



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-05794
)
 Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

May 23, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on February 24, 2010. On December 6, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on December 9, 2010; answered it on December 14, 2010; and requested a hearing before an administrative judge. DOHA received the request on December 20, 2010. Department Counsel was ready to proceed on January

3, 2011, and the case was assigned to me on January 13, 2011. DOHA issued a notice of hearing on February 10, 2011, scheduling the hearing for March 2, 2011. DOHA issued an amended notice of hearing on February 17, 2011, rescheduling the hearing for March 15, 2011. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Department Counsel presented one demonstrative exhibit summarizing the evidence, and it is attached to the record as Hearing Exhibit (HX) I. Applicant testified and presented the testimony of one witness. I kept the record open until April 4, 2011, to enable Applicant to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. Department Counsel's comments regarding AX A through G are attached to the record as HX II and HX III. DOHA received the transcript (Tr.) on March 23, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR except SOR ¶ 1.e, which he denied. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 54-year-old welder employed by a defense contractor. He has worked for his current employer since April 2004. He was granted a security clearance in December 1980, and he worked for a defense contractor until he was laid off in 1994. His clearance was administratively terminated when he was laid off. He worked as a welder in the private sector until he began his current job. As of the date of the hearing, he did not have a clearance. (Tr. 14.)

Applicant's supervisor, who has known him for about 10 years, describes him as pleasant, considerate, cooperative, and dependable. (AX C.) A coworker and neighbor has known Applicant for three years and considers him a conscientious, dependable employee with good work ethics. (AX B.)

Applicant served on active duty in the U.S. Navy from May 1977 to May 1980. He served in the Navy Reserve from May 1980 to May 1983. He received an honorable discharge.

Applicant married in July 1982. He and his wife have two adult children, ages 28 and 24. Their 24-year-old son and his pregnant wife live with them. (Tr. 25.)

Applicant and his wife filed a petition for Chapter 7 bankruptcy in November 2001 and received a discharge in February 2002. (GX 4 at 4.) Applicant could not recall what kinds of debts were discharged. He remembered that his daughter was in college at the time, but there was no particular event that triggered the bankruptcy, other than an accumulation of debts. (Tr. 37-38.) This bankruptcy is alleged in SOR ¶ 1.a.

Applicant and his wife accumulated several delinquent debts after their bankruptcy discharge, including debts of \$2,620 for a leased car and \$19,000 for new

siding and windows for their home. He told a security investigator that the leased-car debt was for excess mileage, but he testified that he surrendered the car because he could not afford it. (GX 2 at 7; Tr. 52.) Applicant recently used his federal income tax refund to pay the leased-car debt. (Tr. 51-52; GX 2 at 7.) The evidence regarding the five delinquent debts alleged in the SOR, including the debt for new siding and windows, is summarized below.

SOR ¶ 1.b (\$3,754 – collection account). This collection account was acquired from the creditor alleged in SOR ¶ 1.f in July 2009. Applicant has been making bi-weekly \$50 payments on this debt since June 2010. (AX D.)

SOR ¶ 1.c (\$1,305 – cell phone). In response to DOHA interrogatories in October 2010, Applicant stated that he was charged unfair fees, attempted to resolve them years ago, and had no success. He testified that he does not intend to pay this debt. He has not filed a written dispute with the creditor or the credit reporting agency. (Tr. 41-42.)

SOR ¶ 1.d (\$24,368 – home improvement loan). This debt was incurred when Applicant and his wife installed new siding and windows on their home. His credit report reflects that the account was opened in November 2006 and became delinquent in May 2008. (GX 4 at 9.) He testified that the creditor refused to accept partial payments. (Tr. 46.) In his response to DOHA interrogatories, he stated that the creditor offered to settle for \$16,000 or \$600 per month for two years. (Tr. 47-48; GX 2 at 1.) He attempted to refinance the debt with another lender but was turned down. (AX G.) He testified he tried to make a hardship withdrawal from his 401(k) account but was informed that his situation did not qualify as a hardship. (Tr. 37.)

SOR ¶ 1.e (\$159 – cell phone). Applicant testified he has never had a cell phone with the provider alleged in the SOR. He has not attempted to contact the provider. (Tr. 48-49.)

SOR ¶ 1.f (\$3,711 – credit card). This debt was acquired by the collection company alleged in SOR ¶ 1.b. (Answer to SOR; Tr. 49; GX 2 at 1; AX E.)

Applicant submitted a personal financial statement in October 2010. It reflected net household income of \$3,950, monthly expenses of \$1,229, debt payments of \$3,604, and a net remainder of \$345. The debt payments include Applicant's primary home mortgage and a \$33,000 home equity loan. (GX 2 at 3.) He testified that his home is worth \$185,000 and the balance on the first mortgage is \$145,000. (Tr. 35.) He testified that they used the home equity loan to buy a new furnace and to pay daily living expenses. (Tr. 45-46.)

