

DATE: September 24, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-26286
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
MARTIN H. MOGUL**

APPEARANCES

FOR GOVERNMENT
Jeff Nagel, Esq., Department Counsel

FOR APPLICANT
John Hernandez, Esq.

SYNOPSIS

Applicant has had a history of financial difficulties. He has paid off or is paying the majority of his debts, and he has a plan to resolve any remaining overdue debt, that is not in dispute. His financial situation is stable and current. Applicant reasonably believed that the financial information that he provided to the Government, on a Security Clearance Application (SCA), regarding his finances, was materially correct. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On July 3, 2007 the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive

Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated July 14, 2007, Applicant responded in writing to the SOR allegations (RSOR), and he requested a clearance decision based on a hearing record.

The case was assigned to this Administrative Judge on August 22, 2007. A Notice of Hearing was issued to the parties on September 4, 2007, and the hearing was held on September 17, 2007.

At the hearing, Department Counsel offered eight documentary exhibits (Exhibits 1-7) and no witnesses were called. Applicant appeared with counsel, submitted 11 documentary exhibits (Exhibits A through K) and offered his own testimony. All documentary evidence was entered into evidence without objection. The transcript (Tr) was received on September 24, 2007.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. The SOR contains seven allegations, 1.a. through 1.g., under Guideline F, and two allegations, 2.a. and 2.b., under Guideline E. In his Response to the SOR (RSOR), Applicant admitted SOR allegations 1.b. through 1.e. and 1.g., with explanations, and he denied allegations 1.a., 1.f., 2.a., and 2.b. The admitted allegations are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the live testimony and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is 57 years old. He is currently engaged to be married, and he has two daughter and two sons. He was born in Mexico, and English is his second language. Applicant is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline F - Financial Considerations)

The SOR lists six debts that Applicant allegedly owed as of December 27, 2006, 1.a. through 1.g., under Adjudicative Guideline F. The debts will be discussed in the order that they were listed in the SOR:

1.a. This debt to Creditor 1 is listed in the SOR in the amount of \$590, for a judgement entered against him. Applicant testified that this debt arose because a former landlord claimed Applicant still owed him money. Applicant agreed that he went to court for this debt, but he testified credibly that it was his understanding that the judge ruled that the money that the landlord had

retained as a security deposit would resolve any claimed debts. Applicant believed the judge dismissed the case, and he claimed that he never received any further documents from the court to inform him that he owed any additional money to the landlord. Applicant further testified that if it was shown that he owed this debt, he would pay it, but he did not believe there was an overdue debt to this creditor.

1.b. through 1.e. These debts are all to Creditor 2, the Internal Revenue Service (IRS) for tax years 1994, 1995, 1998, and 1999 is in the amounts of \$1,592.87, 11,500.64, 272.65, and \$495, respectively. Applicant testified that he always filed and paid his taxes in a timely manner but contended that when he was audited by the IRS, he never received the notice, as he was a long distance truck driver traveling throughout the U.S., and he simply did not get his mail. He also claimed that he did not get notice of the back taxes that he owed.

Applicant further testified that for the last two years, since he became aware of the debt to the IRS, he has been in contact with them, attempting to resolve this debt. He stated that his overdue debt to the IRS had totaled \$30,000, but it has now been reduced to \$11,500, through the IRS lien and by his filing amended taxes for tax years 2004 and 2006 (Exhibits A and B). Applicant also recently filed an amended tax return for year 2005, and he anticipates an additional \$2,400 being applied to the debt (Exhibit C).

Finally, Applicant has entered into an agreement with the IRS, in which he would make payments of \$226 a month to the IRS. Thus far he has made two payments of \$226.

1.f. This debt to Creditor 3 is in the amount of \$1,684. Applicant testified that this debt was incurred as a result of a dental treatment that he received from a work related injury. He was informed, and it is still his belief, that this debt should have been resolved through workers compensation insurance. He is attempting, with the help of his attorney, to have this debt resolved as a workers compensation debt.

1.g. This debt to Creditor 4 is listed in the SOR in the amounts of \$221. At the hearing, Applicant testified that this debt arose because he cosigned the contract for his daughter's phone. He has been attempting to resolve the debt, but when he contacted the collection agency which had been attempting to collect on this debt, he was informed that they no longer were responsible for this debt. However, he was not told who is now attempting to collect this debt. He testified that when he could ascertain who owned this debt, he would make prompt restitution.

Since Applicant incurred these debts, he has been and remains current on all his other debts, and he has demonstrated a stable and mature outlook about his finances.

Applicant also submitted 4 letters of reference from individuals, who know him. All of them spoke extremely highly of him as honest, hard working and dependable (Exhibit K).

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges that when Applicant completed an SCA, executed on October 7, 2005, (Exhibit 1), he did not furnish truthful, complete answers.

2.a. Question #27 c. asks, “In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?” Applicant responded “No” to this question. The Government alleges that Applicant should have included all of the debts, listed on the SOR as 1.b. through 1.e., above, as they were all debts for which the IRS did place a lien on Applicant’s wages.

Applicant testified credibly that he believed the question only concerned real property, and since he did not own any property, he believed that he answered the question correctly. As discussed above, English is the second language of this Applicant, and I am persuaded that his incorrect response to this question was as a result of a misunderstanding, not an attempt to mislead the Government.

2.b. Question #27 d. asks, “In the last 7 years, have you had any judgements against you that have not been paid?” Applicant responded “No” to this question. The Government alleges that Applicant should have included the judgement, listed on the SOR as 1.a.

As discussed in subparagraph 1.a., above, Applicant believed this debt was resolved and no judgement was placed against him. The evidence has not clearly established that a judgement was entered against Applicant, but in any case, I find that Applicant had a good faith belief that there was no judgement, so his response to this question was not an attempt to mislead the Government.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to Applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of Applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance. This the Applicant has done.

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines F and E:

(Guideline F - Financial Considerations)

The Government has established its initial case under Guideline F. The record evidence proves Applicant's history of indebtedness, primarily to the IRS. However, there is evidence that Applicant is attempting to resolve the overdue debts to the IRS.

Regarding the Disqualifying Conditions (DC) under Guideline F in the Adjudicative Guidelines, I conclude DC 19 (a) applies because of Appellant's "history of not meeting financial obligations."

In considering the Mitigating Conditions (MC) I find that MC 20. (d) applies, as Applicant has initiated a good-faith effort to repay the IRS, and (e) also applies, as Applicant has a reasonable basis to dispute the debt listed as 1.a., because he believes the court resolved the case in his favor,

and 1.f., because Applicant believes this debt should have been resolved through workers compensation insurance. I, therefore, hold Guideline F for Applicant.

(Guideline E -Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant provided incorrect material information to the Government in response to at least one of the two questions on the SCA that he executed in 2005. Applicant did have a lien placed on his property by the IRS. As discussed above, it is not clear if a judgement was entered against him. However, I find that Applicant's contention that he did not believe a judgement was entered against him, and he understood the term property to mean only real property when he completed his SCA are valid, and Applicant did not intend to mislead the Government.

In reviewing the DCs under Guideline E, I conclude that no DC applies against Applicant. I therefore, resolve Guideline E against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1, Financial Considerations, Guideline F: For Applicant

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

Paragraph 2, Personal Conduct, Guideline E: For Applicant

- Subparagraph 2.a.: For Applicant
- Subparagraph 2.b.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul
Administrative Judge