



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-05798
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Ronald Sykstus, Esq.

07/31/2015

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 February 6, 2013, Applicant submitted a Questionnaire for National Security Positions (SF 86). On January 21, 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 (financial considerations). 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 continued or revoked.

On February 16, 2015, Applicant responded to the SOR with explanations. On April 2, 2015, Department Counsel was ready to proceed on Applicant's case. On April 8, 2015, DOHA assigned Applicant's case to me. On April 22, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for May 27, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were received into evidence without objection. Applicant testified, called three witnesses, and offered Applicant Exhibits (AE) A through F, which were received into evidence without objection. On June 4, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant admitted all of the SOR allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 60-year-old aviation sheet metal mechanic employed by a defense contractor since January 2013. He seeks a secret security clearance as a condition of his continued employment. (GE 1; Tr. 12-14)

Applicant graduated from high school in May 1972, and after high school he took "about a semester" of community college courses. (Tr. 18, 39-40) He served in the U.S. Air Force from May 1972 to December 1975, and was honorably discharged as a sergeant (pay grade E-4). (GE 1; Tr. 13, 18)

Applicant was previously married from August 1978 to May 1981, and that marriage ended by divorce. He remarried in January 2010. He has an adult son and daughter from his first marriage and an adult stepdaughter from his second marriage. Applicant's wife is employed as a full-time registered nurse at a dialysis center. (GE 1; Tr. 14-16, 19, 38, 43-44)

Financial Considerations

Applicant's SOR lists 16 debts – 10 collection accounts, 5 past-due accounts, and 1 judgment, totaling \$67,164. (SOR ¶¶ 1.a – 1.q)

Applicant's financial problems began when he was permanently laid off from a plant where he worked from October 1981 to January 2011. During his almost 30-year career at the plant, he was laid off "six to seven times" and had to file for unemployment. Applicant was unemployed for 15 months before he found his present

job. Without a steady income for 15 months, Applicant fell behind on his debts. (GE 1; Tr. 20-27, 31-36)

To address the debts, Applicant contacted a bankruptcy attorney and filed for Chapter 13 bankruptcy. On February 24, 2015, Applicant filed his Chapter 13 bankruptcy petition. On May 13, 2015, Applicant's Chapter 13 petition was approved and a confirmation order was issued. His Summary of Schedules lists \$74,466 in liabilities. All of the SOR debts were addressed in the bankruptcy petition and order. Applicant completed financial counseling as part of the bankruptcy process. The terms of the order require Applicant to pay \$410 per month to the Chapter 13 Trustee for 60 months. As of the hearing date, Applicant had made three payments to the Trustee. (AE A – AE E; Tr. 27-30, 34-38, 40-41)

Applicant has no debts apart from than those included in his Chapter 13 bankruptcy. He is current on his federal and state income taxes. (Tr. 38-39) After Applicant pays his monthly bills to include his bankruptcy payment, his net monthly remainder is "\$1,000 to \$1,500." (AE E; Tr. 57)

Character Evidence

Applicant submitted a reference letter from his former supervisor. His former supervisor stated that Applicant was an excellent worker, punctual, and trustworthy. (AE F)

Three witnesses testified on Applicant's behalf – his wife, a fellow church member, who has known Applicant for 10 years, and a former co-worker and fellow church member, who has known Applicant for 20 years. The witnesses provided favorable testimony about Applicant's character, work ethic, and trustworthiness. (Tr. 42-70)

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.

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 the 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 was permanently laid off from a plant after a 30-year career and was unemployed for 15 months. During that 30-year career, he experienced five to six layoffs. He struggled to find a job and fell behind on his debts. These layoffs as well as being permanently being laid off could not be anticipated. Applicant initially remained in contact with his creditors, but reached a point where he simply did not have the money to pay them.

AG ¶¶ 20(c) and 20(d) are fully applicable. Applicant took a financial counseling course as part of the Chapter 13 bankruptcy process and his finances are under control. Rather than file Chapter 7 bankruptcy, he chose to file Chapter 13 bankruptcy and is repaying his creditors. As of his hearing date, he had made three payments to the Trustee. Having heard his testimony, as well as the testimony of his wife, this process has made a substantial impression on Applicant. He conveyed that he is determined to follow through on his payments and not jeopardize his security clearance.¹ 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.

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

Applicant's 41 months of honorable service in the Air Force, his 30-year career with his previous employer, and current employment with a defense contractor weighs 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 have been resolved or are being resolved. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating 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's debts are being paid through the Chapter 13 bankruptcy process. Due to circumstances beyond his control, his debts became delinquent. Despite his financial setback, it is clear from Applicant's actions that he is on the road to a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

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, the steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, his reference letter, his testimony and demeanor, and the testimony of his witnesses. 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.

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.q: 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