



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-05624
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

08/11/2015

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On June 27, 2013, Applicant submitted a Questionnaire for National Security Positions (SF 86). On February 17, 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 Guideline F. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant 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 granted or denied.

On March 9, 2015, Applicant responded to the SOR. On May 20, 2015, Department Counsel was ready to proceed. On June 1, 2015, DOHA assigned Applicant's case to me. On June 11, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 8, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection.

Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A through P, which were received into evidence without objection. I held the record open until July 24, 2015 to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE Q through AE U, which were received into evidence without objection. On July 17, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant admitted SOR ¶¶ 1.a., 1.b., 1.d., and 1.e.; and denied SOR ¶ 1.c.; with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 44-year-old independent agent employed by a defense contractor since January 2008. He seeks a security clearance as a condition of his continued employment. (GE 1; Tr. 14-15, 41-42)

Applicant served in the Army National Guard from May 1990 to July 1992, was honorably discharged as a private first class (pay grade E-3). He was awarded an associate of arts degree in criminal justice in September 2010. (GE 1; AE K - AE L; Tr.15, 42-43)

Applicant was married from October 26, 1991 to July 1, 2007, and that marriage ended by divorce. He remarried on July 26, 2007. His current wife is employed full time as a registered nurse. (GE 1; Tr. 41) Applicant has an adult son who is working with him in the trucking business and an 11-year-old stepdaughter. (GE 1; Tr. 17, 19, 42)

Financial Considerations

Applicant's SOR alleges five allegations under this concern: a Chapter 7 Bankruptcy, a 2009 judgment, two charged-off accounts, and one collection account. (SOR ¶¶ 1.a – 1.e) Details regarding those five allegations and their status follow.

SOR ¶ 1.a – Chapter 7 Bankruptcy filed in 2005 and discharged in 2006. Applicant experienced a substantial income reduction as a result of his employer reducing his work hours in 2005, and he fell behind on his debts. He took a job in a different location to repay creditors. His absence from home led to his separation in 2006 and divorce in 2007. Applicant filed bankruptcy to recover from the debts he had at the time. (SOR answer; Tr. 24)

SOR ¶ 1.b – Judgment filed in 2009 in the amount of \$23,387 in favor of a vehicle lender. Applicant was unable to make his monthly payments and voluntarily returned the vehicle to the dealer. In 2012, he made payment arrangements with the creditor and has been making timely payments since then. **ACCOUNT BEING RESOLVED.** (SOR answer; Tr. 24-25, 29-32; AE E, AE Q)

SOR ¶ 1.c – Charged-off credit card account in the amount of \$600. This account was paid in full in March 2015. **ACCOUNT RESOLVED.** (SOR answer; Tr. 25; AE D)

SOR ¶ 1.d – Charged-off loan in the amount \$6,500. Applicant challenged the validity of this account and provided documentation substantiating his challenge. **ACCOUNT RESOLVED.** (SOR answer; Tr. 25-27, 32-35; GE 2; AE F)

SOR ¶ 1.e – Collection account for second mortgage in the amount of \$30,340. The property was sold at foreclosure in 2008 and proceeds from that sale satisfied debts owed and the lender provided Applicant with a Form 1099-C that he reported on his income tax return. Applicant's current credit report reflects a zero balance on this account. Additionally, a class action lawsuit was filed against Applicant's mortgage lender for engaging in deceptive mortgage lending practices. **ACCOUNT RESOLVED.** (SOR answer; Tr. 35-36, 40-41; AE I, AE P)

During cross-examination, Applicant testified that he filed his 2014 federal income tax return, but owed the Internal Revenue Service (IRS) "approximately \$10,000 to \$12,000." (Tr. 37) Applicant made payment arrangements with the IRS and provided documentation that he is current on his payments. (Tr. 37-39; AE Q – AE U)

Applicant submitted a current budget that reflects that he leads a modest lifestyle, is living within his means, and has a net monthly remainder of \$1,987. (Tr. 39-40; AE O) He also participated in formal financial counseling completing courses in "Setting Your Financial Goals and Creating a Budget," "Your Banking Relationship," "Understanding Credit and Credit Reports," "Introduction to Borrowing," "Introduction to Investing," "Identity Theft and Predatory Lending," and "Your Financial Life For Young Adults." (AE A)

Applicant had been the owner-operator of an independent trucking company since 1998. He sought to expand his company by adding a second set of equipment in 2001 and subsequently experienced costly mechanical breakdowns and driver-related issues. Applicant was unable to recover and in 2004, he sold his equipment and

closed his business. Shortly after he closed his business, he began working for a trucking company at about the same time the nation experienced a major economic downturn. During the timeframe from 2004 to 2007, he periodically had no work or income. Additionally and as noted, he separated from his wife in 2006, and divorced her in 2007. (Tr. 17, 43-44; AE N) Since Applicant began working for his current employer in January 2008, he has regained financial responsibility. (AE N)

Character Evidence

The Director of Government Operations for Applicant's employer submitted a reference letter on his behalf. Since 2008, Applicant has been employed by the same company as a driver and more recently as an independent agent. Applicant is "an absolute asset" to their company and is an individual with the "highest standards of integrity." Applicant accumulated numerous accolades from customers as well as being the recipient of "awards from motorists for his selfless acts of heroism performed on the highways." (AE M)

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

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 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 documented by the evidence establishing 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.

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 partial credit under AG ¶ 20(a), because his 10-year-old bankruptcy and debts occurred under circumstances that are unlikely to recur and his behavior does not cast doubt on his current reliability, trustworthiness, or good judgment.

Full application of AG ¶ 20(b) is warranted. Applicant's trucking company sustained significant losses following mechanical breakdowns and employee-related problems. After Applicant sold his company, he went for period of time with no income from 2004 to 2007. He also separated in 2006 and divorced in 2007. None of these mitigating factors could have been anticipated. During this time, Applicant remained in contact with creditors.

AG ¶¶ 20(c) is fully applicable. Applicant received financial counseling and his financial problems are resolved and under control. AG ¶ 20(d) is also fully applicable.

As noted above, all of Applicant's debts are resolved or being resolved.¹ AG ¶ 20(e) is applicable to the charged-off debt alleged in SOR 1.d.

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). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence against mitigating Applicant's financial conduct. Credit reports submitted by the Government document his SOR delinquent accounts. This process has no doubt made an impression on Applicant and demonstrates the need to exercise diligence when monitoring one's credit.

The mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. There is no evidence of any security violations. Applicant is a law-abiding citizen and a productive member of society. His current financial problems were caused by factors beyond his control. Applicant's employment in the defense industry weighs heavily in his favor. He is current on his day-to-day expenses, lives within his means, and his SOR debts have been resolved or are being resolved. The Appeal Board has addressed a key element in the whole person analysis in financial cases stating:

¹"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 or she] maintained contact with [his or her] creditors and attempted to negotiate partial payments to keep [his or her] debts current.

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 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).

Applicant has achieved some important educational and employment goals, demonstrating his self-discipline, responsibility and dedication. He holds an associate of arts degree that he earned later in life. Applicant is making a significant contribution to the defense industry and is highly regarded by his employer and customers. I specifically considered Applicant’s years of financial responsibility before falling into debt, the circumstances that led to his financial difficulties, his financial recovery, the steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, his reference letter, and his testimony and demeanor.

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 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 - 1.e: | 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