separated in December 2008, and divorced in March 2010. Applicant and his former wife, age 49, have one child, an 18-year-old daughter. Applicant's former wife lives in a Midwestern state with their daughter (State A) and he lives in a Southern state (State B). (Tr. 20-22, 43, 62-64, 85-86, GE 1, AE Q - R.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his November 2009 e-QIP, one set of February 2011 DOHA Interrogatories; as well as his November 2009, September 2010, October 2010, and July 2011 credit reports. (GE 1 – 6.) Applicant's SOR alleges three separate debts consisting of a mortgage foreclosure with a balance of \$296,002, a home equity line of

credit with a balance of \$175,000, and a homeowner's association fee of \$872. (SOR ¶¶ 1a – 1c.)

Applicant's financial problems stem from a variety of factors to include a 1989 automobile accident that left his wife disabled, a health-related move from State B to State A to accommodate his wife, his unemployment following that move, his attempting to maintain the costs of two households in States A and B, a separation and divorce, uncovered hurricane damage to his home in State B, and a dramatic decline in the value of his home in State B when he tried to sell his house following his move from State B to State A. All of these factors played a role in Applicant's financial problems; however, the decline in the value of his home in State B and his inability to sell it while separated and going through a divorce were perhaps the most significant factors. (Tr. 30-44, 86-87.)

Two years after Applicant married, his wife was involved in a severe automobile accident in 1989. At the time of the accident, she was a college graduate and a dental office manager. Before college, she was a figure skater. She has been disabled since her 1989 accident. During an August 2009 medical evaluation, she was diagnosed with severe bilateral patellofemoral syndrome, moderately severe fibromyalgia, moderately severe chronic daily headaches, and adjustment disorders with mostly depressive features. She is severely limited with regard to her physical activities and it is "very unlikely she would be able to work in any productive capacity, part time or full time." (AE P.) This accident and diagnosis is pertinent in that it significantly impacted Applicant's marriage, choices they made, and the collateral financial fallout.

As noted, Applicant moved his family from State B to State A as an accommodation to his wife where they rented a home. That move occurred in November/December 2007. Applicant attempted to sell his house in State B before moving to State A. In October 2007, his house in State B was appraised at \$659,000 with a mortgage of \$303,945. He also owed a home equity line of credit (home asset funds currently in use) of \$120,462. Applicant used the line of credit to upgrade the house in order to increase its "curb appeal" as well as to make expensive repairs following a series of hurricanes in 2004. (Tr. 15-16, 38-41, AE J.) Applicant was unsuccessful in his efforts to sell his house from 2008 to 2010. These efforts included two short sale attempts. The record is replete with Applicant's diligent efforts to sell his house and attempts to work with his lenders during the process. During his separation, Applicant found that he could not maintain a household in State A where his wife was residing with their daughter, pay her spousal and child support, and maintain their home in State B. To Applicant's credit, he was able to remain current on his mortgage until about September 2009. (Tr. 45-54, AE F – H.)

The bank initiated foreclosure proceedings and obtained a final summary judgment of mortgage foreclosure of \$329,996.77 in August 2010 with a sale date in January 2011. In essence, Applicant had approximately five months to sell his home or lose it to foreclosure. In June 2011, the bank was awarded title and Applicant lost his home. (Tr. 55-56, AE L.)

The appraised property value of Applicant's house at the time of hearing was \$339,690, an amount greater than the foreclosure amount of \$329,996.77. The first mortgage appears to be more than satisfied through foreclosure proceeds. He has yet to receive a final accounting, however. Applicant understands that any potential outstanding debt on his mortgage may have to be addressed and he is prepared to do so. With regard to the home equity line of credit, under applicable State B law, Applicant is no longer legally liable for that debt. Furthermore, his credit report reflects that this debt has been charged off and has a zero balance. However, and even though Applicant is not legally obligated to pay the home equity line of credit balance, he is prepared to do so. Applicant provided ample documentation of his efforts to remain in contact with his creditors with regard to both his mortgage and his home equity line of credit. Lastly, the homeowner's association debt has been paid and his account is current. (Tr. 56-62, 71-72, 79-84, 95, GE 3 – 5, AE M, AE U, AE W - Y.)

In short and apart from the potential liability arising from his foreclosure, Applicant is "debt free." Applicant did seek counsel from real estate agents and an attorney regarding his foreclosure and made on-line credit counseling inquires. He has not, however, sought formal financial counseling. Applicant's budget reflects that his monthly gross salary is \$11,328 and his net monthly remainder after paying all of his bills is \$1,214. His monthly alimony and child support payments are \$4,783. In conclusion, Applicant has addressed each and every debt alleged. The proceeds from his home foreclosure sale appear to have satisfied his mortgage. He is prepared, however, to deal with any shortfall, should one arise, from his foreclosure. His budget clearly demonstrates that he maintains a modest lifestyle and is living within his means. (Tr. 62-66, 77-78, 81-82, AE Q - R, V.)

Character Evidence

Applicant submitted five work-related reference letters from individuals who have known Applicant throughout his working career. Four of the five individuals are in management positions at Applicant's company and the remaining individual is a co-worker and friend. It is clear from these references that Applicant is very highly regarded at his place of employment. They note that Applicant is a recognized expert in the theory, application, and development of navigation and related systems. Applicant is truly making a contribution to the national defense in a very meaningful way. He is held in very high regard, both personally and professionally. There is no question that Applicant's company considers him to be a valued and trusted employee. All individuals are familiar with Applicant's situation the security clearance process. They all strongly recommend that Applicant be granted a security clearance. (Tr. 27-30, AE A – 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 are useful 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 house went through foreclosure in 2010 as a result of his inability to maintain his mortgage and home equity line of credit. During the process, he also fell behind on his homeowners association dues. These debts have been 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 does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant merits full credit under AG ¶ 20(b) because of the direct and indirect costs associated with his wife's automobile accident and disability, his separation and divorce, uncovered hurricane damage to his house, and dramatic decline in the value of his house were circumstances beyond his control and he acted responsibly under the circumstances. Even though he did not have the funds to remain current on his debts, he remained in contact with his creditors during this timeframe and has taken reasonable steps to resolve his debts.¹

AG ¶ 20(c) is partially applicable even though Applicant did not seek formal financial counseling. He has, however, produced evidence that reflects he is living within his means and has regained 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 home owners association debt. Applicant's first mortgage appears to be satisfied following the foreclosure of his home. As noted, he is not required under

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:

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)).

applicable state law to repay the home equity line of credit, he is nonetheless negotiating a settlement with the creditor. Given his financial situation, Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is not applicable.

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 record of 14 years of distinguished service as a defense contract employee and 18 years of similar service as a Department of the Navy civilian employee and his successfully holding a security clearance for a total of 32 years during that time weighs 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 and are being addressed in a meaningful and thoughtful 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).

With the exception of one debt that Applicant is attempting to settle, he satisfied or paid the remaining debts alleged. And, as discussed, there is little more for him to do with regard to his mortgage or home equity line of credit debts. He is in no way trying to rely on his state statute to avoid responsibility for his home equity line of credit. He is making a significant contribution to the national defense. His company fully supports him and recommends him for a security clearance. Due to circumstances beyond his control, his debts became delinquent. 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 employment history, his history of successfully holding a security clearance, his years of financial responsibility before falling into debt, his plan for financial recovery and 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 reference letters, 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 1c:	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