



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 12-02696
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

12/20/2013

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) described one delinquent mortgage account for \$167,872 that went into foreclosure. He failed to provide sufficient documentation of progress resolving this debt. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 27, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 4) On July 16, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD 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). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On August 15, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated October 22, 2013, was provided to him on October 30, 2013.¹ Applicant e-mailed Department Counsel on November 19, 2013, that he did not have any response to the FORM. The case was assigned to me on December 12, 2013.

Findings of Fact²

Applicant admitted the allegation in SOR ¶ 1.a; however, he denied SOR ¶ 1, which quotes the concern in AG ¶ 18. (Item 3) He also provided a mitigating statement. He did not provide any corroborating documentation from creditors as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is 57 years old, and he has been employed as a senior mechanical engineer since 1991. He married in 1988, and he was divorced in 1995. In 2002, he married, and he has two children, who were born in 1989 and 1992, and three step-children, who were born in 1971, 1978, and 1979. He never served in the military. He earned a bachelor's degree in 1979. There is no evidence of criminal arrests, convictions, use of illegal drugs, or alcohol abuse.

In 2007, Applicant separated from his spouse.³ In October 2007, he purchased property PH for \$170,000, and his spouse remained in property CR. In August 2008, his daughter began attending college; she did not qualify for need-based financial assistance; and Applicant and his spouse each chose to pay half of her college tuition and expenses, which amounted to about \$10,000 to \$12,000 per year for Applicant's share. Applicant's mortgage payment for property PH was \$20,400 per year. Applicant stopped making his mortgage payments in October 2008, and property PH was foreclosed in October 2009. Applicant said he stopped making payments on his mortgage because he could not afford to pay his share of his daughter's tuition and still make the mortgage payments on property PH. In November 2009, Applicant and his spouse "reunited and resumed [their] marriage," and now they both reside in property CR. After about three months of not paying his mortgage, Applicant asked the creditor

¹The FORM is dated October 21, 2013. The DOHA transmittal letter is dated October 22, 2013, and Applicant's receipt is dated October 30, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Unless stated otherwise, Applicant's February 27, 2009 SF 86 and/or his October 7, 2011 Office of Personnel Management (OPM) personal subject interview (PSI) are the sources for the facts in the Statement of Facts. (Items 4, 5)

³Unless stated otherwise, the source for the facts in this paragraph and the next paragraph is Applicant's SOR response. (Item 3)

to renegotiate the mortgage; however, the creditor wanted him to bring the mortgage to current status. Applicant was unable to bring the mortgage to current status. Applicant said he disclosed the foreclosure to his security manager in August 2009; however, his JPAS incident history indicates he disclosed the foreclosure on June 7, 2010. (Item 6)

Applicant provided a November 2009 court order from a lawsuit involving Fannie Mae, also known as Federal National Mortgage Association, stating that the case was called for trial and “neither party to the cause of action appeared to answer the summons of the court.” The Court dismissed the case “for want of prosecution.”

When Applicant completed his February 21, 2009 SF 86, he stated that he did not have any debts currently over 90 days delinquent. He did not disclose any derogatory financial information. Applicant told the an Office of Personnel Management investigator during his personal subject interview (PSI) he did not disclose his delinquent mortgage because his mortgage had not yet gone into default or foreclosure status when he completed his SF 86. (OPM PSI at 6, Item 5)

Applicant said he received a letter from the creditor in October 2009 stating the mortgage company “had forgiven” him for the debt. *Id.* at 2. He said he still had possession of the letter. *Id.* He had no further contact with the creditor after October 2009. *Id.* In October 2009, Applicant was approximately 12 months or \$22,878 behind on his mortgage. *Id.* Applicant has not received financial counseling. *Id.* at 3. He did not provide a copy of the letter from his mortgage creditor that he referenced in his OPM PSI.

Applicant and his spouse’s monthly financial information is as follows: gross income is \$13,429; net income is \$10,600; monthly expenses are \$3,025; and net remainder is \$7,574. *Id.* Applicant had \$90,000 in his 401k account, and his spouse had \$180,000 in her 401k account. *Id.*

Applicant said he is a reliable, trustworthy, loyal, ethical, law-abiding, and responsible U.S. citizen.⁴ He is a sincere believer in freedom and security. Although he has had some financial difficulties, he would never jeopardize national security.

Applicant’s credit reports, OPM PSI, responses to DOHA interrogatories, and SOR response all establish an unresolved debt of approximately \$170,000. Applicant’s FORM repeatedly emphasized the absence of mitigating information and explained that the lack of evidence showing Applicant acted reasonably and responsibly “before, during, or after [the] financial hardship” occurred. (FORM at 3) The FORM suggested that Applicant investigate whether the foreclosure might not result in a debt because of “a State Anti-Deficiency law.” (FORM at 3) Applicant had 30 days from the receipt of the FORM in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. (FORM at 3-4) No additional information was submitted in response to the FORM.

⁴The source for the facts in this paragraph is Applicant's SOR response. (Item 3)

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 [or 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

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 credit reports, OPM PSI, responses to DOHA interrogatories, and SOR response. Applicant’s file documents one delinquent foreclosed mortgage debt of about \$170,000 that became delinquent in January 2009. 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;⁵ 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

⁵The 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)).

Applicant's conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to his SOR debt; however, he provided some mitigating information. Applicant's separation from his spouse and establishment of a separate household and the necessity of funding his daughter's college education are financial conditions largely beyond his control; however, he did not act responsibly under the circumstances. He did not describe any unemployment or changes in his income in the last six years. He did not establish that he could not have done more to pay his creditors and provide documentation of such efforts to DOHA.

In the state where property PH is located a deficiency judgment is a possibility:

[A] lender [may] obtain a deficiency judgment against the borrower [if] the property is sold at the foreclosure sale for less than the amount of the outstanding indebtedness. The amount of deficiency that can be sought is the difference of the amount of the outstanding indebtedness (including allowable fees and expenses related to the sale) minus either the fair market value of the property at the time of the foreclosure sale or the sales price of the property at the foreclosure sale. Unless a party requests a determination of fair market value at the time of the sale and provides competent evidence of the value, the court defaults to using the sales price for its calculation.

Katherine A. Tapley, *New Law Complicates Foreclosure Sales in Texas*, 41 St. Mary's L. J. 525, 537 (2010) (footnotes omitted). There is no evidence of the sale price at the foreclosure. There is no evidence that a deficiency judgment has been issued against Applicant, and it is well beyond the two years in which such a suit must be brought.⁶ Thus, Applicant may not owe anything to the creditor in SOR ¶ 1.a. Applicant, however, has not provided any documentation showing the status of the debt. A more fundamental problem of Applicant is that he provided evidence that he had ample financial resources to pay his mortgage using his net monthly remainder of \$7,574 or even to withdraw the funds from his 401k account. He did not show whether his daughter could have borrowed some of her tuition from student loan companies or why it was necessary for him to default on his mortgage for property PH.

In sum, Applicant did not provide any documentation, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the mortgage creditor for the year prior to his foreclosure. There is no financial documentation relating to this SOR creditor as follows: financial counseling; maintenance of contact with the SOR creditor;⁷ correspondence to or from

⁶See Tex. Prop. Code § 51.003(a) ("any action brought to recover the deficiency must be brought within two years of the foreclosure sale" in a nonjudicial foreclosure); Tex. Prop. Code § 51.004(b) (a suit to collect a deficiency in a judicial forfeiture case "must be brought not later than the 90th day after the date of the foreclosure sale"). Tex. Prop. Code §§ 51.0001-51.015 is available at <http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.51.htm>.

⁷"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

the SOR creditor; a credible debt dispute in light of his acceptance of responsibility in his SOR response; attempts to negotiate payment plans; or other evidence of progress or resolution of this SOR debt. There is insufficient evidence that his financial problems are being resolved, are under control, and will not occur in the future.

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.

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 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 is some evidence supporting approval of Applicant's clearance. Applicant's finances were adversely affected when he became separated from his spouse, and his daughter had unexpected college expenses. These are financial conditions largely beyond his control. He has an ample monthly net monthly remainder of \$7,574 and accumulated a substantial 401K account balance. He admitted responsibility for his mortgage debt. He has been employed by the same defense contractor since 1991, and for the last 22 years he had stable employment. There is no evidence of criminal conduct, abuse of alcohol or drugs, or other delinquent debts. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. He fell behind on his mortgage in 2009. His PFS showed a net monthly remainder of \$7,574, and he did

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 or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

not describe any payments after 2009 to his mortgage creditor. He could have made greater progress resolving and documenting resolution of his delinquent SOR debts. He did not provide documentary proof that he attempted to settle this delinquent debt and described no contact with the creditor after 2009. His failure to establish his financial responsibility shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 19. More documented financial progress is necessary to mitigate security concerns.

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. Financial considerations concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information at this time.

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:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge