



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



In the matter of:)
)
) ISCR Case No. 12-09735
)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

09/04/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the Financial Considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 3, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOHA acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on January 25, 2013, and requested a hearing before an administrative judge. Department Counsel issued an amended SOR with one additional allegation (¶ 1.00) on May 3, 2013. Applicant answered the amended SOR with a fax transmission dated May 22, 2013. The case was assigned to me on June 21,

2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 9, 2013, and the hearing was convened as scheduled on July 30, 2013. The Government offered exhibits (GE) 1 through 17, which were admitted into evidence without objection. Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I. Applicant testified, called two witnesses, and offered exhibits (AE) A through I into evidence. Department Counsel objected to AE A through F based upon relevancy and hearsay. Those objections were overruled. All of Applicant's exhibits were admitted into evidence. The record was held open for Applicant to submit additional information. Applicant submitted AE J through N, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on August 8, 2013.

Findings of Fact

Applicant admitted the following SOR allegations: ¶¶ 1.i. 1.k – 1.p, 1.aa, 1.cc – 1.gg, and 1.jj – 1.oo. He denied ¶¶ 1.a – 1.h, 1.j, 1.q – 1.z, 1.bb, and 1.hh – 1.ii.¹ The admissions are incorporated as findings of fact. After a review of the pleadings, and evidence, I make the following additional findings of fact.

Applicant is a 45-year-old former employee of a defense contractor. He worked for that contractor from November 2011 until his security clearance was denied in July or August 2012. He has a bachelor's degree. He is married and has two children. He served in the U.S. Marine Corps for eight years and was an aviator. He held a security clearance at that time. He does not currently hold a secret security clearance.²

The SOR and amended SOR allege 35 delinquent debts and six bankruptcy filings by Applicant or his business entities. The total for all the debt is in excess of \$24 million (some of the debt is duplicated). The debts were listed in various bankruptcy schedules filed by Applicant and his business entities in May, June, and August 2010, and June 2012.³

Applicant's financial problems arose because of various real estate development businesses he owned sometime after December 2003. At the same time he was a branch manager for a local realty firm, he also incorporated four businesses to facilitate the acquiring of development real estate and soliciting investors in these real estate ventures. The real estate ventures included developing raw land, constructing a condominium project, and building homes on a different site. In 2007, to fund the operating costs for these various projects, Applicant moved developmental loans from one financial institution to another institution. Through this financial arrangement, he was extended lines of credit for his businesses. These lines of credit were in excess of several million dollars. He claimed he had an agreement with the financial institution

¹ Applicant's answer to the SOR listed two ¶¶ 1.ii. The first ¶ 1.ii was a denial and the second was an admission. The second ¶ 1.ii should have been listed as a response to SOR ¶ 1.jj.

² Tr. at 80-81; GE 1.

³ GE 2-3, 8, 11-13.

that he would only make principal and interest payments on the loans when the various real estate properties were developed and sold. He personally guaranteed all of these business loans in excess of nine million dollars. This arrangement worked well for some time, but in late 2009, the financial institution wanted payments made on an upfront basis rather than waiting until the property was developed and sold. In February 2010, Applicant's access to his line of credit was denied. Applicant asserts this change came about because the financial institution was experiencing its own financial difficulties caused by excessive loans it was making and because of criminal conduct by one of its officers. That bank officer was ultimately convicted in federal court on fraud charges. Additionally, in December 2010, the financial institution was taken over by a governmental financial oversight agency and placed in a conservatorship. He first filed for bankruptcy relief under Chapter 11 in June 2010. He also filed for bankruptcy relief personally and for all four of his companies between May 2010 and June 2012. He claims his attorney advised him to file these "defensive" bankruptcy actions to protect his assets. Ultimately, all these bankruptcy petitions were dismissed for either failing to complete a plan or for exceeding the unsecured debt limit allowed by law for that type of bankruptcy (SOR ¶¶ 1.ii – 1.nn).⁴

In September 2011, Applicant filed a civil lawsuit in state court against the financial institution alleging fraudulent misrepresentation, tortious breach of contract, and defamation. The case was removed to federal court and ultimately dismissed for failure to state a claim and a judgment was issued against Applicant on a counterclaim in the amount of \$15,000 (the judgment alleged in amended SOR ¶ 1.oo) by order dated July 3, 2012.⁵

In April 2013, Applicant and his wife filed a petition for bankruptcy relief and discharge of debts under Chapter 7 of the bankruptcy code. Among the debts listed in this petition are over nine million dollars of unsecured non-priority claims. The debts listed in SOR ¶¶ 1.a and 1.d – 1.s are all included in the listing of bankruptcy claims. As of August 13, 2013 (date the record closed), the debts had not been discharged.⁶

The debt alleged in ¶ 1.a is a personal secured loan that is included in the Chapter 7 bankruptcy. Applicant also offered documentation from the creditor establishing that the loan is current and has never been in a delinquent status. This debt is resolved.⁷

The debts alleged in SOR ¶¶ 1.b and 1.c are for a mortgage debts and a home equity line of credit on Applicant's personal residence. The mortgage was \$465,000 and the home equity loan was \$55,000. He stopped making payments on these loans in 2010 based upon his attorney's advice. Ultimately the residence was sold through a

⁴ Tr. at 81-84, 127-128; GE 2-4, 8, 11-14.

⁵ Tr. at 124; GE 6, 14.

⁶ Tr. at 86-87; AE M.

⁷ Tr. at 92; AE I.

short sale in April 2012. A deficiency resulted from the sale and Applicant believed he received IRS Forms 1099 for the cancellation of the debts. No documentation was provided to show the status of these debts. These debts are not included in the Chapter 7 bankruptcy. The evidence is inconclusive as to whether these debts are resolved.⁸

The debts alleged at SOR ¶¶ 1.d and 1.e are federal and state tax obligations. Applicant provided documentation showing that he settled the state tax debt and that he owed nothing on the federal tax debt. These debts are resolved.⁹

The debts alleged at SOR ¶¶ 1.f through 1.h are the personal loan guarantees Applicant made for the businesses lines of credit he received in the amount of over nine million dollars. These are included in his Chapter 7 bankruptcy.¹⁰

The debts alleged at SOR ¶¶ 1.i and 1.k through 1.p are all delinquent credit card accounts (\$75,464) that Applicant used in order to support his businesses after his lines of credit were stopped. He allocated about 90 percent of this debt to his businesses and the remaining 10 percent was for personal use. These are all included in the Chapter 7 bankruptcy. The debt alleged at SOR ¶ 1.j (\$248) is a consumer debt that is also included in the bankruptcy.¹¹

The debts alleged at SOR ¶¶ 1.q and 1.r are consumer debts (\$685 and \$338) and both have been included in the Chapter 7 bankruptcy. The debt alleged at SOR ¶ 1.s is a personal loan (\$30,000) from Applicant's father. Applicant stated that his father is not seeking to collect on the loan, but it was included in the Chapter 7 bankruptcy. The debt alleged at SOR ¶ 1.t is for an automobile loan (\$15,000). Applicant paid this loan and offered a copy of a lien-free title as proof. Applicant does not know about the debt alleged at SOR ¶ 1.u (\$600). It was not included in the Chapter 7 bankruptcy and is unresolved.¹²

The debts alleged at SOR ¶¶ 1.v through 1.hh all are affiliated with the defunct businesses Applicant created. He testified that none of these businesses have any assets. He signed personal guarantees for these loans, and thus they are duplicate debts as alleged in the SOR. The debt amounts listed in the SOR were taken from the various dismissed bankruptcy schedules associated with the businesses.¹³

⁸ Tr. at 93-95; AE M.

⁹ Tr. at 96-100-101; AE K, L.

¹⁰ Tr. at 113-115; AE M.

¹¹ Tr. at 101-102, 105-106; AE M.

¹² Tr. at 107-109; AE M, N.

¹³ Tr. at 84; GE 2, 3, 8, 11-13; AE M.

According to his Chapter 7 bankruptcy summary of schedules, Applicant lists his current monthly income as \$7,481 and his expenses as \$7,444, with a remainder of \$37. He received financial counseling through the bankruptcy process. Applicant called two witnesses who recently worked with him. They both testified that Applicant is highly respected in his field, is a consummate professional, and supported his effort to gain a security clearance.¹⁴

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 that are to be used 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, administrative judges apply the guidelines 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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 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.

¹⁴ Tr. at 53-74; AE M.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has over nine million dollars in delinquent personal loan guarantees, sold his residence through a short-sale leaving a deficiency on both the primary mortgage and a home equity loan, and sought bankruptcy relief for four businesses he established. The evidence is sufficient to raise the above disqualifying conditions.

Several 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 debts are recent, multiple, and cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not applicable.

Applicant made conscious decisions to finance his real estate ventures with leveraged funds backed by his personal loan guarantees. When his financial institution stopped extending his lines of credit and the businesses could not make the loan payments, his personal guarantees made him responsible for the loan amounts. Regardless of how the financial institution operated, Applicant was responsible to pay back the loans. When he could not, he decided to file for bankruptcy protection. Although the action of the financial institution (calling in the loans) may have been beyond his control, I am unable to find that he did act responsibly by allowing himself to become so heavily leveraged in the first place. AG ¶ 20(b) is partially applicable.

The only evidence of financial counseling is what Applicant received as required by his bankruptcy filing. However, seeking bankruptcy relief is not a good-faith effort to repay his debts.¹⁵ Although AG ¶ 20(c) partially applies, ¶ 20(d) does not.

Applicant provided documentary evidence that the SOR debts listed in ¶¶ 1.a, 1.d, 1.e, and 1.t were paid. Additionally, the corporate debts that are also covered by Applicant's personal loan guarantees will be considered duplicate debts (¶¶ 1.v, 1.w, 1.x, 1.y, 1.z, 1.aa, 1.bb, 1.cc, 1.dd, 1.ee, 1.ff, 1.gg, and 1.hh).

¹⁵ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the predecessor mitigating condition to AG ¶ 20(d)], an Applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the Applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an Applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [AG ¶ 20(d)].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

At this point, Applicant's finances remain a concern despite the presence of some mitigation.

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 relevant 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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's military service, the good character testimony of his witnesses, and the circumstances by which his financial institution called in his personal loan guarantees. However, I also considered that he purposefully engaged in his speculative, high risk, real estate development business for many years. He is seeking a bankruptcy action to extricate himself from his personal loan guarantees. Since his current bankruptcy is not completed and no debts have been discharged, and his previous bankruptcies were all dismissed by the court, his past financial track record reflects a troublesome financial history that causes me to question his ability to resolve his debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations security concerns.

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:	AGAINST APPLICANT
Subparagraph: 1.a:	For Applicant
Subparagraphs: 1.b – 1.c:	Against Applicant
Subparagraphs: 1.d – 1.e:	For Applicant
Subparagraphs: 1.f – 1.s:	Against Applicant
Subparagraph: 1.t:	For Applicant
Subparagraph: 1.u:	Against Applicant
Subparagraphs: 1.v – 1.hh:	For Applicant
Subparagraphs: 1.ii – 1.oo:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge