



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 12-02245
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

10/01/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 4, 2010. On April 28, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on May 19, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 30, 2014, and the case was assigned to me on August 1, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 8, 2014, scheduling the hearing for August 28, 2014. I convened the hearing as scheduled. Government

Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on September 8, 2014.

I kept the record open until September 15, 2014, to enable Applicant to submit additional documentary evidence. At Applicant's request, I extended the deadline to September 19, 2014. Applicant timely submitted AX I through Z, which were admitted without objection. Department Counsel's comments regarding AX I through Z are attached to the record as Hearing Exhibit (HX) I.¹

Amendment of the SOR

On my own motion, without objection from either party, I amended the second sentence of SOR ¶ 1.b by deleting the words, "bankruptcy was" and substituting the words "dischargeable debts were." The second sentence, as amended, alleges, "The dischargeable debts were discharged in or about December 2012."

Evidentiary Issue

Department Counsel offered an unauthenticated summary of a personal subject interview conducted in December 2010, which was part of a report of investigation conducted by the Office of Personnel Management for the DOD. (GX 9; Tr. 26-27.) Because Applicant declined to waive the authentication requirement of Directive ¶ E3.1.20, I did not admit the document.

Findings of Fact

In his answer to the SOR, Applicant admitted both allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 44-year-old test engineering manager employed by a defense contractor. He has worked for his current employer since August 1990. (Tr. 54.) He worked for another defense contractor from October 1996 to July 1997 and then returned to his current employer. He attended a community college as a full-time student for about two years and part-time for two semesters, but he did not receive a degree. Tr. 52-53.)

Applicant has held a clearance since October 1997. He was appointed as the facility security officer (FSO) for his place of employment in September 2011. In August 2012, he was appointed as the corporate FSO for all facilities operated by his employer. (AX G; Tr. 46-47.)

¹ A copy of HX I, annotated to cross-reference the documents listed in HX I and Applicant's post-hearing submissions of AX I through Z, is attached to the record as HX II.

Throughout his career, Applicant has enjoyed a reputation for technical proficiency, hard work, dedication, innovation, and good judgment. (AX U at 1-9.) His most recent performance appraisal rated him above “meets requirements” and below “exceeds requirements.” (AX U at 14-19.) His evaluations for the four previous years commented favorably on his dependability, technical ability, judgment, and organizational skills. (AX U at 10-18.)

In December 2011, Applicant underwent his first security review as FSO. The Defense Security Service rated his employer’s security program as “satisfactory.” Subsequent reviews in January 2013, February 2013, August 2013, and February 2014, rated his employer’s security program as “commendable,” one level below the top rating of “superior.” (AX H.)

Applicant married in November 1992 and divorced in November 2013. Three children were born during the marriage, now ages 23, 21, and 19. The oldest has graduated from college and is self-supporting. The middle child is in college, living away from home. The youngest lives with Applicant and is a full-time student at an art institute.

Applicant’s wife began consuming alcohol excessively in about 2008, and her alcohol consumption began interfering with her job. She quit her job in January 2010, substantially reducing the family income. She went through alcohol rehabilitation programs twice and worked part-time briefly, but never returned to full-time employment. (Tr. 74-77; GX-7.) Applicant’s federal income tax returns reflected family income from wages and salaries of \$104,318 for 2007; \$110,975 for 2008; \$116,450 for 2009²; \$96,139 for 2010; \$87,550 for 2011; \$96,379 for 2012; and \$100,957 for 2013. (AX A.) His current annual salary is about \$104,000. (Tr. 55.)

Applicant’s wife left the marital home in October 2011 and lived with her mother. She filed for divorce in January 2012, the marital stipulation was signed in April 2013, and the divorce was granted on October 30, 2013. The marital stipulation granted Applicant custody of their minor daughter, with no requirement that either party pay child support. The stipulation required Applicant to pay \$10,000 to support his wife, to be paid in a lump sum of \$5,000 followed by monthly \$250 payments for 20 consecutive months. He began making his monthly support payments in April 2013, and they are current. His marital support obligation will be satisfied in December 2014. (AX W.)

Applicant and his wife agreed that the marital home would be sold. They also agreed that if either party should file a bankruptcy petition that would cause the non-filing party to incur liability for a joint debt, the filing party would affirm the debt. (AX B.)

Applicant was unable to keep up the payments on the home. His monthly payments were \$1,937 on the first mortgage and \$680 on the second mortgage. In

² Applicant and his wife filed separate federal returns in 2009. He reported wages and salaries of \$84,790 and she reported \$31,660.

November 2011, he applied for a loan modification due to hardship, and he exchanged extensive correspondence with the lender. In August 2012, the lender agreed to reduce the monthly payments to \$1,734.55, and Applicant made two payments of the reduced amount. (AX I through M and O through T.) He stopped making payments when the divorce was final, because he intended to sell the home. He began negotiating with the lender about a short sale. When the lender expressed reluctance to approve a short sale, he offered a deed in lieu of foreclosure. (Tr. 41.) The offer was rejected by the lender because a subordinate lien holder would not agree to release its lien. (GX 8.)

Applicant filed a Chapter 7 bankruptcy petition in September 2012 and received a discharge in December 2012. He completed the financial counseling required by the bankruptcy court. He affirmed a debt for \$251,874, secured by a first mortgage on the marital home; a debt for \$62,408, secured by a second mortgage on the marital home; and a line of credit for \$18,228, also secured by the marital home. (AX C, Schedule D and Individual Debtor's Statement of Intention.) The remaining debts included an automobile loan, local property taxes, a student loan, multiple consumer debts, and a delinquent personal loan. (AX C, Schedules D through F.) The student loan for his son's college education and the property taxes on the marital home were not discharged. (Tr. 41, 58-61.)

In May 2014, Applicant's home loan was sold to another lender. (AX D.) The new lender was more receptive to a short sale and gave Applicant a list of realtors. (Tr. 42.) The property was listed for sale in June 2014. (AX E.) A prospective buyer submitted an offer in July 2014 (AX F.) The draft settlement statement provides for a sale price of \$186,000, with \$160,416 to be paid to the holder of the first mortgage. There is no provision for payoff of the second mortgage loan or the line of credit. (AX V, Settlement Statement (HUD-1).) Applicant testified that closing on the short sale was tentatively scheduled for September 1, 2014. (Tr. 44.) On September 4, 2014, he received an email from the lender stating that it was "in process of reviewing the value results along with the current offer submitted." (AX-V at 2.) When the record closed on September 19, 2014, the short sale had not yet been closed.

Since 2009, Applicant has withdrawn about \$60,000 from his 401k retirement fund. About \$10,000 was used to pay his son's college expenses, and the remainder was used to pay bills. He now has about \$5,000 in his retirement fund. (Tr. 69-71.) Applicant's bank records reflect that in 2010, he made two payments to an attorney totaling \$1,625 and five payments to his mortgage lender totaling \$17,380. In 2011, he paid \$875 in attorney's fees; \$4,446 in tuition for his son; two payments to his mortgage lender totaling \$14,403; and \$9,930 in past-due property taxes. In 2012, he paid \$2,500 in attorney's fees; \$735 in tuition; and \$10,000 in past-due property taxes. In 2013, he paid about \$3,500 in tuition and \$4,800 for a security deposit and first month's rent for his apartment. (AX-Y.)

In April 2013, Applicant was notified that he owed \$16,558 in federal income taxes. In August 2013, he received credit for \$6,668 in taxes withheld, reducing his indebtedness to \$10,634. He began making monthly \$148 payments in October 2013.

In March 2014, his tax refund for 2013 was applied to his indebtedness, reducing it to \$7,910. In April 2014, he increased his monthly payments to \$300. (AX X at 17-72; Tr. 83-86.) Applicant testified that his tax debt arose when his wife withdrew money from her retirement fund in 2010 but did not pay the penalty for an early withdrawal. He testified that he was unaware of her withdrawal from her retirement fund until he received the bill for unpaid taxes.

In May 2014, Applicant was notified that he owed \$5,294 in state income taxes. In the same month, he entered into a payment agreement providing for 36 payments of \$171.69, and he began making payments by automatic monthly deductions from his checking account. The projected interest and penalties during the payment period increased his debt to \$6,180. (AX X at 3-16.)

Applicant tracks his income and expenses in an Excel spread sheet. His budget for 2014 is based on a gross annual income of \$104,000 and projected annual expenses of \$48,597. ((Tr. 91; AX N.)

The unpaid property taxes, federal income taxes, and state income taxes were not alleged in the SOR. I have considered these debts for the limited purposes of evaluating Applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether Applicant has demonstrated successful rehabilitation; and as part of my whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

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 and 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 that 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 a delinquent home loan that is past due for \$39,533.91 (SOR ¶ 1.a). It also alleges that Applicant filed a Chapter 7 bankruptcy petition in September 2012, and his dischargeable debts were discharged in December 2012. (SOR ¶ 1.b.)

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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The credit reports in the record (GX 2 and GX 3) do not reflect the debt alleged in SOR ¶ 1.a. However, Applicant admitted the debt in his answer to the SOR, and the notice of default (GX 5) and the correspondence regarding his tender of a deed in lieu of foreclosure (GX 6) list the account number alleged in the SOR. Applicant's admissions in his response to the SOR, the correspondence admitted as GX 5 and GX 6, and the record of his Chapter 7 bankruptcy discharge establish two following disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) is partially established. Applicant's debts are recent and numerous, but they occurred under circumstances making them unlikely to recur. Applicant's financial problems were caused by his wife's alcohol problems, her decision to quit her job, and the breakup of their marriage. It is unlikely that he will find himself in a similar situation again.

AG ¶ 20(b) is established. Applicant's financial problems arose from his wife's alcoholism, her decision to quit her job, the breakup of their marriage, and his wife's decision to make withdrawals from her retirement account without telling him or arranging to pay the penalties for an early withdrawal. He has acted responsibly by staying in contact with his creditors, seeking to resolve his defaulted mortgage, and making arrangements to pay his delinquent federal and state taxes.

AG ¶ 20(c) is established. Applicant completed the counseling required by the bankruptcy court, and he is making steady progress toward resolving his delinquent debts.

AG ¶ 20(d) is not established for the debts discharged in bankruptcy. 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). A bankruptcy discharge is not a "good-faith" effort to resolve a debt. "[A]n 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 this [mitigating condition.]" ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006).

However, a good-faith effort is established for the debt alleged in SOR ¶ 1.a. A security clearance adjudication is aimed at evaluating an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) A person is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has a credible, realistic plan to resolve the delinquent debt in SOR ¶ 1.a, and he has taken significant steps to execute it.

Whole-Person Concept

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. In applying 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.

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 has worked for defense contractors and held a security clearance for many years. He has a reputation for responsible behavior. He was candid, sincere, and credible at the hearing. Although the debt in SOR ¶ 1.a is not fully resolved, he has demonstrated his commitment to putting his financial house in order. His available funds will soon increase when his support obligation to his ex-wife is satisfied. He has done everything he can do to resolve his delinquent debts, and I am satisfied that he will continue his efforts.

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 mitigated the security concerns based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his 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): FOR APPLICANT

Subparagraphs 1.a-1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge