



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 11-02781
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines F (Financial Considerations) and E (Personal Conduct). Clearance is granted.

Statement of the Case

On July 7, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 30, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). 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 March 20, 2012. DOHA received his Answer on April 6, 2012. Department Counsel was prepared to proceed on April 24, 2012. The

case was previously assigned to another administrative judge on May 1, 2012, and was reassigned to me on June 26, 2012. DOHA issued a notice of hearing on July 3, 2012, scheduling the hearing for July 26, 2012. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 10, which were received into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A, a three-ring binder with dividers, which was received into evidence without objection. DOHA received the hearing transcript (Tr.) on August 6, 2012.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a. through 1.h. and 1.k. through 1.m., and denied the remaining allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 55-year-old production operations manager, who has worked for a defense contractor since January 1981. He seeks to retain his secret security clearance that he has held for the better part of the 30 years of that employment. (Tr. 9, 18-21, GE 1.)

Applicant graduated from high school in June 1975. Three months later, he enlisted in the U.S. Marine Corps for four years. He served in the Marine Corps from September 1975 to September 1979, and was honorably discharged. Applicant was awarded a Bachelor of Science degree in production management in May 1979, and was awarded a Master's degree in international business in June 1993. (Tr. 16-18.) Applicant's marriage from May 1988 to March 1998 ended by divorce. He has two adult children from that marriage. (Tr. 21, GE 1.)

Financial Considerations

Applicant's SOR identified 15 debts totalling \$82,191. His largest debt, which made up the vast majority of his debt total, was a home mortgage that had gone into foreclosure.

Applicant was able to demonstrate significant progress in regaining financial responsibility. The first six SOR debts pertain to medical expenses Applicant incurred following shoulder surgery. Five of those six debts are no longer a concern because they have been paid or have been successfully disputed. The sixth debt was a valid medical debt for \$91 that Applicant paid on June 21, 2012. (SOR ¶¶ 1.a. – 1.f.) (Tr. 22-24, AE A.)

Furthermore, Applicant was able to demonstrate similar progress with the remaining nine debts. With the exception of the debt listed in SOR ¶ 1.j., which is a

past-due amount of \$60,000 on a home equity loan and is Applicant's largest debt, and the debt listed in SOR ¶ 1.n., which is a collection account for \$137 owed to a telephone company, all of the remaining debts have been resolved, which means the debts have been paid or a settlement has been reached and Applicant is honoring his settlements.

SOR debts in ¶¶ 1.i. and 1.o. have merged and have been paid, and the SOR debts in ¶¶ 1.m. and 1.h. have merged and are being paid. With regard to the past-due mortgage, Applicant has been in contact with his lender over the past several years attempting to reach a loan modification or settlement. He ultimately retained counsel to resolve this debt and negotiations are ongoing. Lastly, Applicant contacted the telephone company in writing to settle his account in SOR ¶ 1.n. and they have yet to respond to him. The \$137 collection account owed to the telephone company no longer appears on his credit report. Applicant provided ample documentation supporting all of the above. (Tr. 24-44, AE A.)

Applicant attributes his financial difficulties to uncovered medical expenses for himself and his son, post-divorce legal expenses, uncovered expenses related to the illness and death of his twin sister, and legal expenses paid on behalf of his son. (SOR answer, GE 3, Tr. 54-59.)

Additionally, Applicant retained the services of a debt counseling service on February 29, 2012, and also retained counsel to address overpaying child support to his former spouse, a matter not raised in his SOR. He remains fully engaged in the resolution of all of his remaining debts and has provided a budget reflecting financial responsibility. (AE A.)

Personal Conduct

The SOR alleged that Applicant falsified his July 2010 e-QIP by failing to list the extent of his indebtedness as reflected above, and that he falsified his February 2000 and July 2010 e-QIPs by failing to list a purported 1975 felony arrest. He credibly testified that his failure to list his debts was an oversight and that he was subsequently forthright regarding his debts during his August 2010 Office of Personnel Management (OPM) interview. Also, after realizing his mistake, Applicant resubmitted corrected e-QIPs to his security officer that reflected the extent of his financial problems.

Applicant further provided documentation that the purported 1975 "felony" arrest was for throwing oranges at a car when he was 18 years old before he joined the Marine Corps. This arrest was disclosed at the time Applicant enlisted in the Marine Corps as well as during his numerous security clearance renewals since beginning his current employment in 1981. Applicant provided documentation indicating that he was arrested for disorderly conduct that was apparently classified incorrectly as a felony. In any event, Applicant demonstrated that he had a sufficient basis to believe that his orange-throwing incident was not a felony as reflected in the documentation that he provided at his hearing. (SOR answer, Tr. 44-54.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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, these guidelines are applied 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 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

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 financial considerations 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." Applicant's history of delinquent debt is established by the evidence presented. He accumulated numerous debts that were in various states of delinquency for several years. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

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)). However, he receives partial credit under AG ¶ 20(a) because the debt occurred under circumstances that are unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant merits partial credit under AG ¶ 20(b) because of his legal expenses following his divorce and legal expenses paid on behalf of his son, as well as, uncovered family medical expenses. These factors were circumstances beyond his control, and with his available resources, he acted responsibly under the circumstances. Even though he did not have the funds for full repayment, he remained in contact with his creditors and took reasonable steps to resolve his debts.¹

AG ¶ 20(c) is applicable because Applicant sought financial counseling through a debt counseling service. He also retained the services of an attorney to assist him in resolving child support arrearages owed to him from his former wife. He has provided ample documentation demonstrating that his financial problems are resolved and are under control. Furthermore, there is sufficient information to establish mitigation under AG ¶ 20(d).² Applicant has resolved most of his SOR debts by either repaying them in full or setting up payment plans. Given his financial situation, Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is applicable for those debts he successfully challenged because they were either paid, were duplicates, or did not belong to him.

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] 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 she maintained contact with her creditors and attempted to negotiate partial payments to keep his debts current.

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)).

Personal Conduct

Posing potential security concerns are Applicant's documented omissions of his indebtedness on his February 2000 and July 2010 e-QIPs. His omissions are, however, attributable to an honest mistake and uncertainty about the status of his debts or the validity of a purported felony arrest that had occurred when he was 18. While Applicant could reasonably have been expected to be more diligent about checking on the status of his debts and past arrest, his judgment lapses are not enough to impute knowing and willful falsification under Guideline E. There being no misconduct substantiated, there is no need to discuss extenuation or mitigation. *Cf.* ISCR Case No. 02-13568 (February 13, 2004). I conclude he did not knowingly attempt to mislead the Government when completing his e-QIPs.

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 discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's record of service as a defense-contract employee weighs heavily in his favor. He is a law-abiding citizen and a productive member of society. Applicant is current on his day-to-day expenses, lives within his means, and his SOR debts have been addressed and are resolved.

As established by the record, Applicant is making a significant contribution to the national defense and his company supports him. Due to circumstances beyond his control, his debts became delinquent. Despite Applicant's financial setback, it is clear that he will make a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

The applicable mitigating conditions and the whole-person analysis support a favorable decision. I specifically considered Applicant's employment record, the obstacles he overcame, the substantial steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, his past military service, his years of successfully holding a security clearance, and his testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the security concerns raised.

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 fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is 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:	FOR APPLICANT
Subparagraphs 1.a. to 1.o.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. to 2.c.:	For Applicant

Conclusion

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

Robert J. Tuidor
Administrative Judge