



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 12-03028
)
Applicant for Security Clearance)

Appearances

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

11/03/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On February 4, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. On May 17, 2014, Applicant

answered the SOR and requested a hearing. This case was assigned to me on August 18, 2014. On September 12, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for September 26, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, while Applicant testified and offered a 66-page package of documents that was marked as Applicant Exhibit (AE) A. The record of the proceeding was left open until October 3, 2014, to provide Applicant an opportunity to present additional matters. He submitted documents that were marked as AE B through D. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on October 6, 2014.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor. He has been working for that employer since March 2010. He earned a high school equivalency certificate in 1984. He has been attending college since October 2010, but has not yet earned a degree. He served in the Air National Guard from August 1985 to January 2008, attained the grade of master sergeant (E-7), and was medically retired. He has been married twice. He married his current wife in November 1990. He has four children, ages 9, 19, 23 and 29. Three of his children and a five-year-old granddaughter live with him and his wife. He has held a security clearance without incident since 1985.¹

The SOR alleged that Applicant filed Chapter 7 bankruptcy in September 2013 (SOR ¶ 1.a) and that he had 22 delinquent debts totaling about \$92,918 (SOR ¶¶ 1.b through 1.w). In his Answer to the SOR, Applicant admitted all of the allegations with the exception of the debt in SOR ¶ 1.b, which alleged \$1,694 in past-due federal income taxes for 2010. His admissions are incorporated as findings of fact.²

Applicant attributed his financial problems to a medical problem that resulted in periods of unemployment. From August 1985 to January 2007, Applicant worked as a full-time civilian employee for the Air National Guard. Throughout that period, he also served as a part-time drilling guardsman. In about 2006, he was diagnosed with a heart condition and deemed disabled. His heart disorder was originally considered to be an inoperable, fatal condition. In 2007, he was medically retired from his civilian and military positions with the Air National Guard. In June 2008, he underwent an experimental surgery that was successful. He then went through a recovery period of a year and a half. While disabled, he began to fall behind on his financial obligations. In November 2009, he was allowed to begin working again. He first had a couple of

¹ Tr. 6-7, 25-27; GE 1; AE A.

² Applicant's Answer to the SOR.

seasonal part-time jobs with an intervening period of unemployment from about December 2009 to February 2010 before obtaining full-time employment.³

In about March 2010, Applicant moved to another state to obtain his current job. At that time, he was unable to sell his home at the former location due to a poor housing market. He worked with the bank on a short sale, but those efforts were not successful. His family continued to reside in the home for about nine months before moving to Applicant's present location. He eventually fell behind on the mortgage payments and surrendered the home back to the bank.⁴

As a result of his financial problems, Applicant decided to file Chapter 7 bankruptcy. The first lawyer that he hired became ill and was unable to complete the bankruptcy filing. He hired another lawyer and filed the bankruptcy petition in September 2013. The petition stated that he had \$212,861 in assets and \$272,793 in liabilities. The bankruptcy petition listed all of the debts alleged in SOR ¶¶ 1.c through 1.w. In January 2014, Applicant was granted a Chapter 7 bankruptcy discharge.⁵

In his Electronic Questionnaire for Investigations Processing (e-QIP), Applicant listed that he owed the federal government about \$1,500 for past-due income taxes for 2010. This deficiency was alleged in SOR ¶ 1.b and supposedly resulted from the tax consequences of Applicant withdrawing money from an individual retirement account. Applicant entered into an agreement to pay \$100 per month to the IRS on this deficiency. In 2011, Applicant hired a lawyer to prepare his upcoming income tax return. The lawyer determined that Applicant improperly prepared his 2010 income tax return and that he was entitled to a refund for that year. Applicant filed an amended income tax return for 2010 and eventually obtained a refund for that year.⁶

Since obtaining his current job, Applicant has been living within his means and has not incurred any new delinquent debts. His bankruptcy petition reflected that his and his wife's average net monthly income was \$5,487, their average monthly expenses were \$5,408, which left them a monthly remainder of about \$79. At the time of the hearing, they had about \$2,200 in a checking account and about \$100 in a savings account. Applicant's wife has Lyme disease. Due to that medical condition, she has been unemployed and disabled since 2000. She was gainfully employed with an insurance company before her health problems. While her medical disorder is not a direct cause of the alleged financial problems, it has had a long-term negative impact on their potential earnings.⁷

³ Tr. 25-28, 32; GE 1, 2; AE A; Applicant's Answer to the SOR.

⁴ Tr. 28-29, 35-37; GE 2.

⁵ Tr. 29, 38; GE 2; AE D.

⁶ Tr. 30-32; GE 1, 2; AE A.

⁷ Tr. 39-43.

In a reference letter, Applicant's manager indicated that Applicant was trustworthy and respected by managers and coworkers. His work performance evaluations reflect that he meets or exceeds expectations and is recognized as a strong contributor.⁸

In the Air National Guard, Applicant was awarded the Air Force Commendation Medal and Air Force Achievement Medal. His enlisted evaluations reflected that he was an exceptional or outstanding performer. He received a number of cash and time-off awards.⁹

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, to reach his decision.

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 of 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), Section 3. Thus, a

⁸ AE A.

⁹ AE A.

clearance decision is merely an indication that the applicant has or 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 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

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

From about 2007 to 2010, Applicant accumulated delinquent debts that he was unable to satisfy. This evidence is sufficient to raise the above disqualifying 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; 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.

From 1985 to 2007, Applicant was gainfully employed with the Air National Guard. In 2006, he was diagnosed with a serious medical condition and shortly thereafter medically retired. As a result of these circumstances beyond his control, he was unemployed for almost three years and fell behind on his financial obligations. Following a successful surgery and lengthy recuperation, he was cleared to begin working again. He filed Chapter 7 bankruptcy to resolve his financial problems. His debts were discharged in that bankruptcy in early 2014. Since he began working again, he has not incurred any new delinquent debts. His financial problems are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a), 20(b), and 20(c) apply. AG ¶ 20(d) does not apply. He provided sufficient documentation to satisfactorily dispute the debt in SOR ¶ 1.b. AG ¶ 20(e) applies to the debt in SOR ¶ 1.b.

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).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. 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 served in military and civilian capacities with the Air National Guard for 22 years. He received many accolades for his Air National Guard service. In his current job, he is considered a strong contributor. He has resolved his financial problems through the bankruptcy process. With his financial problems behind him, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant mitigated the financial considerations security concerns.

Formal Findings

Formal findings 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 – 1.w: For Applicant

Decision

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

James F. Duffy
Administrative Judge