



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



In the matter of:)
)
) ISCR Case No. 16-03510
)
Applicant for Security Clearance)

Appearances

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

02/05/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On January 15, 2016, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 26, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (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). 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 or revoked.

On February 14, 2017, Applicant responded to the SOR. On March 6, 2017, 2014, Department Counsel was ready to proceed. On May 16, 2017, the Defense Office of Hearings and Appeals Office (DOHA) assigned Applicant's case to me. On May 18, 2017, DOHA issued a hearing notice, setting the hearing for June 13, 2017. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant did not call any witnesses, testified, and did not offer any exhibits.

I held the record open until July 28, 2017, and granted an extension until November 9, 2017, to afford Applicant the opportunity to submit evidence. Applicant timely submitted Applicant Exhibits (AE) A through K, which were received into evidence without objection. On June 21, 2017, DOHA received the hearing transcript (Tr.).

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs, as required.¹

Findings of Fact

In his SOR answer, Applicant admitted all of the allegations with explanations. Applicant's answers and explanations 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 60-year-old supervisory engineer employed by a defense contractor since July 2016. He seeks to retain his secret security clearance, which is a requirement of his continued employment. Applicant has successfully held a security clearance since 1981 when he began working in the defense industry, a 37-year period. (GE 1, Tr. 10-12, 40)

Applicant graduated from high school in May 1975. He was awarded a bachelor of science degree in mechanical engineering in May 1981. Applicant married in May

¹ The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

1993, and has an adult son and an adult stepson. His wife retired as an elementary school cook in May 2017. Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 12-15)

Financial Considerations

Applicant's SOR contains two separate debts: (1) a credit card collection account for \$28,860; and (2) a home equity collection account for \$23,545. (SOR ¶¶ 1.a and 1.b)

Applicant attributes his financial problems to two unexpected medical emergencies that occurred during the timeframe of 2011 through 2014. The first was being diagnosed with Graves' disease. Applicant's treatment included removal of his thyroid and extensive radiation treatments. Shortly after recovering from Graves' disease, he was diagnosed with prostate cancer, which required additional treatment. He lives in a rural community with limited medical care and had to seek treatment with out of network providers. As a result, he incurred over \$20,000 in uncovered medical bills. Applicant stated that he fell behind on his credit card bills and ran up a home equity loan "to the max." During this time, Applicant was also helping put his son through college. (Tr. 16-19, 26-31)

Applicant attempted to negotiate settlements with his SOR creditors. When those attempts proved to be unsuccessful, he retained the services of a debt consolidation company (DCC) in 2010. Applicant paid the DCC about \$14,000 over a two-year period, but the DCC failed to pay down the debts as agreed and Applicant ceased doing business with them. Applicant then tried to withdraw funds from his 401K account to pay off these debts, but was unable to do so because he did not qualify for a hardship withdrawal. (SOR answer; Tr. 19-23, 32-35)

At his hearing, Applicant stated that he had retained the services of a bankruptcy attorney and requested additional time to follow through with completing the bankruptcy process. (Tr. 25-26, 36, 39-42) He stated that, "I plan on working until I get out of the mess, get some of the debt cleared up." (39)

Post-hearing, Applicant's bankruptcy attorney provided documentation that he had filed a Chapter 13 bankruptcy petition on October 24, 2017, with further documentation that bi-weekly payments of \$1,151 are withheld from his payroll and forwarded directly to the Chapter 13 Trustee. Both of Applicant's SOR debts are included in that petition. Applicant completed the mandatory financial counseling required to file bankruptcy. His budget reflects a net monthly income of \$1,460. (AE B, AE J) SOR DEBTS ¶¶ 1.a AND 1.b ARE BEING RESOLVED.

Character Evidence

Applicant submitted three work-related reference letters, one from a co-worker and two from supervisors. His co-worker has known him "since 1990" and the two

supervisors have known him since the “early 80’s” and “over twenty years,” respectively. The letters collectively describe Applicant as conscientious, honest, and trustworthy. (AE C - E) Applicant’s most recent performance evaluations document top-level performance. (AE G, AE H) His reference letters and performance evaluations reflect his past contributions to the national defense.

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 for financial problems:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; and “(c) a history of not meeting financial obligations.” The Government established disqualifying conditions AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists five potential mitigating conditions:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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.

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).

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. 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)). Nevertheless, he receives credit under AG ¶ 20(a) because the debts occurred under circumstances that are unlikely to recur and his behavior does not cast doubt on his current reliability, trustworthiness, or good judgement.

Full application of AG ¶ 20(b) is warranted because of Applicant's medical emergencies were beyond his control and could not have been anticipated. AG ¶¶

20(c) and 20(d) are fully applicable. Applicant received the mandatory financial counseling required to file bankruptcy and is adhering to a good-faith effort to repay his creditors through his Chapter 13 wage earner plan. Before filing bankruptcy, Applicant attempted to resolve his debts with his creditors, but was unable to do so.² AG ¶ 20(e) is not relevant.

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.

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 37 years of sustained and honorable service in the defense industry weigh heavily 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 are being addressed. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he has paid off each

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

and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

After unsuccessfully trying to resolve his two SOR debts on his own, Applicant retained the services of a bankruptcy attorney. His attorney filed a Chapter 13 wage earner plan that includes repayment of Applicant’s two SOR debts. Due to circumstances beyond his control, his debts became delinquent. Despite Applicant’s recent financial setback, it is clear from his actions that he is in the process of regaining financial responsibility.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant’s years of financial responsibility before falling into debt, the circumstances that led to his financial difficulties, his financial recovery and steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, the mature and responsible manner in which he dealt with his situation, his performance evaluations, 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 financial considerations security concerns.

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 and 1.b: 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 Tuidor
Administrative Judge