



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-00542
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

02/24/2012

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 April 15, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 28, 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 issued after September 1, 2006.

Applicant answered the SOR on August 9, 2011, and DOHA received his answer on August 18, 2011. Department Counsel was prepared to proceed on September 28, 2011. The case was assigned to me on October 14, 2011. DOHA issued a notice of hearing on October 17, 2011, scheduling the hearing for November 3, 2011. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through L, which were received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on November 14, 2011.

Procedural Matters

Department Counsel moved to amend the SOR to correct the debt amounts alleged as follows: SOR ¶ 1a: \$687,000 to \$68,700; SOR ¶ 1j: \$687,000 to \$68,700; SOR ¶ 1k: \$614,000 to \$61,400; and SOR ¶ 1l: \$530,000 to \$53,000. Without objection from the Applicant, I granted Department Counsel's motion. (Tr. 10-11.)

Findings of Fact

Applicant admitted SOR ¶¶ 1c through 1i, and denied the remaining allegations. His admissions are incorporated as findings of fact.

Background Information

Applicant is a 52-year-old escort monitor, who seeks a security clearance as a condition of his employment. If granted a clearance, Applicant anticipates being deployed to Afghanistan. (GE 1, Tr. 17-19.)

Applicant graduated from high school in June 1978. He attended college and earned approximately 67 college credits. Applicant served in the U.S. Army from April 1980 to April 1984, and was honorably discharged as a sergeant (pay grade E-5). His military occupational specialty was 98K (signals collection/identification analyst). While on active duty, Applicant successfully held a top secret clearance with access to sensitive compartmented information (TS SCI). He also served in the U.S. Army Reserve in the "mid '90s" for "a year" and successfully held a secret security clearance. (GE 1, Tr. 20-25.)

Applicant was previously married four times. He was married to his first wife from December 1988 to March 1993; he was married to his second wife from September 1994 to December 1997; he was married to his third wife from November 2003 to September 2005; and he was married to his fourth wife from July 2007 to July 2010. All marriages ended by divorce. Applicant is currently not married. He has one child – a 15-year-old daughter born during his first marriage, and he pays her mother \$229.50 in monthly child support. (GE 1, Tr. 25-29.)

Financial Considerations

Applicant's SOR alleges 12 debts that relate to a combination of real estate holdings that went bad and consumer debt. In 1998, Applicant began investing in real estate and by 2003 he had acquired 13 properties. As a result of: (1) bad business decisions; (2) failed marriages, particularly his last two marriages; and (3) a depressed

real estate market, he encountered financial difficulties. Eight of his properties went into foreclosure, and the remaining five properties have been charged off. (Tr. 12-14, 30-38.)

After losing eight properties to foreclosure and after discussing the tax implications with his accountant for the remaining five properties (two duplexes and three single family homes), Applicant decided to let those five properties go to foreclosure. However, after foreclosure proceedings were initiated, the lender filed dismissal notices for all five properties and “charged off” the properties. According to Applicant, the lender essentially told him, “we don’t want them back.” Applicant is attempting to repair these properties, settle property tax arrearages, and rent them out. He estimated that he spent \$5,000 to \$6,000 in repair bills and travel expenses attempting to get the properties to an acceptable rental condition. All properties are rented; however, Applicant is not making any payments to the lenders. (Tr. 38-42, 61-62, AE L.)

The status of the alleged SOR debts is summarized as follows:

SOR ¶ 1a – This is a foreclosed property with a balance due of \$68,700 following foreclosure. This debt is not resolved. (Tr. 43, AE A.)

SOR ¶ 1b – This is a collection account in the amount of \$116,000 owed to the lender on a property. Applicant has a tenant in the property who is paying him \$600 in monthly rent. The lender offered to pay the Applicant \$1,000 if he would sign the property over to the lender. Negotiations are ongoing. This debt is not resolved. (Tr. 43-44, AE B.)

SOR ¶¶ 1c through 1e and 1i – These are four collection accounts for credit cards in the respective amounts of \$13,000, \$16,000, \$16,000, and \$3,704. Applicant wanted to group these accounts together since they are all owed to the same creditor, and he is attempting to negotiate one settlement for these accounts. Applicant anticipates that he can settle these accounts for a fraction of the amount, but will only do so if he has a job because he does not want to deplete his cash reserve. These debts are not resolved. (Tr. 45-52, 68-73, AE C, AE D, AE H.)

SOR ¶¶ 1f through 1h and 1k – These were initially foreclosed properties with respective balances due of \$54,000, \$58,000, \$62,000, and \$61,400 following foreclosure. These debts stem from four of the five properties that Applicant still possesses. They are now charged-off accounts. Applicant has reached agreements to pay down the back property taxes owed. Although agreements have been reached with regard to back property taxes, nothing has been done to resolve the charged-off amounts of the loans. These debts are not resolved. (Tr. 51-56, 58-59, AE E – G, AE J.)

SOR ¶ 1j – This is a foreclosure property with a balance due of \$68,700 that the lender took back. The lender issued Applicant a Form 1099 “a couple of years ago” for the difference in income. Applicant does not remember the amount on the Form 1099. This debt is resolved insofar as Applicant no longer has possession of the property and was issued a Form 1099. (Tr. 56-58, AE I.)

SOR ¶ 11 - This is a foreclosure property with a balance due of \$53,000 that the lender took back. This property sold at auction in 2008 for \$61,409 so there is no deficiency owed. The lender issued Applicant a Form 1099. This debt is resolved insofar as Applicant no longer has possession of the property and was issued a Form 1099. (Tr. 59-60, AE K.)

Of the eight properties that the lender took back, Applicant estimates that “probably half of them had deficiencies” for which he was provided Forms 1099. (Tr. 61.) In 2007, Applicant made a decision based on the declining real estate market not to make any further mortgage payments on his 13 properties. The foreclosures of the eight properties discussed above took place “sometime [in] 2008 or 2009.” (Tr. 65.) Applicant is receiving rent for the five properties he still owns and is using those proceeds as living expenses as well as for upkeep and maintenance of those properties. (Tr. 74-77.) Applicant owns his personal residence and vehicles free and clear. (Tr. 77-79.) Applicant offered evidence that he had settled for a lesser amount two other credit card debts not alleged with balances of \$26,500 and \$27,000. (Tr. 50-51, AE C.) Before 2007, Applicant described his credit as “outstanding.” (Tr. 88.)

Character Evidence

Applicant did not submit any character evidence.

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

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.)

Applicant accumulated 12 debts primarily related to 13 investment real estate properties. As a result of the declining real estate market, he chose to stop making payments on those properties. He lost eight of those properties to foreclosure and the lender charged off the remaining five properties. Applicant’s 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 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 of the declining real estate market, but his choice to cease making payments on all 13 properties in 2007 precludes full application of this mitigating condition. Furthermore, he has not made any payments on the five properties that the bank charged off. He continues to receive rent for those properties. Applicant has to demonstrate that he acted responsibly under the circumstances. Although his "business decisions," may be acceptable in some situations, they are not considered acceptable in the context for one seeking a security clearance. There is little evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time.¹

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.

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).² Despite receiving rent on his five remaining properties, Applicant is doing the bare minimum to satisfy the local tax authority. Applicant offered little evidence that he had made or is making a good-faith effort to repay his creditors or otherwise resolve his debts and his conduct is not indicative of “good-faith” effort as contemplated by the Directive. AG ¶ 20(e) is not applicable because Applicant does not dispute the validity of the debts alleged.

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 the whole-person concept analysis. Applicant continues to have a substantial amount of delinquent debt. I have taken into account Applicant’s honorable military service and the fact that he successfully held security clearances. I also acknowledge that he

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)).

maintained an acceptable level of financial responsibility before 2007. However, his choice to become an owner and landlord of numerous properties entailed a certain degree of risk. Applicant's plan did not materialize as anticipated, and he is now heavily leveraged. Given the tenuous nature of his financial situation, I cannot in good conscience state with certainty that he is a good candidate for a security clearance at the present time. 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:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1a – 1h:	Against Applicant
Subparagraph 1j:	For Applicant
Subparagraph 1k:	Against Applicant
Subparagraph 1l:	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