



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-00578
)
 Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esq., Department Counsel
For Applicant: *Pro se*

August 22, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on July 14, 2010. On March 29, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on April 8, 2011, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 5, 2011, and the case was assigned to me on May 20, 2011. DOHA issued a notice of hearing

on May 26, 2011, scheduling the hearing for June 14, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. I kept the record open until July 2, 2011, to enable Applicant to submit additional evidence. He timely submitted AX B through J, which were admitted without objection. DOHA received the transcript (Tr.) on June 21, 2011.

Findings of Fact

Applicant is a 27-year-old engineer technician employed by a federal contractor. He attended a community college from August 2002 to June 2005, but he did not receive a degree. He also attended a vocational school from June 2001 to April 2002 and received a diploma. He worked in the private sector from May 2002 to April 2008. He worked as a field engineer for a temporary employment agency from May 2008 until June 2009, when he began working for his current employer. He has never held a security clearance.

The SOR alleges nine delinquent debts to six creditors, totaling about \$400,000. Three of the delinquent debts are mortgages on Appellant's primary residence and the rental property. All three delinquent mortgages are held by the same creditor. One debt is for delinquent homeowners' association assessments, and five are medical debts incurred when Applicant did not have medical insurance. He admitted all the debts in his answer to the SOR, and his admissions are corroborated by his credit reports dated July 22, 2010, and March 15, 2011. (GX 4; GX 5.)

Applicant has a five-year-old son who lives with him. He was earning about \$55,000 per year when he bought his first home in 2003. He paid \$116,000 and borrowed the entire purchase price. He testified that this property is now worth about \$56,000. When his son was born in 2005, he bought a larger two-bedroom home and began renting his previous home. He was earning about \$65,000 per year when he bought his second home. He paid about \$200,000, with a 10 percent down payment. He testified that this property is now worth about \$84,000. (Tr. 28-29.) After the hearing, he presented evidence that his first home is listed for sale at \$40,000, and a condominium similar to his current residence is listed for sale at \$79,000. (AX C.)

Applicant was current on his mortgage payments until 2009. He decided to sell the rental property after his tenants moved out in February or March 2009. He stopped looking for renters after he decided to sell the property. He tried a short sale and had two offers, but the lender would not approve the contracts. He submitted a deed in lieu of foreclosure, but the lender would not accept it. As of the date of the hearing, the rental property was vacant. (Tr. 35-40.)

Applicant tried to negotiate a loan modification on his primary residence, but the bank would not modify the loan because the payments were current. Applicant stopped making payments in an unsuccessful effort to qualify for a loan modification. After his unsuccessful efforts to sell either property, he decided to "walk away from both of them."

(Tr. 33-36.) He stopped making payments on all the mortgages in August 2010. (Tr. 40.) As of the date of the hearing, neither property had been foreclosed. (GX 4 at 1-2.)

In June 2009, Applicant was involved in a motorcycle accident and unable to work. He had just begun his current job, and he had not worked long enough for his medical insurance to take effect. His employer placed him on long-term disability, at about 80% of his pay, for about six months while he recovered from his injuries. The delinquent medical bills were incurred during the period he was without medical insurance. He was making small monthly payments on his various medical bills until January 2011. (AX J; Tr. 40.)

In October 2009, Applicant's condominium association obtained a judgment against him for unpaid assessments totaling about \$4,350. He was making monthly \$200 payments on the judgment until February 2011. (AX J.)

Applicant filed a petition for Chapter 7 bankruptcy on April 8, 2011. (AX B.) The petition includes the debts alleged in the SOR. He listed assets of \$172,465 and liabilities of \$439,371. (AX B at 15.) He has completed the credit counseling required by the bankruptcy court. (AX H; AX I.) The meeting of creditors was held in May 2011, but he had not received a discharge as of the date of the hearing. (AX A.)

Applicant's federal income tax returns reflect gross income of \$76,630 for 2008, \$54,064 for 2009, and \$53,965 for 2010. (AX D, E, F.) His current net monthly income is about \$3,300. His current budget provides for monthly rent of \$1,300, based on the assumption that he will no longer be living in his condominium after obtaining a bankruptcy discharge, and it projects a net monthly remainder of about \$680. (AX G.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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. Thus, a decision to deny a security clearance is merely an indication the applicant 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 therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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

Guideline F, Financial Considerations

The SOR alleges three delinquent real estate mortgages with the same lender (SOR ¶¶ 1.d, 1.e, and 1.f), an unsatisfied judgment for unpaid condominium fees (SOR ¶ 1.c), and five delinquent medical bills (SOR ¶¶ 1.a, 1.b, 1.g, 1.h, and 1.i). The concern under this guideline is set out in AG ¶ 18:

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.

Applicant admitted all the allegations and his admissions are corroborated by his credit reports. Thus, two disqualifying conditions under this guideline are established: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). This mitigating condition is not established because Applicant's debts are recent, numerous, and not the result of circumstances making them unlikely to recur.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). Applicant encountered several conditions beyond his control: a substantial income reduction in 2009, uninsured medical expenses, and a downturn in the real estate market. He acted responsibly toward some of his delinquent debts. He was making payments on his medical bills and the judgment for delinquent condominium fees until he decided to file for Chapter 7 bankruptcy. However, he did not act responsibly regarding the three mortgages. Instead, he decided to "walk away" from the mortgages on his primary residence and his rental property because they were no longer good investments. Thus, I conclude that AG ¶ 20(b) is established for the medical bills (SOR ¶¶ 1.a, 1.b, 1.g, 1.h, and 1.i) and the delinquent condominium fees (SOR ¶ 1.c), but not for the three delinquent mortgages (SOR ¶¶ 1.d, 1.e, and 1.f).

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). Applicant receives some credit under this mitigating condition because he has completed the counseling required by the bankruptcy court, and a Chapter 7 bankruptcy discharge, if granted, will resolve all his delinquent debts.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Reliance on a legally available option such as bankruptcy does not necessarily establish the good-faith effort contemplated by this

mitigating condition. See ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007). For this reason and the reasons set out in the above discussion of AG ¶ 20(b), I conclude that this mitigating condition is established for the medical bills and the judgment for condominium fees, but not for the three delinquent mortgages.

Security concerns under this guideline also can be mitigated by showing “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.” AG ¶ 20(e). This mitigating condition is not established, because Applicant has admitted all the debts alleged in the SOR.

Whole-Person Concept

Under the whole-person concept, an 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. An 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.

Under AG ¶ 2(c), 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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant invested in real estate by borrowing most of the purchase price on two properties, counting on them to appreciate and provide rental income. Like many others, he encountered a downturn in the real estate market. Although he was “upside down” on his mortgages, he was keeping current on his payments until he decided that he had made a bad investment. When he could not negotiate a loan modification or a short sale, he decided to stop making payments on all three mortgages alleged in the SOR. He is now counting on Chapter 7 bankruptcy to resolve his debts. However, the circumstances of his bankruptcy do not demonstrate the sense of duty required of persons entrusted with classified information.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has

not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.c:	For Applicant
Subparagraphs 1.d-1.f:	Against Applicant
Subparagraphs 1.g-1.i:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge