



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



In the matter of:)
)
) ISCR Case No. 11-01603
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel
For Applicant: Ellis Bennett, Esquire

06/19/2012

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 13, 2010. On January 5, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On February 6, 2012, Applicant answered the SOR. He elected to have a hearing before an administrative judge. The case was assigned to me on March 2, 2012. The parties agreed to a hearing on April 23, 2012. At the request of Applicant’s counsel, the

hearing was rescheduled to take place on May 2, 2012. I convened the hearing, as rescheduled, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced four exhibits (Ex.), which were marked Ex. 1 through 4 and entered in the record without objection. Applicant testified and called six witnesses. He filed a hearing memorandum with 15 attachments. I marked Applicant's hearing memorandum as Hearing Exhibit (HE) 1, and I marked the 15 attachments as Ex. A through Ex. O. Applicant's hearing memorandum and his 15 exhibits were entered in the record without objection. DOHA received the hearing transcript (Tr.) on May 10, 2012.

Procedural Matters

The SOR alleged at ¶ 1.m. that Applicant filed a Chapter 7 bankruptcy in March 2009, and the bankruptcy was dismissed in September 2011. In his answer to the SOR, Applicant admitted the allegation but crossed out "Chapter 7" and inserted instead "Chapter 11." After hearing Applicant's opening statement, I asked the parties if they wished to amend the SOR allegation at ¶ 1.m. to conform to facts revealed in Applicant's answer and opening statement. The parties then agreed to amend the SOR allegation at ¶ 1. m. to read as follows: "You filed Chapter 11 Bankruptcy in the United States Bankruptcy Court of [jurisdiction deleted] in about March 2009. This bankruptcy was dismissed in about September 2011." The amendment to the SOR was accordingly approved and entered in the hearing record.

Findings of Fact

The SOR contains 13 allegations of financial conduct that raise security concerns under Guideline F, Financial Considerations (SOR ¶¶ 1.a. through 1.m.) In his Answer to the SOR, Applicant admitted all 13 allegations. Applicant's admissions are entered as findings of fact.

Applicant is 55 years old and employed as a senior systems engineer by a government contractor. He was first awarded a security clearance in 1994. In May 1979, he enlisted in the Army, where he served on active duty until March 1989. From March 1989 until March 1992, Applicant served in the active reserves. He received an honorable discharge. (Ex. 1; Ex. 2.)

Applicant has been married three times. He married for the first time in 1977. He and his first wife divorced in 1992. Applicant and his second wife married in 1997. They divorced in 2002, as a consequence of financial disagreements. Applicant and his third wife have been married since 2005. Applicant is the father of two adult children, who were born during his first marriage. (Ex. 1; Ex. 2.)

Applicant and the woman who became his third wife purchased a home in 2003. They anticipated that they would be able to sell the home at a profit in about five years and purchase another home. In 2004, the couple refinanced the property and acquired

a balloon mortgage. Initially, under the balloon mortgage, their monthly mortgage payment was \$1,700. However, it soon rose to \$2,200 and then to \$2,500 a month. (Ex. B; Ex. C; Tr. 104-105, 108-110, 151.)

In July 2005, Applicant and his wife purchased a timeshare in the Virgin Islands. In 2007, Applicant lost his job with a communications company. While he soon acquired a position with his current employer, his annual salary was considerably less than it had been previously. (Tr. 104-105, 1511-152.)

Applicant and his wife used savings to pay their living expenses and the balloon mortgage. Soon, however, they found it necessary to pay some of their monthly expenses with credit cards. Applicant acquired a second job, which he held from January 2008 until September or October of 2008. His gross pay from the second job was \$300 or \$400 a week. (Tr. 113-114, 169-171.)

Applicant's financial situation grew more difficult. In January 2009, he sought legal counsel and was advised to file for bankruptcy. In March 2009, Applicant filed a Chapter 11 bankruptcy. His counsel advised him to stop paying his delinquent debts. Applicant informed his security manager when he filed the bankruptcy. (Ex. 2; Tr. 113-115.)

The amended SOR alleges Applicant's Chapter 11 bankruptcy and 12 delinquent debts totaling approximately \$436,751. The largest debt alleged in the SOR is Applicant's home mortgage: \$273,396. (SOR ¶ 1.a.)

Although the Chapter 11 bankruptcy was filed in March 2009, the majority of the affected creditors would not approve the payment plan proposed by the bankruptcy. Accordingly, the bankruptcy court dismissed Applicant's Chapter 11 petition in September 2011. (Ex. 2; Ex. 4; Tr. 106-108, 148-149, 154-156.)

Applicant provided documentation showing that his home was sold at foreclosure in February 2010. Following foreclosure, Applicant was not responsible for a deficiency, and he owed nothing on the property. However, he acknowledged that at some time in the future he might receive a Form 1099-C and could owe federal tax on income imputed to him as a result of the foreclosure of the mortgage. (Ex. B; Ex. C; Tr. 108-111; 138, 157-158.)

The SOR alleges that Applicant is responsible for the following unsatisfied bad debts owed to credit card companies: SOR ¶ 1.b. (\$7,250); SOR ¶ 1.c. (\$17,803, \$20,041, and \$8,365);¹ SOR ¶ 1.d. (\$16,566); SOR ¶ 1.e. (\$32,193, \$8,149, and \$4,408);² SOR ¶ 1.f. (\$25,293); and SOR ¶ 1.i. (\$933). (SOR; Ex. 2.)

¹ SOR ¶ 1.c. alleges bad debts on three different accounts owed to one credit card company. (Ex. 2.)

² SOR ¶ 1.e. alleges three bad debts owed to one credit card company. (Ex. 2.)

The debt alleged at SOR ¶ 1.b. was closed by the credit grantor, and it remains unsatisfied. Applicant testified that he intends to contact the creditor and will make monthly payments on the debt in the future. (Ex. J; Tr. 118-119.)

Applicant had three different accounts with the creditor identified in SOR ¶ 1.c. The first delinquent account, for \$17,803, was closed by the creditor and shows a zero balance on an April 2012 credit report provided by Applicant. Applicant stated that he had “negotiated a zero balance” with the creditor on the second delinquent account, which totaled \$20,041. He further explained that the debt had been cancelled, and he had received a Form 1099-C from the creditor indicating that the debt had been attributed to him as income for Federal tax purposes. The third debt alleged under SOR ¶ 1.c. totaled \$8,365. Applicant explained that he still owed the debt and would pay it in the future. (Ex. A; Ex. E; Ex. K; Tr. 118-122.)

Applicant owed a delinquent credit card debt of \$16,566 to a creditor identified in SOR ¶ 1.d. This delinquent debt was also written off as a bad debt by the creditor. On Applicant’s credit report of April 30, 2012, the debt is listed with a zero balance. (Ex. A; Tr. 128-130.)

Applicant owed the following three delinquent debts to a creditor identified in SOR ¶ 1.e: \$32,193, \$8,149; and \$4,408. All three debts were closed and cancelled by the creditor. (Ex. A; Tr. 131-136.)

Applicant owed a \$25,293 delinquent debt to a creditor identified in SOR ¶ 1.f. He asserted that he had settled the debt for \$10,000, and he provided documentation to corroborate his assertion. (Ex. D; Tr. 134-135.)

Additionally, Applicant is responsible for a delinquent time share debt of \$4,177 and a delinquent maintenance fee on the timeshare of \$997 (SOR ¶ 1. g. and SOR ¶ 1. h.). These debts have not been paid or otherwise resolved. Applicant stated that he would pay these debts at some time in the future. (Tr. 136-137, 152-153.)

Applicant also owes the following unsatisfied delinquencies: \$933 (SOR ¶ 1.i.); \$2,881 (SOR ¶ 1.j.); and \$1,144 (SOR ¶ 1.k.). He stated that he would pay these delinquent debts at some time in the future. (Tr. 139-140.)

Applicant’s credit report of April 30, 2012, stated that two debts to a retail store, one for \$7,995 and the other for \$5,160, were included in his bankruptcy and had been discharged. These debts appear at SOR ¶ 1.i. Both debts show a zero balance. However, Applicant’s Chapter 11 bankruptcy was dismissed, and his debts were not discharged. (Ex. A; Tr. 106-108, 141.)

Applicant provided a personal financial statement dated April 29, 2012. He reported that his net monthly salary is \$5,436. His wife’s net monthly salary is \$3,981. The couple’s combined net monthly income is \$9,417. (Ex. H.)

Applicant reported the following fixed monthly expenses: rent, \$1,200; groceries, \$800; clothing, \$100; utilities, \$400; car expenses (insurance, repairs, gasoline), \$1,000; life and other insurance, \$150; medical expenses, \$100; and miscellaneous, \$500. (Ex. H.)

Applicant reported payments on three existing automobile debts each month. The three payments totaled \$1,500. His net monthly remainder was \$3,668. (Ex. H.)

Applicant has a plan to allocate \$650 each month to pay the debts alleged at SOR ¶¶ 1.b., 1.c., 1.g., 1.h., 1.i., 1.j., and 1.k. These debts total \$25,940. He had financial counseling associated with his bankruptcy filing in 2009. At the time of his hearing, he had not implemented his payment plan. (Ex. H; Ex. I; Tr.148.)

Applicant presented six witnesses who spoke on his behalf. His security officer testified that Applicant was open and forthcoming in informing her of his financial problems. Four individuals who supervised Applicant described his work performance as “exemplary.” Additionally, the supervisors praised Applicant’s integrity and stressed his value to the organization. A coworker also testified and stated that Applicant was an exceptional worker. (Tr. 52-96.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “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 and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider and apply the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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, the administrative judge applies these guidelines 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.

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 in seeking to obtain 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

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated substantial delinquent debt and was unable or unwilling to pay his creditors. This evidence is sufficient to raise these potentially disqualifying conditions.

Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. Unresolved financial delinquency might be mitigated if it “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)) Additionally, unresolved financial delinquency might be mitigated if “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)) Still other mitigating circumstances that might be applicable include evidence 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)) or “the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” (AG ¶ 20(d)) Finally, if “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 options to resolve the issue,” then AG ¶ 20(e) might apply.

Applicant admitted a history of financial difficulties. In 2003, he purchased a home and agreed to finance the property with a balloon mortgage. In 2005, he purchased a timeshare property. In 2007, he was laid off from his job. While he acquired another job, his pay was considerably lower. Applicant’s monthly mortgage obligations rose beyond his ability to pay. He and his wife used credit cards to pay their monthly expenses. His financial obligations overwhelmed his capacity to pay them. While Applicant experienced some financial reversals that were beyond his control, his response - using credit cards to meet current living expenses - was not responsible under the circumstances.

Applicant sought legal counsel. Upon the advice of counsel, he stopped paying his debts and filed for Chapter 11 bankruptcy in 2009. Applicant’s creditors refused to participate in the bankruptcy proceedings. In 2011, a bankruptcy court dismissed his Chapter 11 petition.

Applicant and his wife have a combined monthly net income of \$9,417. After meeting their monthly expenses and making payments of \$1,500 on three automobile debts, they report a net monthly remainder of \$3,668.

Applicant had financial counseling when he filed for bankruptcy in 2009. To his credit, Applicant settled one of the 12 delinquent debts alleged in the SOR. He also

received a Form 1099-C from the creditor identified at SOR ¶ 1.c when the creditor cancelled a debt of \$20,041.

At his hearing, Applicant proposed a plan to allocate \$650 each month to pay seven of the debts alleged in the SOR. However, at the time of his hearing, he had not yet initiated payment, and the debts remained unsatisfied. While he appears to have sufficient resources to satisfy the debts, it is not clear from the record that he will do so in a timely and consistent manner. In determining an individual's security worthiness, the Government cannot rely on the possibility that an applicant might resolve his or her outstanding debts at some future date. ISCR Case No. 98-0614 at 5 (App. Bd. Jul. 12, 1999). Accordingly, I conclude that while AG ¶ 20(d) applies in part to Applicant's case, none of the other Guideline F mitigating conditions fully apply to the facts of his case.

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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature person of 55 years. His financial problems began several years ago and are ongoing. While Applicant acted reasonably in following the advice of counsel to withhold payment of his debts during the Chapter 11 bankruptcy, the bankruptcy was dismissed in September 2011, nine months ago. Since that time, Applicant has proposed a plan to resolve his financial delinquencies. He reports he has sufficient income to pay his debts, and therefore there appear to be no impediments to prompt resolution of debts that are several years old. However, the majority of Applicant's financial delinquencies remain unresolved.

Overall, the record evidence leaves me with questions and doubts about Applicant's judgment as well as his eligibility and suitability for a security clearance. For

these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies.

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
Subparagraph 1.a.:	For Applicant
Subparagraphs 1.b - 1.e.:	Against Applicant
Subparagraph 1.f.:	For Applicant
Subparagraphs 1.g. - 1.l.:	Against Applicant
Subparagraph 1.m.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Joan Caton Anthony
Administrative Judge