Applicant testified that his food expenses increased by about \$200 per month and his utility bills increased by about \$100 per month after his son and pregnant daughter-in-law moved in with them. (Tr. 31-32.) His son is employed but does not contribute to the household expenses. His daughter-in-law is not employed. (Tr. 52.) As

of the date of the hearing, Applicant had about \$75 in his checking account, \$375 in savings, and about \$25,000 in his 401(k) retirement account. (Tr. 35-36.)

Applicant attributed their current financial difficulties to his wife's loss of employment due to illness. (Tr. 38-39.) His wife's Social Security Earnings Record reflects that her taxed social security earnings in 2002 were \$25,011. They dropped to \$18,387 in 2003, \$594 in 2004, and zero in 2005. Her earnings increased to \$1,860 in 2006, \$9,509 in 2007, \$11,945 in 2008, and \$13,000 in 2009. (AX F.) His wife testified that she suffered a severe knee injury at work in May 2004 and was laid off. She received Workmen's Compensation and eventually received a \$20,000 settlement for her work-related injury. She was out of work until she found a part-time retail sales job in October 2006. She also has had surgery for diverticulitis and a second surgery on her injured knee.

Applicant has never sought financial counseling. He testified that he was unaware that he could dispute entries on his credit report. (Tr. 53.)

Policies

"[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 made "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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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

The SOR alleges Applicant’s Chapter 7 bankruptcy in 2002 (SOR ¶ 1.a) and five delinquent debts (SOR ¶¶ 1.b-1.f). The concern under this guideline is set out in AG ¶ 18:

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.

Applicant’s financial history, established by his admissions, testimony at the hearing, and his credit reports, establishes three disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(e): consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

"A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather, a security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness in order to make a decision about an applicant's security eligibility." ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.)

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). This mitigating condition is not established because Applicant's delinquent debts are recent, numerous, and did not occur under circumstances making them unlikely to recur.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). Applicant's wife's job-related injury, serious illness, and the resulting loss of income were conditions beyond their control. This mitigating condition applies to the delinquent credit card account alleged in SOR ¶ 1.b and 1.f, because it affected Applicant's ability to pay it, and he acted responsibly by negotiating and complying with a payment agreement.

This mitigating condition is not relevant to the two cell phone debts, however, because the debt in SOR ¶ 1.c is the product of a billing dispute rather than an inability to pay it, and Applicant denies that he had a contract with the provider alleged in SOR ¶ 1.e. Furthermore, Applicant has not acted responsibly regarding these two debts, because he has chosen to ignore them rather than attempt to resolve them.

The evidence fails to establish AG ¶ 20(b) for the home improvement loan alleged in SOR ¶ 1.d, because it falls short of showing that her loss of income caused the delinquent debt. His wife's Social Security Earnings Record shows that her income dropped steadily from 2002 to 2005, when it was zero; but the credit report shows that the loan for new siding and windows was not opened until November 2006, after she returned to work. Applicant testified that the siding and windows were installed about three years ago (Tr. 43.) I conclude that AG ¶ 20(b) is not established for the debt alleged in SOR ¶ 1.d.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). This

mitigating condition is not established because Applicant has not sought or received financial counseling, and his financial problems are not under control.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has negotiated a payment plan for the debt alleged in SOR ¶ 1.b and duplicated in ¶ 1.f, and he has been making regular payments on this debt since June 2010. He has attempted to refinance or settle the home improvement loan alleged in SOR ¶ 1.d, but without success. He refuses to pay the cell phone bill alleged in SOR ¶ 1.c, but has never filed a dispute with the creditor or credit bureau. He has never contacted the creditor alleged in SOR ¶ 1.e. I conclude that AG ¶ 20(d) is established for the delinquent debts alleged in SOR ¶¶ 1.b, 1.d, and 1.f, but not for the debts alleged in SOR ¶¶ 1.c and 1.e.

Security concerns under this guideline also can be mitigated by showing “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(e). This mitigating condition is not established because Applicant has not provided documentary proof that he has disputed any of the debts. To the contrary, he testified that he was not aware that he could dispute any of the debts and did not know how to do it.

Whole-Person Concept

Under the whole-person concept, an 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. An 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 eligibility for 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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid and sincere at the hearing. He served honorably in the U.S. Navy. He has worked for defense contractors for many years and earned a reputation for dependability. He held a clearance for 14 years until it was administratively terminated. He is a mature adult, but he is unsophisticated in financial matters and has a track record of financial ineptitude. His Chapter 7 bankruptcy was the result of too many debts and not enough income. After receiving a bankruptcy discharge, he leased a car that he could not afford and undertook a major home improvement that he could not afford. Although he has made good-faith efforts to resolve the delinquent home improvement loan, he exercised bad judgment by incurring a large debt on his limited income, with no financial reserve for emergencies. He used a home equity loan to pay ordinary living expenses and now has virtually no equity in his home. His adult son and a pregnant daughter-in-law live with him but do not contribute to the family expenses. He has no savings for unexpected expenses.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge