



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-02164
)
Applicant for Security Clearance)

Appearances

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

03/14/2014

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 November 30, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On September 10, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) 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 September 26, 2013. His SOR answer was received by the DOD CAF on October 2, 2013. Department Counsel was prepared to

proceed on November 6, 2013. The case was assigned to me on November 18, 2013. DOHA issued a notice of hearing on November 19, 2013, scheduling the hearing for December 4, 2013. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through K, which were received into evidence without objection.

I held the record open until December 20, 2013, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE L through N, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on December 11, 2013.

Findings of Fact

Applicant admitted with explanation SOR ¶ 1.a, the sole allegation. The answer with explanation is 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 35-year-old driver firefighter, who has worked for a defense contractor since March 2005. He seeks to retain his secret security clearance, which is a requirement of his continued employment. He previously held a secret security clearance when he was employed by a defense contractor from January 2001 to March 2005. (Tr. 18-20, GE 1.)

Applicant graduated from high school in June 1997. He graduated from community college in December 2010 and was awarded an associate's degree in general studies. (Tr. 17-18.) Applicant served in the U.S. Army from September 1997 to September 2001, and was honorably discharged as a specialist 4 (pay grade E-4). His military occupational specialty in the Army was 51M (firefighter). (Tr. 20-22, AE L.)

Applicant was previously married from September 1999 to June 2004, and that marriage ended by divorce. He remarried in January 2008, and has a two-year-old son with his second wife. (Tr. 11, 21, GE 1, GE 2.) His wife works full-time at a bookstore. Applicant's annual salary is \$72,000 and his wife's annual salary is \$18,000, for a combined annual salary of \$90,000. (Tr. 21-22.)

Financial Considerations

Applicant's SOR consists of one allegation of an August 2011 \$33,916 deficiency judgment against him. (SOR ¶ 1.a.) In August 2005, Applicant purchased a vacant lot for \$76,000. He put \$20,000 down and financed the balance. At the time he purchased the lot, he planned to build a family home on it. In 2006, however, he

decided the location would not suit his family's needs and put the lot up for sale. He actively tried to sell the lot from 2006 to 2010. Unfortunately during this timeframe, the real estate market crashed and a local Government employer had a major drawdown that resulted in significant layoffs. Despite Applicant's best efforts, which included lowering his price several times, he was unable to sell the lot. He reached the point where he was unable to continue making the \$600 monthly payments on an empty lot and maintain payments on a home that he had purchased in April 2010. Applicant consulted an attorney and was advised to stop making payments on the empty lot and let the lot go into foreclosure. Following that advice, the bank foreclosed on the vacant lot in April 2011 and sold the land at auction. After the lot was sold, the bank secured a deficiency judgment against Applicant for \$38,916. (Tr. 11, 22-33, GE 2.)

Applicant submitted documentation that his counsel initiated legal action in July 2013 to contest the bank's ability to collect the deficiency judgment. The court ruled in Applicant's favor in October 2013, and the debt in question is no longer enforceable. (AE A – AE K.)

Character Evidence

Applicant submitted his DD-214 and two reference letters. The first letter is from his project manager and chief, who has supervised Applicant since March 2005. His chief discussed Applicant's job duties, addressed his trustworthiness, and recommended him for a security clearance. The second letter is from an eight-year family friend, who discussed Applicant's work ethic and dedication as a provider, husband, and father. (AE M – AE N.)

Applicant's budget and testimony demonstrates that he lives within his means, is current on his debts, and has \$18,000 in savings. (GE 2, Tr. 31-33.) Applicant primarily spends his discretionary free time with his wife and son and secondarily on his hobbies, which are wood working and cooking. (Tr. 35.)

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 *a/so* 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 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

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."

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 warrants full application of AG ¶ 20(a) because his sole debt was infrequent, occurred under such circumstances that it is unlikely to recur, and based

on record evidence, does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant merits full credit under AG ¶ 20(b) because of the unexpected downturn in real estate and adverse impact on the local economy following the drawdown of a large local Government employer. These factors were circumstances beyond his control, and despite his limited resources he acted responsibly under the circumstances. Even though he did not have the funds to remain current on his empty lot and support his family, he remained in contact with his creditors and took reasonable steps to resolve his debts.¹

AG ¶¶ 20(c) 20(d), and 20(e) are applicable because Applicant resolved his sole debt after his attorney successfully challenged it in court and Applicant provided documentation of same.

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.

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 he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

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

As noted by his reference, Applicant is making a significant contribution to the national defense. His company fully supports him and recommends him for a security clearance. Due to circumstances beyond his control, his debt became delinquent. Despite Applicant's financial setback, it is clear that he had made 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 past military service, employment record, the substantial steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, his reference letters, 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

Subparagraph 1.a: 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