



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 12-06779
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Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

04/03/2013

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns about his finances. He has paid his past-due student loan, and he is repaying past-due tax debts. Clearance is granted.

Statement of the Case

On April 16, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his work as an employee of a federal contractor. After reviewing the results of the ensuing background investigation, Department of Defense (DOD) adjudicators were unable to find it clearly consistent with the national interest to give Applicant access to classified information.¹ On September 19, 2012, DOD issued Applicant a Statement of Reasons

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

(SOR) alleging facts which raise security concerns addressed in the adjudicative guideline² for financial considerations (Guideline F).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on December 19, 2012, and I convened a hearing on January 15, 2013.³ Department Counsel presented Government Exhibits (Gx.) 1 - 5, which were admitted without objection. (Tr. 13 - 19) Applicant testified and proffered one exhibit admitted without objection as Applicant's Exhibit (Ax.) A. (Tr. 20 - 22, 29 - 31)

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed approximately \$28,034.33 in past-due debts for unpaid taxes in 2001 (SOR 1.a) and 2002 (SOR 1.b), and for a past-due student loan (SOR 1.c). Applicant admitted, with explanations, SOR 1.a and 1.b. Applicant denied SOR 1.c, and established that he paid that debt in August 2012. Accordingly, SOR 1.c is decided for Applicant. Applicant's admissions are incorporated herein as facts. Having reviewed the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 35 years old and has been employed by a defense contractor as a heating, ventilation and air conditioning (HVAC) mechanic since December 2009. This is his first application for a security clearance. After graduating high school in 1997, Applicant sporadically attended college and technical schools. The student loan addressed in SOR 1.c arose when Applicant's stepfather failed to pay tuition as he had promised for Applicant's first academic year in 1997-1998. (Gx. 1; Gx. 3)

Applicant was self-employed in sales and marketing jobs between about February 2000 and January 2004. Thereafter, he worked in various jobs for low and minimum wages. He was fired from two of those jobs for misconduct. Between February 2007 and December 2009, Applicant was twice unemployed for a total of 17 months. (Gx. 1; Gx. 2; Gx. 3; Tr. 37 - 40, 47, 53)

In 2003, the IRS audited Applicant's 2001 and 2002 tax returns. By 2005, the IRS determined that Applicant owed \$9,874 in unpaid taxes for 2001 and \$13,889 in unpaid taxes for 2002, because he could not substantiate work-related deductions and credits he had claimed. Applicant started to negotiate an offer in compromise to settle his tax debt. However, he was unable to make the initial payments required by the IRS and stopped pursuing that solution. Also, while the audit was pending, Applicant was advised by a certified public accountant (CPA) to delay filing his federal tax returns for the next few years. The CPA told Applicant that doing so would preserve those tax year refunds for use in satisfying any tax debts that might arise from the audit. This was

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ DOHA received the transcript of hearing (Tr.) on January 30, 2013.

erroneous because of IRS time limits on the disbursement of tax refunds. Relying on the CPA's advice, Applicant did not timely file his returns for tax years 2003 through 2008. However, the only tax liability he incurred was for tax year 2003, which he has since satisfied. Applicant completed filing all of his past-due tax returns in April 2009. (Gx. 1 - Gx. 3; Tr. 23 - 26, 31 - 38, 40 - 41, 54 - 57)

Between 2004 and 2009, in addition to his tax debts, Applicant incurred delinquent debts for credit cards and unpaid rent. Much of his financial difficulty during this period was due to uneven employment. Applicant acknowledged that some of his employment problems arose from his own misconduct. After he was hired by his current employer in December 2009, he became able to use money in a pre-existing 401(k) retirement account to help repay his debts. Only one of those debts, a civil judgment for unpaid rent, is reflected in his credit history. It appeared in a May 2010 credit report (Gx. 4), but not in a June 2012 credit report (Gx. 5). Applicant presented information showing he paid that debt. There are no other adverse accounts, including those alleged in the SOR, listed in either credit report. (Gx. 2 - 5; Tr. 47, 46 - 53, 59 - 61, 69)

Sometime during the summer of 2012, Applicant renewed his negotiations with the IRS to resolve his tax debts. He was able to take funds from his 401(k) to pay his tax year 2003 debt, and to make the initial payments required to establish a repayment plan for his 2001 and 2002 tax debts. He has been making \$540 monthly payments on those debts since September 2012. His tax debts will be repaid by September 2015 under this plan. (Answer; Gx. 2 - 3; Ax. A; Tr. 25 - 26)

Applicant's response to DOD interrogatories (Gx. 2) included a personal financial statement (PFS). After paying all of his monthly expenses, including the monthly payment to the IRS, Applicant has a positive cash flow of about \$500 each month. There is no indication he incurred any additional past-due debt since 2009. His only credit card debt was recently incurred to pay for tools he needs for work, and he has begun restoring the retirement savings he used to pay his debts. (Tr. 62 - 68)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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

⁴ See Directive. 6.3.

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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Financial Considerations

Applicant admitted two of the three allegations. He supported his denial of SOR 1.c with information showing his past-due student loan debt was satisfied before the SOR was issued. However, available information also shows his debt for unpaid taxes in 2001 and 2002 has been due and owing for more than ten years. That information raises a security concern about Applicant's finances, which is articulated, in relevant part, at AG ¶ 18 as follows:

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*). Applicant filed his taxes as required for 2001 and 2002, but he did not support some of the deductions and credits claimed as part of his self-employment in sales and marketing. He did not follow through on an attempted offer in compromise in 2005, and the debts generated from those tax returns, as alleged in SOR 1.a and 1.b, remained unaddressed until 2012.

Applicant is now current with all of his tax filing obligations. He is repaying the SOR 1.a and 1.b tax debts through an agreement with the IRS that will resolve the debts in three years. The Government is reasonably concerned about the seven years that passed between the IRS audit and his repayment agreement. The reasons for that delay were a combination of Applicant's own misconduct leading to loss of employment and income with which to pay, and erroneous advice from a CPA. Applicant has corrected those circumstances by filing all of his past-due tax returns and establishing a repayment agreement for the tax debts addressed in SOR 1.a and 1.b. Applicant did not immediately address his tax debts after he was hired for his current job because he decided to resolve other debts. For example, he had already resolved the SOR 1.c student loan debt before the SOR was issued. Applicant's current finances reflect a positive cash flow each month, increasing retirement savings, and the absence of recent past-due debts. All of the foregoing supports application of the following AG ¶ 20 mitigating conditions:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

On balance, Applicant has mitigated the security concerns established by adverse information about his finances.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant made poor decisions in his personal life that adversely impacted his finances. However, since 2009, his defense contractor job has afforded him the ability to resolve his financial problems. He resolved other debts not addressed in the SOR, filed all of his past-due tax returns, paid off a delinquent student loan, and is now repaying his 2001 and 2002 tax debts. A fair and commonsense assessment of all available information shows that Applicant has mitigated the security concerns raised by his unpaid debts.

Formal Findings

Formal findings 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.c: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge