



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



In the matter of:)
)
) ISCR Case No. 15-01623
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

07/29/2016

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 March 3, 2013, Applicant submitted a Questionnaire for National Security Positions (SF-86). On September 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. 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.

On November 12, 2015, Applicant responded to the SOR. On March 7, 2016, Department Counsel was ready to proceed. On March 23, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On April 1, 2016, DOHA issued a notice of hearing, setting the hearing for April 21, 2016. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 4, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through AE K, which were received into evidence without objection. I held the record open until May 20, 2016, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE L through AE Q, which were received into evidence without objection. I subsequently reopened the record on July 25, 2016, and closed it on July 27, 2016. Applicant submitted AE R and AE S, which were received into evidence without objection. On April 29, 2015, DOHA received the transcript (Tr.).

Findings of Fact

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 60-year-old executive project manager engineer employed by a large company since February 1999. He transferred to the federal sector in 2012, which requires him to have a secret security clearance. (GE 1; Tr. 12-13, 16)

Applicant graduated from high school in June 1973. He was awarded a bachelor of science degree in engineering in June 1978, and was awarded a master of science degree in systems technology with a subcategory in space systems operations in September 1988. Applicant also received a certificate of completion in December 1993 after completing a graduate-level course in program management. (SOR answer; GE 1; AE E, AE F; Tr. 13, 17)

Applicant was previously married from June 1978 to December 2001, and that marriage ended by divorce. He has two adult daughters from that marriage. Applicant remarried in January 2002. He served in the U.S. Army from June 1978 to January 1999 and retired as a lieutenant colonel (pay grade O-5) with an honorable discharge. His spouse is employed full-time as owner and operator of a sewing business. (GE 1; Tr. 13-16, 46)

Financial Considerations

Applicant's SOR lists ten debts consisting of seven charged-off accounts and three past-due accounts totaling \$537,546. Of that amount \$453,888 was the past-due amount on two homes he owned – one home he purchased for his parents and the other home as his primary residence. Four of the SOR debts are credit card accounts from the same creditor and two of the four debts are duplicates reducing the total number of debts to nine. (SOR ¶¶ 1.a – 1.j)

Applicant attributed his financial problems to the financial fallout following the passing of his father, his wife losing her job, and the downturn in the housing market. Applicant purchased a home in State A in 2006 for his parents, who were paying rent to him. In 2008, his father passed away. His father's estate did not have sufficient funds to cover the costs of maintaining the home in State A prompting his mother to move in with Applicant and his wife in State B. Applicant attempted to rent or sell his parents' home in State A with no success. (SOR answer; Tr. 19-22, 32-31, 44, 49-50, 63)

Applicant and his wife were employed by the same company and purchased a home in 2002 in State B. In 2010, Applicant's wife was laid off from her job that she had held for 20 years. After Applicant's wife was laid off, they were unable to afford two homes in States A and B on Applicant's income alone. Despite their best efforts to rent or sell the two homes, they were unable to do so as a result of the collapse in the housing market. (Tr. 19-22, 31-32, 44-46, 49-50, 63)

Applicant used lines of credit from his credit cards to maintain his two homes to shore up the income gap created by his wife's lay off. When this became unsustainable in 2012, Applicant sought professional help from a credit counseling firm and later with a local attorney. He was counseled to eliminate the largest debts first and to avoid liquidating retirement accounts to pay off debts. Applicant declined to file bankruptcy stating that he had an obligation to pay debts he had incurred. And lastly, in January 2011, Applicant and his wife moved to State C to benefit from a lower cost of living. Applicant continued his company employment transferring to a federal sector position. After moving to State C, Applicant's wife worked until mid-2012 as a contract project manager until she opened up her sewing business. (Tr. 21-23, 37-38, 46-48)

The following describes Applicant's debts and their current status.

SOR ¶ 1.a – Past-due mortgage account of \$67,936 with a total loan balance of \$238,786. This mortgage was on Applicant's home in State B. He had a 12-year history of on-time payments. Applicant was in negotiation with the lender to restructure the mortgage; however, the lender chose to discontinue restructuring discussions. This debt was completely satisfied through a consent judgment. **Debt resolved.** (SOR answer; Tr. 18-24, 50, 64; AE K, AE L, AE M)

SOR ¶ 1.b – Charged-off credit card debt for \$20,312. Applicant used his line of credit to maintain one or both of his homes. Applicant had a 14-year history of on-time payments with the account until September 2012. Although this debt is statute barred, Applicant intends to pay it when he has the funds available. **Debt not resolved.** (SOR answer; Tr. 25-26, 64)

SOR ¶ 1.c – Charged-off credit card debt for \$15,606. Applicant used his line of credit to maintain one or both of his homes. In May 2014, Applicant and the creditor negotiated a settlement agreement after the creditor filed suit. The parties agreed that Applicant would pay an initial lump sum of \$3,000 and make \$250 monthly payments until debt is paid off. **Debt being resolved.** (SOR answer; Tr. 26-27, 57-58, 64-65; AE A, AE B, AE N, AE S)

SOR ¶ 1.d – Charged-off credit card debt for \$12,961. Applicant used his line of credit to maintain one or both of his homes. He had an 18-year history of on-time payments until August 2012. Although this debt is statute barred, Applicant intends to pay this debt when he has the funds available. **Debt not resolved.** (SOR answer; Tr. 27-28, 38, 52-57, 65)

SOR ¶ 1.e – Charged-off credit card debt for \$11,448. Applicant used his line of credit to maintain one or both of his homes. He had a 10-year history of on-time payments until August 2012. Applicant received an Internal Revenue Service Form 1099-C from the creditor cancelling the debt that he claimed when filing his income tax return. **Debt resolved.** (SOR answer; Tr. 28-29, 52-57, 65-66; AE P, AE S)

SOR ¶ 1.f – Charged-off credit card debt for \$10,569. Applicant used his line of credit to maintain one or both of his homes. He had a 23-year history of on-time payments until September 2012. Although this debt is statute barred, Applicant intends to pay this debt when he has the funds available. **Debt not resolved.** (Tr. 29-30, 52-57, 66; AE S)

SOR ¶ 1.g - Past-due mortgage account for \$10,737 with a total loan balance of \$182,312. This is the mortgage on Applicant's home in State A that he purchased for his parents. Applicant attempted to seek a loan modification as well as rent this home until the home went into foreclosure in 2013. The loan was completely satisfied through the foreclosure process. **Debt resolved.** (SOR answer; Tr. 30-33, 44, 50-51, 66)

SOR ¶ 1.h – Charged-off second mortgage account for \$32,782 for Applicant's home in State B. This debt was completely satisfied through a consent judgment. **Debt resolved.** (Tr. 33-34, 66; AE Q, AE L, AE R, AE S)

SOR ¶ 1.i – Past-due credit card debt for \$1,528 with a total balance of \$10,399. This is a duplicate of the account listed in SOR ¶ 1.f. The debts listed in SOR ¶¶ 1.d, 1.e, 1.f, and 1.i are the same creditor. **Duplicate account.** (SOR answer; Tr. 34-35, 52-57; AE S)

SOR ¶ 1.j – Charged-off credit card debt for \$2,371. The creditor filed suit and the case was dismissed. It no longer appears on Applicant’s credit report. **Debt resolved.** (SOR answer; Tr. 35-36, 66-68; AE O, AE S)

Following the financial advice he received and as noted above, Applicant tackled his larger debts first and plans to pay off his smaller debts as funds become available. He plans to pay his smaller debts off when he receives his annual bonus “which is typically \$15,000 a year.” As noted, he was counseled to keep his retirement accounts in reserve. (Tr. 30, 38-41) Applicant’s monthly budget reflects a combined net monthly income of \$14,652, with a net remainder of \$1,589. His budget reflects that he is leading a measured and responsible lifestyle. Applicant’s net worth is \$861,289. (Tr. 38-40, 58-63; AE H, AE I)

Character Evidence

During Applicant’s 21 years of active duty, he served in the infantry his first 10 years and after post-graduate school, he served in the acquisition field specializing in purchasing and developing weapons systems. While in the Army, Applicant initially held a confidential or secret security clearance which was later upgraded to a top secret security clearance with access to sensitive compartmented information (TS/SCI). He is very familiar with security clearances and security procedures and during the 21 years he held a clearance, he never had a security violation. (Tr. 12, 16-18, 41, 43) Included among Applicant’s two personal military awards are the Defense Meritorious Service Medal and the Meritorious Service Medal. (SOR answer; AE E, AE J)

Applicant was leading a project for his company from the World Trade Center on September 11, 2001, and was in the North Tower when the first plane hit. He led his team to safety, but in the process of ensuring his entire team was evacuated, he was exposed to the toxic debris cloud. He was subsequently diagnosed with the early onset of Parkinson’s disease in 2009 and in 2011 was diagnosed with leukemia. Applicant described his 9/11 experience as “more traumatic than anything that happened in my 20 years of military career.” He gives presentations on his 9/11 experience and discusses the attack and aftermath of the attack two to four times a year in the local community. (SOR answer; Tr. 42-43; AE G, AE J)

After 9/11, Applicant continued his career with his company successfully leading larger and more complex projects. In 2013, he transferred to his company’s federal sector where he is able to utilize his experience in commercial project delivery and his expertise in defense systems acquisitions. (SOR answer) In 2013, Applicant’s project was recognized by his company as their Distinguished Project of the Year. His company certified him as an executive project manager and designated him as a thought leader in managing programs and projects. Applicant is an internationally certified project management professional and he was also certified in program management by the Department of Defense. (SOR answer; AE F, AE G, AE J)

In his personal life, Applicant holds leadership positions in his church and provides regular sermons and other presentations of faith, leadership, and service. He spends his discretionary free time with his wife, daughters, and grandchildren. (SOR answer) Applicant submitted seven reference letters that include company managers, co-workers, a former college classmate, and long-time friends. The collective sense of these letters convincingly relay that Applicant is hard working, trustworthy, and an individual who contributes to the national defense and his community. (SOR answer; Tr. 41-42; AE G, AE J)

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's wife lost her job that she had held for 20 years when she was laid off in 2010. When Applicant's father passed away in 2008, his mother was unable to afford rent payments to Applicant. Applicant found himself in an untenable situation being the owner of two homes that he could not afford with his available income. When Applicant tried to sell or rent his parents' home in State A and his home in State B, his timing occurred at the peak of the housing market downturn.

AG ¶¶ 20(c) and 20(d) are fully applicable. Applicant sought financial counseling from a credit counseling firm as well as from an attorney and followed the advice provided. Although one can debate the merits of paying the largest bills first before paying the lowest bills, Applicant followed the professional advice he received. Applicant has made significant progress in addressing the financial concerns raised by resolving the mortgages on his two homes, by resolving several of his smaller debts, and is committed to paying the smaller debts even though statute barred.¹ During this

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.

process, he attempted to engage his creditors with mixed results. At the onset of these proceedings, the SOR alleged ten debts totaling \$537,546. Applicant has mitigated seven of those debts amounting to \$493,704, leaving three unmitigated debts totaling \$43,842. 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 21 years of honorable service in the Army and his 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

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.

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 resolved his two largest debts, which are his two mortgages. 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 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.

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.j: 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