



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-06552
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Ralph B. Leemis, Esq.

08/11/2015

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On November 27, 2012, Applicant submitted a Questionnaire for National Security Positions (SF 86). On April 3, 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 E. 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 May 8, 2015, Applicant responded to the SOR. On June 10, 2015, Department Counsel was ready to proceed. On June 15, 2015, DOHA assigned Applicant's case to me. On June 16, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 7, 2015. 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 offered Applicant Exhibits (AE) A through D, 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 E through AE NNNN, which were received into evidence without objection. On July 15, 2015, DOHA received the hearing transcript (Tr.).

Procedural Matters

Department Counsel moved to withdraw SOR ¶¶ 1.c and 1.d and to amend the last sentence in SOR ¶ 2.a to read, "as set forth in subparagraphs 1.a. and 1.b and subparagraphs 1.e through 1.i, above." Without objection from Applicant's Counsel, I granted Department Counsel's motion. (Tr. 8-10)

Findings of Fact

In his SOR answer, Applicant denied 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 55-year-old chief executive officer, president, and facility security officer of a company he started in December 1999. He seeks a secret security clearance to comply with DoD requirements as a defense contractor. (GE 1; Tr. 18, 20-22)

Applicant was awarded a bachelor's degree in mathematics in May 1982 and a master's degree in theology in August 2006. (GE 1; Tr. 19-20) He married in August 1982. He has three daughters, ages 30, 29, 27, and two sons, ages 19 and 17. His two youngest sons are dependent on him for support. He did not serve in the armed forces. (GE 1; Tr. 22-24)

Financial Considerations

Applicant's amended SOR lists six debts consisting of five collection accounts and one delinquent debt totaling \$12,358. (SOR ¶¶ 1.a – 1.b and 1.e – 1.i) Details regarding those six debts and their status follow.

SOR ¶ 1.a – Delinquent medical account for \$1,000. Applicant testified to the best of his knowledge this account was paid in full. This debt does not appear on Applicant's recent credit reports. **ACCOUNT RESOLVED.** (AE E, AE DD – AE KKKK; Tr. 40)

SOR ¶ 1.b – Credit card collection account for \$659. This account was paid in full. **ACCOUNT RESOLVED.** (AE E, AE U, AE V, AE DD – AE KKKK, AE MMMM; Tr. 40)

SOR ¶ 1.e – Credit card collection account for \$2,440. This account was paid in full. **ACCOUNT RESOLVED.** (AE E, AE AA, AE BB, AE CC, AE DD, AE DD – AE KKKK; Tr. 40)

SOR ¶ 1.f – Credit card collection account for \$3,734. This account was paid in full and does not appear on Applicant's recent credit reports. **ACCOUNT RESOLVED.** (AE E, AE DD – AE KKKK, AE MMMM; Tr. 41, 70-71)

SOR ¶ 1.g – Collection medical account for \$79. This account was paid in full. **ACCOUNT RESOLVED.** (AE E, AE W, AE DD – AE KKKK, AE MMMM; Tr. 40)

SOR ¶ 1.h – Collection medical account for \$4. (Tr. 41-42) This account was paid in full. **ACCOUNT RESOLVED.** (AE E, AE X, AE DD – AE KKKK, AE MMMM; Tr. 40)

SOR ¶ 1.i – Credit card collection account for \$4,442. (Tr. 42, 70-71) This account was paid in full. **ACCOUNT RESOLVED.** (AE E, AE Y, AE Z, AE DD – AE KKKK, AE MMMM; Tr. 40)

Applicant's financial problems began in 2000 when his company lost a major contract, his salary went to zero, and he undertook the responsibility of caring for his wife's 95-year-old grandmother. In 2001, his wife was laid off. In 2002, his oldest daughter entered college; in 2003, his second oldest daughter entered college; and in 2003, Applicant entered the seminary. In 2004, Applicant experienced an abdominal blockage; and in 2006, his third oldest daughter entered college. In 2010, Applicant had neck surgery. In 2012, Applicant had abdominal surgery and cancer surgery. (Tr. 26-27)

To address his financial shortfalls, Applicant liquidated his 401(k) and in 2005, he sold his home. (Tr. 27-28) Applicant submitted a single-bureau credit report dated July 3, 2015, and a combined three-bureau credit report dated July 1, 2015. The

single-bureau credit report reflected no delinquent accounts and a credit score of 807. The three-bureau credit report reflected respective credit scores of 776, 698, and 800. Two credit bureaus reflected no delinquent accounts, and one credit bureau reflected one delinquent account. (AE C, AE D; Tr. 34-36) Applicant paid his creditors, and when money was short, he paid the minimum amounts. (AE E; Tr. 36, 49-50) Applicant's credit bureau report dated July 22, 2015, submitted post-hearing, reports a credit score of 807. (AE LLLL)

Since 2015, Applicant's company's performance improved substantially. For example, in 2013, his company's annual income was \$800,000 and in 2014, it was \$1.6 million. (Tr. 48-49)

Applicant lives at his mother-in-law's house and pays her \$400 monthly mortgage. He owns two cars that are both paid off. (Tr. 42-44) Applicant's post-hearing budget reflects that he leads a modest lifestyle and lives within his means. His net monthly remainder ranges from about \$2,200 to \$2,400. (AE NNNN)

Personal Conduct

Applicant credibly testified that when he completed his November 27, 2012 SF 86, he answered the questions pertaining to delinquent accounts truthfully and honestly, and to the best of his knowledge. Applicant was making payments to his creditors directly and not to any collection agencies. Applicant did not receive anything from his creditors suggesting that he had delinquent accounts. He opined that as a result of moving, his mail may not have been forwarded to his new address. Nor did he review his credit report, because he had "[n]ever needed to." The first time Applicant reviewed his credit report was in March 2015, as a result of these proceedings. (Tr. 30-35)

On December 20, 2012, Applicant was interviewed during an Office of Personnel Management Personal Subject Interview (OPM PSI). During that interview, the OPM investigator brought Applicant's SOR debts to his attention. He stated he would look into those debts and resolve them. In his SOR answer, OPM PSI, and in his testimony, Applicant did not deny the existence of his debts, but maintained that he did not knowingly provide false information. (SOR answer; GE 2; Tr. 36-39, 57-68) Applicant submitted snapshots from 2012 to 2015 of his bank account showing that he was making payments on his SOR debts, demonstrating that they would not have been 120 days delinquent when he completed his SF 86. (AE C, AE D; Tr. 47-49)

Character Evidence

As an uncompensated pastor, Applicant works with his local municipality to assist homeless veterans, works with a local church for prison ministry, does one-on-one mentoring for young men, and provides a range of counseling services. (Tr. 50-53) As a pastor and one who adheres to what the Bible teaches, Applicant believes in paying his bills and would not lie to keep a clearance. (Tr. 53)

Applicant submitted 14 reference letters from a range of individuals to include pastors, long-time friends, business associates, parishioners, and family members. These letters collectively convey that Applicant is a dedicated family man and an individual of highest integrity whose character is above reproach. (AE F – AE T)

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 *a/so* 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 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's company lost a major contract, his wife lost her job, and he experienced several costly medical problems. None of these mitigating factors could have been anticipated. Although not qualifying as a mitigating condition, three of his daughters started college. During this time, Applicant remained in contact with creditors.

AG ¶¶ 20(c) is partially applicable. Although there is no evidence that Applicant received financial counseling, his financial problems are clearly resolved and under control. AG ¶ 20(d) is fully applicable. As noted above, all of Applicant's debts are paid in full and resolved.¹ AG ¶ 20(e) is not relevant.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern 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.

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false security clearance application:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

On November 27, 2012, Applicant provided an SF-86 which asked questions about delinquent debts in the last seven years. Applicant responded "No" to several questions pertaining to his delinquent debts. AG ¶¶ 16(a) and 16(b) both apply because he provided incorrect answers when submitting his SF about his delinquent debts. Further review is necessary.

Applicant credibly stated when he completed his SF-86 he was not aware that he had any delinquent debts. On December 20, 2012, during his OPM PSI, he did not deny the existence of his debts and advised the investigator that he would look into them. He certainly did that and ensured they were all paid. The fact that he moved several times, was paying his creditors directly, and did not review his credit report adds credence to his testimony.

Applicant was candid and forthright at his hearing about his financial situation. I conclude Applicant's alleged falsification of his SF-86 is refuted. Although he provided incorrect information on his SF-86, the falsification allegations are not substantiated. I am satisfied he did not deliberately and intentionally fail to disclose his delinquent debts with intent to deceive.² I find "For Applicant" in the Findings section of this decision with respect to SOR ¶ 2.

²The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

- (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is

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 Guidelines F and E 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 evidence under the whole-person concept in this case outweighs the adverse evidence. 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. 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

direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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 a bachelor’s degree in mathematics and a master’s degree in theology. In addition to his contribution to the defense industry, Applicant is an active pastor making a significant contribution to his community.

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 letters, 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.b:	For Applicant
Subparagraphs 1.c - 1.d:	Withdrawn
Subparagraphs 1.e – 1.i:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a as amended:	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