



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



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| In the matter of: |) | |
| |) | |
| XXXXXXXXXXXX, XXXXX |) | ISCR Case No. 10-10109 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

July 18, 2011

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On June 10, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On March 22, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant 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 April 4, 2011, which DOHA received on April 8, 2011. Department Counsel was prepared to proceed on May 3, 2011. The case was assigned to me on May 20, 2011. DOHA issued a notice of hearing on June 3, 2011, scheduling the hearing for June 20, 2011. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. Accompanying GE 1 through 4 was a List of Government's exhibits, which was marked as Exhibit (Ex.) I. The Applicant offered Applicant Exhibits (AE) A through E, which were received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on June 30, 2011.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1c – 1z and 1aa; and denied the allegations in SOR ¶¶ 1a, 1b, 1bb, and 1cc. His admissions are incorporated as findings of fact. (SOR Answer, Tr. 10.)

Background Information

Applicant is a 36-year-old senior trade control specialist, who has been employed by a defense contractor since October 2005. He seeks a security clearance to enhance his position within his company. (GE 1, Tr.18-21.)

Applicant graduated from high school in December 1993. He has accumulated approximately 23 college credit hours, but does not have a degree. Applicant also completed a six-month travel industry-related trade school in 1995. (GE 1, Tr. 21-23.) He was previously married from August 1995 to July 2006. That marriage ended by divorce. Applicant has two children from his first marriage – a ten-year-old daughter and an eight-year-old son. He currently pays his former spouse \$1,282 in child support. Applicant remarried in December 2006 and has two children from his second marriage – a five-year-old son and a seven-month-old daughter. His wife works part-time as a customer service representative. Applicant did not serve in the armed forces. (GE 1, Tr. 23-26, 37, 44.)

Financial Considerations

Applicant's SOR alleges 29 debts totalling \$80,024. These debts consist of one judgment and numerous collection, past-due, and unpaid accounts. Excluding the debts Applicant denied, he still owes approximately \$55,733 for the debts he admitted. In July 2010, Applicant was interviewed by an Office of Personnel Management (OPM) investigator and during that interview, the investigator reviewed Applicant's debts with him in detail. Applicant stated that he had just started a three-year plan in which he would set aside \$500 in escrow each month and at the end of three years, he would have \$18,000 to begin paying off all of his delinquent debt. He also stated during that interview that he had no current plans to begin paying off any of his delinquent debt until the end of his three-year plan. (GE 2.)

Applicant's financial problems began in early 2004 when he and his first wife began having marital problems. After separating, in August 2004, Applicant began making \$1,200 monthly child support payments on his \$45,000 annual salary. From about 2004 to 2005, Applicant fell into debt by overuse of credit cards. Also during this time, he reverted to a former drug habit that "started back in my adolescent days" – the

illegal use of methamphetamine. He estimates that his drug habit cost about \$500 to \$600 a week. All of these factors contributed to Applicant's finances spiralling out of control and led to his current financial situation. (Tr. 27-28, 51-52, GE 2.) Applicant self-enrolled in a drug treatment program from July 2005 to September 2005. He successfully completed the program and is drug-free. (Tr. 29-31.)

All debts alleged have been established by the Government, in particular by the two credit reports received in evidence. (GE 1-4.) Applicant has denied or claimed to have no knowledge of several debts; however, he offered no documentary evidence rebutting the validity of the debts he disputes. Applicant stated that he has not incurred any new debt since January 2006 and that he has not sought financial counseling or sought professional help because his debtors were not pursuing him. (Tr. 33-35, 57-59.) Applicant appeared uncertain regarding the best course of action to take to resolve his debts – whether to file bankruptcy or leave things as they are. In any event, he does not have the financial resources to address his indebtedness, remain current on his existing expenses, and support his family. Applicant's annual salary is about \$86,000. (Tr. 36-38.)

Applicant rents rather than owns a home and has no personal credit cards. (Tr. 46.) He stated that based on his family's current expenses and joint income, he is living paycheck to paycheck. (Tr. 54.)

Character Evidence

Applicant submitted two work-related reference letters. The first letter is from an individual in a responsible company position. He spoke of Applicant's knowledge and expertise as well his character, commitment, and loyalty to the company and fellow employees. The second letter is from a co-worker. He spoke of Applicant's dedication and high ethical standards, among other things. Both individuals support Applicant being granted a security clearance. (Tr. 40-42, AE A, AE B.)

Applicant also submitted three documents to demonstrate that he is attempting to repay his debts not alleged and to demonstrate his financial responsibility. The first document is a letter from his stepfather indicating that Applicant borrowed \$4,000 from him in 2005 and completed paying him back in 2010. The second and third documents are from state and federal tax authorities indicating that Applicant's past tax liabilities are current. (Tr. 42-44, AE C – E.)

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.” *Egan* at 528.

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* at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

Under Guideline F, the 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.)

AG ¶ 19 provides two 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." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, his OPM interview, DOHA interrogatories, and his statement at his hearing. Applicant's SOR lists 29 delinquent debts totaling \$80,024. These debts have been delinquent for several years. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

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)).

Under AG ¶ 20(b), Applicant receives partial credit because at the time he incurred his debts, he was going through a divorce with his first wife. However, any consideration he may have received for the affects of going through a divorce are negated by his illegal drug use during this time. Furthermore, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time.¹

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). Applicant offered little or no evidence that he had made or is making a good-faith² effort to repay his creditors or otherwise resolve his debts. Quite to the contrary, his past debts remain in a delinquent state. Applicant receives some credit for paying his state and federal tax liabilities, which were not alleged. However, this does not overcome his other outstanding debts, which were incurred in whole or in part as a result of his illegal drug use. Applicant's overall response to his indebtedness has been

¹ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his 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.

² 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)).

disappointing, especially since being put on notice that his financial history was a concern during his July 2010 OPM interview. In short, his actions do not rise to the level of a “good-faith” effort. Although Applicant disputes the validity of several of his debts, his lack of documentation fails to support his assertions, precluding application of AG ¶ 20(e).

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 relevant 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 comments in the Analysis section of this decision are incorporated in this whole-person concept analysis. Applicant’s financial indebtedness is ongoing. Applicant is well regarded by his employer and is making a contribution to the national defense as a defense contractor employer. However, he simply does not have the necessary funds to pay off or pay down his past debts and at the same time remain current on his everyday expenses. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated security concerns pertaining to financial considerations.

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 not fully mitigated or overcome the Government’s case. For the reasons stated, I conclude he is not 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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1a – 1cc: | Against 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