



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



In the matter of:)
)
) ISCR Case No. 15-02710
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

10/14/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines F (financial considerations) and J (criminal conduct). Clearance is granted.

Statement of the Case

On August 6, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On October 13, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F and J. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it

recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued.

On November 17, 2015, Applicant responded to the SOR. On February 29, 2016, Department Counsel was ready to proceed. On March 9, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On April 1, 2016, DOHA issued a notice of hearing setting the hearing for April 20, 2016. The hearing was convened as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 7, which were received into evidence without objection. Applicant testified, did not call any witnesses, and did not offer any exhibits. On April 28, 2016, DOHA received the transcript (Tr.) At the conclusion of the hearing, I held the record open until May 20, 2016, and subsequently granted Applicant two extensions until July 29, 2016, and August 31, 2016, to afford him an opportunity to submit additional evidence. Applicant submitted Applicant Exhibits (AE) AE A through V, which were received into evidence without objection.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, 1.d – 1.f, 1.h, 1.i, 1.m, 1.n, 2.a, 2.b, and 2.d; and denied SOR ¶¶ 1.c, 1.g, 1.j – 1.l, and 2.c. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 35-year-old cost analyst employed by a defense contractor since August 2014. He seeks to retain his secret security clearance as a condition of his continued employment. Applicant has successfully held a security clearance since 2008 when he began working for a defense contractor. (GE 1; Tr. 15-17)

Applicant graduated from high school in May 1999. He was awarded a bachelor of science degree in finance in May 2004. Applicant is "one class away" from earning a second bachelor of science degree in accounting, which he undertook to take the certified public accounting examination, but "things change[d]." He also took several graduate-level courses through his employer. (GE 1; Tr. 17-20)

Applicant was married from June 2004 to January 2014, and that marriage ended by divorce. He has a 15-year-old daughter and a 10-year-old son from that marriage. Applicant's children reside with their mother and he pays her \$352 in monthly child support. His former spouse works full-time in a doctor's office. Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 20-24)

Financial Considerations

Applicant's SOR lists 14 allegations under this concern. One allegation is a Chapter 13 bankruptcy filed in November 2011 that was dismissed in January 2014. (SOR ¶ 1.a) The remaining 13 allegations document debts totaling \$171,256. (SOR ¶¶ 1.a – 1.n; SOR answer; AE G)

Applicant attributes his financial problems stemming from three layoffs in 2006, 2009, and 2010, underemployment, and his 2014 divorce. (Tr. 24-28) Unable to make his mortgage payments after his 2010 layoff, Applicant filed under Chapter 13 primarily to prevent the loss of his home. His Chapter 13 was dismissed when Applicant was unable to make payments under the wage earner's plan due to lack of income. (Tr. 28-31)

On May 19, 2016, Applicant filed Chapter 7 bankruptcy. On his petition, he listed assets of \$131,250, and liabilities of \$197,983. (AE P, AE R) On August 24, 2016, he filed an amended petition that listed assets of \$135,388, and liabilities of \$232,210. (Tr. 30-57; AE L, AE P, AE V) Applicant was granted a discharge on August 18, 2016. (AE P, AE U) His SOR debts were included in his Chapter 7 bankruptcy. (AE P, AE S)

On August 18, 2016, Applicant completed the mandatory financial counseling as part of the bankruptcy process. (AE P, AE T) Applicant's gross annual income is \$67,500. His gross monthly income is \$5,625, his net monthly income is \$3,733, and his net monthly remainder is \$363. Applicant's monthly budget reflects that he is living a modest lifestyle and living within his means. (Tr. 57-62; AE P, AE V)

Criminal Conduct

Applicant's SOR lists four allegations under this concern. These allegations all occurred while Applicant was going through a contentious divorce. In March 2013, he was arrested and charged with violence and criminal trespass and issued a protection from abuse order. In September 2013, he was again arrested and charged with domestic violence, criminal mischief, and violation of a protection and abuse order. He testified that his former spouse was manipulating the legal system and that all of the charges against him were subsequently dismissed. He corroborated his testimony with post-hearing documentation. Applicant further testified that he was seeking to have those arrest records expunged. (SOR ¶¶ 1.a -1.d; SOR answer; Tr. 62-77; AE C – F, AE H – K)

Character Evidence

Applicant submitted three reference letters from former co-workers. All of these individuals stated that Applicant was trustworthy, contributing to the national defense, and recommended him for a security clearance. One of the individuals is a former Air

Force officer and pointed out that the acquisition field needs qualified people like the Applicant. (AE B, AE M, AE O)

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 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 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. The Government established disqualifying conditions 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.

AG ¶¶ 20(a) through 20(c) apply. Appellant's finances were adversely affected by his divorce, unemployment, and underemployment, which are conditions largely beyond his control. He acted responsibly under the circumstances on August 18, 2016, when all of his delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code.¹ It was evident that Applicant found himself in a difficult situation, but he has managed to overcome what he no doubt thought was an overwhelming life event and is in the process of regaining financial responsibility.

Appellant received financial counseling and generated a budget as part of the bankruptcy process. His negative financial situation "occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [Appellant's] current reliability, trustworthiness, or good judgment" under AG ¶ 20(a). He "acted responsibly under the circumstances," and "the problem is being resolved or is under control" as required under AG ¶¶ 20(b) and 20(c). Appellant did not provide documentation showing he disputed any of his SOR debts, and AG ¶ 20(e) does not apply to any of his SOR debts.

In sum, Appellant has mitigated all of the delinquent debts listed on his SOR. He has not generated any new delinquent debts after his nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. His resolution of his delinquent debts through the bankruptcy process shows sufficient effort, good

¹There is some duplication of debts in Appellant's bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Appellant failed to list some nonpriority unsecured debts on his bankruptcy schedule, this failure to list such debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), but see *First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Some categories of priority obligations are listed on bankruptcy schedules, but are not discharged by bankruptcy, such as tax debts, student loan debts, and child support obligations.

judgment, trustworthiness, and reliability to warrant mitigation of financial considerations concerns.

Criminal Conduct

AG ¶ 30 articulates the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 provides two criminal conduct disqualifying conditions that could raise a security concern and may be disqualifying in this case, "(a) a single serious crime or multiple lesser offenses"; and "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." The Government established disqualifying conditions AG ¶¶ 31(a) and 31(c) by the evidence presented.

Four criminal conduct mitigating conditions under AG ¶¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 31(a) and (d) are fully applicable. The purported criminal conduct occurred in 2013 while Applicant was going through a contested divorce. He demonstrated that such conduct occurred under "such unusual circumstances that it is unlikely to recur." The charges were subsequently dismissed and Applicant is attempting to have the charges expunged from his record. AG ¶¶ 31(b) and (c) are not relevant.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the whole-person concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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 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 Guidelines F and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The rationale for continuing Applicant's clearance is more substantial than the reasons for denying his clearance. Applicant is a 35-year-old cost analyst, who has been working in the defense industry since 2008. In 2004, Appellant married, and in 2014, he divorced. He provides child support for his two children and remains involved in their lives. Appellant's former co-workers share a high opinion of him and recommend him for a security clearance.

Appellant acted responsibly under the circumstances when all of his delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. He has received a fresh financial start. He is motivated to continue his career as a defense contractor. He understands that he needs to pay his debts, and the conduct required to retain his security clearance.

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.

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.n: For Applicant

Paragraph 2, Guideline J: FOR APPLICANT

Subparagraphs 2.a to 2.d: 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. Clearance is granted.

Robert J. Tuidor
Administrative Judge