



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 12-03403
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: Jason R. Perry, Esq.

10/26/2012

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 October 20, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 2, 2012, 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 in an undated response. Department Counsel was prepared to proceed on May 16, 2012. The case was assigned 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 4, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through F, which were received into evidence without objection.

I held the record open until August 10, 2012, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE G through W, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on August 3, 2012.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a. through 1.d. and 1.j. through 1.u., and denied the remaining allegations. His answers 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 37-year-old material control specialist, who has worked for his current employer, a defense contractor, since August 2011. He is a first-time applicant for a security clearance. (Tr. 13, 23, GE 1.)

Applicant graduated from community college in May 2009 and was awarded an associate's degree. He has never married and currently has no dependents. Applicant lives with his girlfriend, who is pregnant. (Tr. 23-24, 43-44.) Applicant served in the U.S. Army Reserve from 1995 to 2003, and was honorably discharged as a specialist (pay grade E-4). His military occupational specialty was 88H (cargo specialist) and later as 88M (motor transport operator). (Tr. 23-27, 41-42, GE 2.)

Financial Considerations

Applicant's SOR identified 22 debts totalling \$99,294. The vast majority of his debts were student loans. He was able to demonstrate remarkable progress in regaining financial responsibility. Applicant has paid in full seven debts (SOR ¶¶ 1.a., 1.b., 1.k., 1.o., 1.s., 1.t., and 1.v. He consolidated or set up payment plans for his student loans, which included 13 SOR debts, and is making regular payments on those debts. (SOR ¶¶ 1.c. through 1.i., 1.l. through 1.n., 1.p. through 1.q., and 1.u.) He is making payments on one consumer debt. (SOR ¶¶ 1.j.) Lastly, he was unable to contact one of the 22 creditors after determining that the creditor went out of business on June 29, 2012. (SOR ¶ 1.r.) That particular debt no longer appears on his credit report. Applicant provided a matrix with supporting documentation that all the above took place or is taking place. (AE A – AE D, AE G – AE W, Tr. 28-41, 48-52, 54-64.)

Applicant attributes his financial difficulties to being unemployed or underemployed from August 2005 to May 2009. (Tr. 70, 72, GE 2.)

Personal Conduct

The SOR alleged that Applicant falsified his October 2010 e-QIP by failing to list the extent of his indebtedness as reflected above. He credibly testified that he did not list his student loans because he thought they were in a deferment status at the time he completed his e-QIP and that his smaller remaining debts would be paid off once he began work. Applicant added that he was given “a day or two” to complete his e-QIP by his prospective employer with little or no guidance. He did not list a judgment as alleged in the SOR because it was filed the month after he completed his e-QIP. Applicant was forthcoming about his debts when interviewed by an Office of Personnel (OPM) investigator in December 2010 and also at his hearing.¹ He acknowledged that he failed to provide accurate information pertaining to his financial situation, but added that such failure was not done deliberately. (Tr. 38-40, 48-51, 73, GE 2.)

Character Evidence

Applicant submitted two reference letters from an active duty Army major and an active duty Army staff sergeant. Both individuals have known the Applicant for a lengthy period of time. These Army personnel describe Applicant as a person of integrity, who is hard working and trustworthy. They both recommend him for a security clearance. (AE E, AE F.)

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.

¹ Applicant’s explanation of being hurried when completing his e-QIP is consistent with some of the other non-fatal errors on his e-QIP such as not listing whether he went by any other names or nicknames, not listing whether he holds or ever held multiple citizenships, not listing his county of birth, not listing his work telephone number, not listing his mobile telephone number, and misspelling the name of one of his references. (GE 1.)

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 22 debts totaling \$99,294 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 full credit under AG ¶ 20(b) because of a significant period of unemployment and underemployment from August 2005 to May 2009. 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 for full repayment, he remained in contact with his creditors and took reasonable steps to resolve his debts.²

²“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

AG ¶ 20(c) is only partially applicable because Applicant did not seek financial counseling; however, his financial problems are resolved and are under control. He has produced evidence that reflects that he has regained financial responsibility. There are clear indications that his financial problems are resolved. Furthermore, there is sufficient information to establish full mitigation under AG ¶ 20(d).³ Applicant has resolved all of his SOR debts by either repaying them in full or setting payment plans. He was unable to repay one of his creditors because that creditor is no longer in business. Given his financial situation, Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is not relevant insofar as Applicant has not contested the validity of any debt alleged.

Personal Conduct

Posing potential security concerns are Applicant's documented omissions of his indebtedness on the e-QIP he completed in October 2010. His omissions are, however, attributable to an honest mistake and uncertainty about the status of his debts. Insofar as failing to list his November 2010 judgment, the judgment had not materialized at the time he completed his e-QIP in October 2010. While Applicant could reasonably have been expected to be more diligent about checking on the status of his debts, 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 about his financial situation.

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.

³The 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)).

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 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 debts have been addressed and are resolved.

As noted by his references, 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 debts 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 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 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
Subparagraphs 1.a. to 1.v.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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