



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 11-01305
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2012

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 July 13, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF-86). On January 11, 2012, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant, deny, continue, or revoke a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be denied, granted, continued, or revoked.

On February 9, 2012, Applicant responded to the SOR and requested a hearing. On March 2, 2012, Department Counsel was ready to proceed on Applicant's case. On March 28, 2012, DOHA assigned Applicant's case to me. On April 6, 2012, DOHA issued a hearing notice, setting the hearing for April 24, 2012. (Tr. 7) Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered five exhibits, and Applicant did not offer any exhibits. (Tr. 18-21; GE 1-5) There were no objections, and I admitted GE 1-5. (Tr. 21-22) On May 1, 2012, I received the transcript of the hearing. I held the record open until May 11, 2012, to provide Applicant an opportunity to provide additional documentation. (Tr. 83, 86, 104) On May 2, 2012, Applicant provided 15 post-hearing documents, which were admitted without objection. (AE 1-15)

Findings of Fact¹

In his Answer to the SOR, Applicant admitted responsibility for the debts in SOR ¶¶ 1.a to 1.c. He also provided explanations for the SOR allegations. His admissions are accepted as findings of fact.

Applicant is a 39-year-old information-technology specialist for a defense contractor. (Tr. 23, 29; GE 1) He became unemployed two months before his hearing. (Tr. 30) His monthly unemployment compensation is \$2,000. (Tr. 34) A defense contractor plans to hire Applicant, if he receives a security clearance. (Tr. 30) He believes his annual salary will be about \$160,000. (Tr. 33) His spouse has full-time employment in property management with an annual salary of about \$120,000. (Tr. 32, 63)

Applicant and his spouse married in 2000. (GE 1) Applicant has a five-month-old baby, and his other three children are ages 10, 11, and 13. (Tr. 26-27) He provides \$500 to \$700 monthly financial assistance to his 23-year-old step daughter, who does not live with Applicant and his spouse. (Tr. 24-25, 28)

Applicant earned a bachelor's degree in business with a major in management information systems. (Tr. 28) During his employment in information technology, he has earned about six technical certifications. (Tr. 29) He has never served in the military. (GE 1)

Financial Considerations

From 2006 to 2009, Applicant was unemployed for about 20 months, and from 2008 to 2009, his spouse was unemployed for about eight months. (Tr. 97-98) She was also briefly unemployed in 2005. (Tr. 100) For the last five years, she has averaged annual income of \$100,000. (Tr. 98)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant disclosed his delinquent debts in his July 13, 2010 SF-86. (GE 1) He disclosed a total of 13 delinquent or previously delinquent accounts or unfiled federal income taxes, and eight of them were settled or satisfied as follows: (1) credit card debt in May 2010; (2) filed overdue federal income tax returns in May 2010 – either no taxes were due or Applicant received a refund; (3) credit card debt in May 2010; (4) credit card debt in April 2010; (5) credit card debt in April 2010; (6) credit card debt in February 2010; (7) credit card debt in December 2009; and (8) mortgage debt in February 2007. (GE 1) One credit card debt was expected to be paid in full by September 2010. (GE 1 at 60) In January 2010, he stopped making payments on a mortgage loan on an investment property, and in May 2010, he planned to put the investment property on the real estate market. (GE 1 at 62)

The three debts listed on his July 13, 2010 SF-86 were not resolved and were listed on the SOR. For the judgment in SOR ¶ 1.a for \$48,071, he said that he was “[l]ooking to cure this [judgment] by beginning a payment plan in October 2010 or proceeds from a real estate liquidation.” (GE 1 at 58) For the debt in SOR ¶ 1.b for delinquent interest in the amount of \$6,612, Applicant disclosed that he was behind seven months on a \$349,875 mortgage, and his solution was to seek a loan modification. (GE 1 at 61) For the judgment in SOR ¶ 1.c for \$29,038, he said that he was “working out a payment plan and/or settlement directly with the bank’s collection department, [and he was l]ooking to establish a repayment to begin October 2010 and/or through liquidation of real estate.” (Tr. 68-69; GE 1 at 59)

SOR ¶ 1.a (\$48,071)—Unresolved. In October 2005, Applicant borrowed \$50,000 on a line of credit. (Tr. 51; SOR ¶ 1.a) Applicant used the line of credit for living expenses and for a remodeling business. (Tr. 52) Applicant said he stayed in touch with the creditor by telephoning every five months or so, and he made a \$7,215 settlement offer, to be paid with monthly \$120 payments for five years. (Tr. 55, 59, 65-66; AE 3) He urged the creditor to accept this offer because of Applicant’s hardship situation; however, the creditor rejected his offer. (AE E) On August 22, 2008, Applicant wrote the court handling the judgment that his wife was laid off on June 30, 2008, and she provided the family their only steady income. (AE 3) He said, “My income is from Real Estate commissions, which have been \$0.00 for the past two years.” (AE 3) On September 19, 2008, and October 1, 2008, the creditor wrote to Applicant and wanted about \$25,000 in a lump sum to settle the debt. (AE 3, Tr. 67) On January 12, 2011, Applicant offered to settle the debt for a lump sum payment of \$10,000. (AE 6) On January 19, 2011, the creditor offered to settle the debt for \$20,000. (AE 6) On May 23, 2011, the creditor rejected Applicant’s offer to settle the judgment for \$10,000. (AE 6) Applicant most recently communicated with the creditor in the summer of 2011. (Tr. 60) He still plans to attempt to resolve this debt; however, he wants to have stable employment before trying to set up a payment plan. (Tr. 56, 65-66)

SOR ¶ 1.b (\$6,612)—Unresolved. In 2004, Applicant and his spouse purchased their residence for \$680,000, and they put 20 percent down. (Tr. 40, 73) They obtained a loan modification, and the mortgage balance on their first mortgage is now \$636,000. (Tr. 48, 75; GE 3 at 155) The monthly mortgage payment on their first mortgage is \$3,013. (Tr. 49, 72; GE 3 at 153) In 2006, Applicant and his spouse borrowed \$484,000,

secured by their residence, and they used the funds to purchase investment property C for \$475,000. (Tr. 40-41, 71, 73-74) Applicant fell behind on the payments for the \$484,000 equity line of credit, and his credit report indicated he had delinquent interest charges of \$6,612. (Tr. 71) Applicant and his spouse have not made any payments on the \$484,000 equity line of credit in at least a year, and they are diligently pursuing a loan modification on that debt. (Tr. 77)

SOR ¶ 1.c (\$29,038)—Unresolved. Applicant received an unsecured line of credit from a bank, and he said he was unable to make his payments. (Tr. 79-80) In 2010, the bank obtained a judgment for \$29,038. (HE 3) The creditor put a lien on Applicant's bank account; however, Applicant was able to convince the court to lift the lien. (Tr. 79) In 2008, he entered into a payment agreement with the creditor where he promised to pay \$600 a month. (Tr. 80) He made payments for six months. (Tr. 80) Then he entered into a period of unemployment and underemployment. (Tr. 80) Applicant was waiting until he had better employment stability before making a settlement offer on the debt. (Tr. 79) He has not made any payments to this creditor in at least a year.

In 2002, Applicant and his spouse purchased a townhome for \$181,000, and then they sold it for \$225,000. (Tr. 39) Applicant and his spouse purchased Property C for \$475,000, which has a current market value of \$250,000. (Tr. 38) They used funds from the equity loan they obtained on their residence. Property C requires about \$150,000 in rehabilitation work, and then it will be worth about \$400,000. (Tr. 38) There is no mortgage on property C.

Applicant and his spouse purchased property N with a \$312,000 mortgage. (Tr. 41) In 2007, Applicant provided a deed in lieu of foreclosure to the lender holding the mortgage loan, and there was no deficiency. (Tr. 41-43)

In 2008, Applicant and his spouse purchased property R with a \$176,000 mortgage. (Tr. 43, 46) In August 2011, the mortgage loan was resolved with a short sale. (Tr. 43-45) They received a 1099 for about \$42,000. (Tr. 45) In addition to resolving debts with the majority of his creditors described above, Applicant took the extraordinary step of moving his family out of their five bedroom suburban home in 2008 to a two bedroom condominium (property R) in an urban setting. He did this to generate rental income and reduce his living expenses. Applicant described the time when his family was living in a condominium in close quarters as "very trying." (Tr. 43-47)

Applicant provided ample documentation demonstrating his efforts to remain in contact with his creditors during this time as well as good-faith efforts to resolve his debts. (AE A, AE B) His personal financial statement (PFS) reflects that Applicant is living within his means, is current on his remaining bills, and exercises prudent spending habits. (GE 3 at 149, AE 1-15)

Character Evidence

Applicant provided multiple recommendations from managers, clients, supervisors, colleagues, and a recruiter of his company. They lauded his hard work, professionalism, technical competence, loyalty, and goal-directed mission accomplishment.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 adjudicative guidelines. These guidelines 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 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 “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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 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 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline F (financial considerations).

Financial Considerations

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 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 SF-86, credit reports, his SOR response, and his statement at his hearing.

Applicant's SOR debts became delinquent in 2009. His SOR alleges three delinquent debts, totaling \$83,721. 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 in resolving his debts warrants full application of ¶¶ 20(a), 20(b), and 20(d).² AG ¶ 20(e) is not applicable because he did not dispute any of the SOR debts. He paid, settled, or satisfied seven debts from December 2009 to May 2010, as indicated on his SF-86. He said he expected a delinquent credit card debt to be paid by September 2010, and I have credited him with resolving this debt in 2010.

Unemployment, underemployment, some medical debts, and the real estate downturn were circumstances largely beyond Applicant's control that adversely affected

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)).

his finances. Applicant acted responsibly and made good progress resolving his delinquent debts until January 2011. He maintained contact with his creditors and attempted to establish payment plans. He hired attorneys and made multiple settlement offers. He divested himself of several real estate properties and avoided additional delinquent debt.

Although Applicant did not receive formal financial counseling, he did generate a budget or PFS. He understands how to establish his financial responsibility and eliminate delinquent debt.

In sum, Applicant fell behind on his debts because of unemployment, underemployment, some medical debts, and the real estate downturn. In 2010, he made excellent progress and resolved most of his delinquent debts. Although Applicant's financial situation is not completely resolved, it is clear that he has made reasonable and diligent efforts to resolve his debts to the best of his ability. What the SOR does not reflect are the debts he has paid and the ongoing good-faith efforts he has made to resolve his remaining debts.

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

There are sufficient facts supporting mitigation of security concerns under the whole-person concept. Applicant is loyal to the United States. Applicant is a 39-year-old information-technology specialist with strong professional credentials. If Applicant receives a security clearance, a defense contractor plans to hire Applicant, and his annual salary will be about \$160,000. Unemployment, underemployment, medical problems, and the real estate downturn were events beyond Applicant's control, which adversely affected his finances. His PFS (when Applicant was employed) shows he had

about \$5,500 available each month to address his debts, and he had funds in his savings account. Most notably are the efforts Applicant made to resolve debts not alleged to in his SOR. I found his documented efforts to mitigate his situation compelling. These efforts included moving his family from a five bedroom home to a two bedroom condominium.

Applicant is sufficiently intelligent and mature to understand and comply with security requirements. He has the ability and intelligence to establish his financial responsibility. His character references and evaluations establish that he is a dedicated, reliable, and trustworthy employee. He is knowledgeable, patriotic, and professional, and he made substantial contributions to his employer.

I have carefully applied the law, as set forth in Department of Navy v. Egan, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has fully mitigated the financial consideration concerns.

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 1.a to 1.c: For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge