



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 12-05035
)
)
Applicant for Security Clearance)

Appearances

For Government: Philip Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

08/15/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted. Applicant presented sufficient information to mitigate security concerns for financial considerations.

Statement of the Case

On September 17, 2010, and June 19, 2013¹, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) issued Applicant interrogatories to clarify information in his background. Applicant responded to the interrogatories on November 12, 2013. After reviewing the results of the background

¹ The SOR is based on the September 17, 2010 e-QIP. At the hearing, Applicant stated that he also submitted an e-QIP in 2013. The 2013 e-QIP was not in the case file and Department Counsel did not have the 2013 e-QIP. After the hearing, Applicant provided a copy of the 2013 e-QIP, and it is included in the record as Applicant Exhibit K.

investigation and Applicant's responses to the interrogatories, DOD could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated March 13, 2014, detailing security concerns for financial considerations under Guideline F, personal conduct under Guideline E, and foreign influence under Guideline B. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the DOD on September 1, 2006.

Applicant answered the SOR on April 15, 2014. He admitted 17 of the 25 financial allegations. He denied the two personal conduct allegations, and admitted the foreign influence allegation that his wife is a dual citizen of the United States and Russia. Department Counsel was prepared to proceed on May 30, 2014, and the case was assigned to me on June 2, 2014. DOD issued a Notice of Hearing on June 17, 2014, scheduling a hearing for July 17, 2014. Applicant signed for the Notice of Hearing on June 24, 2014. I convened the hearing as scheduled on July 9, 2014. The Government offered four exhibits that I marked and admitted into the record without objection as Government Exhibits (GX) 1 through 4. Applicant testified, and offered six exhibits that I marked and admitted into the record without objection as Applicant Exhibits (AE) A through F. I kept the record open for Applicant to submit additional documents. Applicant timely submitted five documents. Department Counsel did not object to the documents. (GX 5, Memorandum, dated August 12, 2014) I marked and admitted the documents into the record as AX G through K. I received the transcript of the hearing (Tr.) on July 18, 2014.

Procedural Issue

Department Counsel moved to withdraw the foreign influence and personal conduct security allegations after the evidence was introduced at the hearing. (Tr. 61-63, 77) I granted the motion. The only security concern is for financial considerations.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 50 years old and employed by a defense contractor. He has an associate's degree, has been married since February 2006, and has two young children. He was a self-employed general contractor from January 2003 until May 2010 when he started employment with the defense contractor. He was initially employed by the defense contractor with a yearly salary of \$80,000. He has steadily risen with the company and is now a senior executive with a salary of approximately \$133,000. The company is reorganizing and he is proposed to be the executive vice president with a potential salary of \$170,000. (Tr. 29-36; GX 1, e-QIP, dated June 19, 2013; AX C, Tax Form 1040, 2013; AX D, Presentation, undated)

Applicant worked for a large oil company in construction management for approximately 18 months before he started his own general contracting business building or renovating gas stations for large oil companies from 2001 until 2009. Federal and state laws required that contractors building or renovating gas stations have specialized licenses to manage hazardous waste and contaminated soil. Applicant had all the required certificates from both the federal government and the state governments in the vicinity where he worked. The rules were very specific, and once he started the process to place or renovate a tank in the ground, he had to complete the process under all circumstances. At the time, the oil companies owned all of the properties where the gas stations were located. The companies paid all of the bills from Applicant on time and understood that Applicant was required to make changes to comply with the strict environmental rules. Applicant did not have to be concerned with the business operations because the oil companies systematically paid their invoices every two weeks. His business with the oil companies was very profitable. The oil companies were Applicant's clients for about eight years. He was accustomed to being paid regularly and having a positive cash flow with his sub-contractors. (Tr. 42-45, 50-52)

In 2008, the oil companies started to sell the properties to private individuals who would build the gas stations and then own and manage them. The individuals did not want to pay for all of the work Applicant was required to do to meet environmental rules. The private owners were only concerned with cost and not the work needed to comply with environmental regulations. Applicant had to have technical contractors examine the soil, have special permits to remove contaminated soil, and to locate licensed dumps for the contaminated soil. Applicant had to pay for these environmental charges, but his private clients many times refused to reimburse him for this work, and pay on time. Many customers did not understand the importance of paying debts on time. (Tr. 52-54)

Applicant focused on the construction part of the business because of his experience with the oil companies paying the bills when submitted. He did not pay adequate attention to the business side and the payment of bills by his private customers. When the private customers did not pay the bills on time, Applicant tried working with the private customers on the debts but was unsuccessful. He did not have a positive cash flow and was unable to pay his sub-contractors. He admits he was irresponsible in not seeking liens against the private customers. He was always paid on time by the oil companies and he always paid his subcontractors on time. He was not experienced in doing business with customers who did not pay on time, and he had no experience in taking customers to court and seeking liens. (Tr. 45-47, 74-75)

The debts listed at SOR 1.b to 1.p. and 1.s are liens and judgments placed by Applicant's sub-contractors in 2009. These debts have not been paid. The debt at 1.g is a duplicate of the debt at 1.h. There is only one debt for \$24,697. The debt at 1.k is a duplicate of the debts at 1.i, and 1.j, There is only one debt for \$18,536. (Tr. 61, 66)

The debt at SOR 1.q is unpaid state income taxes. Prior to Applicant starting his own company, he worked for a company that withheld state income taxes from his pay. However, the company did not send the funds to the state as required. The company is

no longer in business. Applicant filed his state tax return each year. He kept his pay sheets from the company and was able to establish with the state that state taxes had been withheld from his pay. The state audited his account and reduced the amount owed to \$19,215, which included penalties and interest, for three tax years in the 1990s. Shortly before this hearing, the state agreed to settle the debt for \$8,000. When he receives the written settlement offer from the state, he will pay the \$8,000 tax bill. (Tr. 31-32, 67-69; AX B, Tax Audit, dated July 8, 2014)

Applicant filed a Chapter 13 Bankruptcy petition in May 2013 to organize the sub-contractor debts for ease of payment. He hired an attorney to work with him to complete all of the documents required by the bankruptcy. Applicant told the attorney that not all of the debts, including some debts listed in the SOR, were listed for the trustee. Applicant wanted to be sure all debts were listed so he could have a favorable debt to creditor ratio for a payment plan. The attorney did not follow through and did not send an accurate list of all debts to the trustee. Subsequently, the attorney left the law firm before Applicant could have the correct debts filed with the trustee. Applicant thought he was complying with the payment plan. Since she did not get all of the debts, the trustee dismissed the bankruptcy in November 2013. The trustee had not made any payments to the creditors. Applicant had made ten monthly payments to the trustee totaling about \$8,000 per the payment plan. The trustee returned the funds to Applicant, less the administrative fees when she dismissed the bankruptcy. Applicant has held the funds in an account so he can use them to pay creditors when he has a payment plan with the creditors. The SOR debts were not paid by the Chapter 13 bankruptcy. (Tr. 54-61; AX F, Bankruptcy Documents; See, Attorney e-mails attached to the Response to SOR)

Applicant and his bankruptcy attorney researched all of the debts listed in his credit report to be able to include them in his bankruptcy petition. He had no information on some of the debts and their research did not reveal information on the debts. The only debt he could verify was the debt at 1.t. This debt is included in his payment plan below. He disputes the debts at SOR 1.u, 1.v, 1.w, and 1.y since he has no information on the debts. (Tr. 70-71)

Applicant had a debt to a credit card company as listed at SOR 1.x. The credit card was used to purchase items when he was a general contractor. The debt has not been paid. He denied the debt because his attorney advised him that the credit card company had written the debt off. Applicant recently accepted a settlement offer from the credit card company that requires monthly payments of \$438.87 for 12 months. He has not made any of the payments. (Tr. 71-72; AX I, Settlement Offer)

Applicant decided not to refile a Chapter 13 bankruptcy. He could save over \$4,000 attorney and filing fees and achieve the same result by a structured payment plan he developed. He has a plan to pay all of the debts accumulated from his general contractor business. The plan requires total monthly payments of \$2,092.67 for approximately five years. He has a large equity in his home because of extra mortgage payments. He has sufficient monthly income to make both the plan's payments and

increased mortgage payments. (AX G, Payment Plan, dated August 12, 2014; AX H, Mortgage Payments, dated June 2, 2014)

Applicant presented a letter of recommendation from his company's director of administration who is also the facility security officer. She notes that Applicant was hired by the company because of his general contractor experience and the ownership of his own company. Applicant possessed the needed entrepreneurial, business development, administration, and construction industry experience needed for the position. He has a proven track record of self-motivation and project experience. He has the ability to create, implement, and maintain a successful business plan. He is highly respected by his peers. (AX E, letter, dated July 7, 2014)

Applicant's subordinate wrote that he has known Applicant for three years. Applicant displayed a high level of integrity and has been a team leader. He is someone you can count on when there are problems. (AX J, Letter, dated July 30, 2014)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Financial Considerations

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. (AG ¶ 18) An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. However, the security concern is broader than the possibility that an individual might knowingly compromise classified information to raise money. It encompasses concerns about an individual's responsibility, trustworthiness, and good judgment. Security clearance adjudications are based on an evaluation of an individual's reliability and trustworthiness. It is not a debt-collection procedure. An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligations to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is at risk of acting inconsistently with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

Delinquent debts established by credit reports and partially admitted by Applicant raise Financial Considerations Disqualifying Conditions AG ¶ 19(a) (inability or unwillingness to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations). The evidence indicates a history of both an inability but not an unwillingness to satisfy debt.

I also considered the Mitigating Conditions at AG ¶ 20(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); and AG ¶ 20(b) (the conditions that resulted in the financial problems 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). The mitigating condition at AG ¶ 20(a) applies, but AG ¶ 20(b) does not apply.

Applicant incurred delinquent debt when he was a general contractor and his clients did not pay him for his work and he was unable to pay his sub-contractors. The sub-contractors entered judgments and liens against Applicant for the work they had performed for him. Applicant is no longer a general contractor with private customers and employing sub-contractors. The debts were incurred under the unusual circumstances of Applicant's customers not paying the bills to Applicant. The debts are unlikely to recur because he is now a salaried employee and not self-employed.

The conditions leading to the financial problems were not wholly beyond his control. Applicant's initial customers, large oil companies, paid their bills on time. When the client base switched to private owners, Applicant did not take the appropriate measures to collect the bills for his work. His failure to adequately monitor the finances and seek liens and judgments against his customers led to the delinquent debts. The conditions causing the debts were his responsibility. He has now acted responsibly by negotiating and developing a plan to pay the debts. He has sufficient income to meet his financial obligations under the payment plan.

I considered mitigating condition at AG ¶ 20(c) (the person has received or is receiving counseling for the problem and/or there a clear indication that the problem is being resolved or is under control). Applicant did not present any information concerning financial counseling. However, a requirement for filing a bankruptcy is to have a financial management course. Applicant's financial obligations are under control.

I considered mitigating condition at AG ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts) as to the past-due mortgage. For AG ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty and obligation. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. A promise to pay delinquent debts in the future is not a substitute for a track record of paying debts in a timely manner and acting in a financially responsible manner. Applicant must establish that he has a reasonable plan to resolve financial problems and has taken significant action to implement that plan.

Applicant initially filed a Chapter 13 bankruptcy as a means of organizing his delinquent debts and having a plan and means to pay the debts. He paid under the plan for ten months. His attorney failed to provide the bankruptcy trustee with a list of all of Applicant's debts as requested by Applicant. The bankruptcy trustee dismissed the bankruptcy and returned all of the funds Applicant paid towards the debts. The dismissal was not Applicant's fault but that of his attorney. Applicant has kept the funds returned to him in an account he can use to pay debts. Applicant did not want to file

another Chapter 13 bankruptcy so he could save the attorney and bankruptcy fees. He developed a plan to pay his delinquent debts on his own. He has not yet started making payments under the plan. Normally promises to pay delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner or otherwise acting in a financially responsible way, However, Applicant's past actions to file the Chapter 13 bankruptcy petition, making the required monthly payments for ten months under the bankruptcy plan, and develop a new plan on his own are more than a mere promise to pay in the future, He acted proactively and kept the returned funds to pay settlements. He has sufficient income to make the monthly payments according to his plan. He established his ability to have a "meaningful track record" of debt payments. His actions on the debts are reasonable, prudent, and an honest adherence to his financial obligations.

I have considered AG ¶ 20(e) (the individual has a reasonable basis to dispute the legitimacy of the past due debt which is the cause of the problem and provided documented proof to substantiate the basis of the dispute or provided evidence of action to resolve the issue). Applicant disputes four of the debts because he did not have any information on the debts. He and his attorney researched the debts for the Chapter 13 petition but could not locate information on the debts. He disputes the debts and is contacting creditors to see if he can learn more about the debt.

Applicant's present and past management of his finances reflects favorably on his trustworthiness, honesty, and good judgment. Applicant established that his financial actions are a "meaningful track record" of debt payment. The recent documented actions to resolve delinquent debt provided by Applicant are firm indication that he is managing his financial obligations reasonably and responsibly, and his responsible conduct is likely to continue. He has shown an honest adherence to financial duty and obligation. There is ample evidence of responsible behavior, good judgment, and reliability. Based on the financial information available, to include Applicant's continued action to resolve the debts, I conclude that Applicant mitigated the financial considerations security concerns.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered the favorable information concerning Applicant provided by his employer and fellow worker. Applicant presented sufficient information to establish that he acted reasonably and responsibly towards his finances. His present financial track record establishes confidence in the responsible management of his financial obligations. This indicates he will be concerned and act responsibly in regard to classified information. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated security concerns arising under the financial considerations guideline. Eligibility for access to classified information is granted.

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.y: | For Applicant |
| Paragraph 2, Guideline E: | WITHDRAWN |
| Paragraph 3, Guideline B: | WITHDRAWN |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge