



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



In the matter of:)
)
) ISCR Case No. 12-10528
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant established financial responsibility by maintaining contact with his creditors and paying all the debts alleged in the SOR. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 7, 2012. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant's eligibility for a clearance. On May 19, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline F (financial considerations).¹ Applicant answered the SOR on July 1, 2015, and requested a hearing before an administrative judge. Attached to his answer, he

¹ The DOD acted 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

included five documents that were marked as exhibits (AE) A through E and were made part of the record.

The case was assigned to another administrative judge on September 17, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 14, 2015, scheduling a hearing for October 29, 2015. The case was reassigned to me on October 28, 2015. At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant testified and submitted three additional exhibits (AE 1 through 3). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on November 5, 2015.

Findings of Fact

In his answer to the SOR, Applicant denied the allegations in SOR ¶¶ 1.a through 1.e. He admitted the factual allegation in SOR ¶ 1.f, with explanations. Applicant's admission to the SOR, and his admissions at his hearing, are incorporated herein as findings of fact. After a thorough review of the evidence, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 56-year-old information technology (IT) system administrator working for a federal contractor. He graduated from high school and completed over three years of college between 1978 and 1982, but did not earn a degree. He married his wife in 1987, and they have two adult children.

Applicant has held a secret level security clearance since 1997, resulting from his employment with federal contractors. His employment history shows that he was employed from May 2001 to May 2002; unemployed from May 2002 to October 2002; part-time employed and self-employed from March 2002 to August 2008; and unemployed during September 2008. He was hired by his current employer, a federal contractor, in October 2008.

In February 2012, Applicant submitted an SCA requesting an upgrade of his clearance. In his response to Section 26 (Financial Record), he disclosed that he failed to timely file and pay his federal and state taxes for tax years 2005, 2007, and 2010.

Applicant explained that between 2004 and 2007, he operated his own IT company and provided services to federal and state governments. He concentrated in the technical aspects of his business and neglected his federal taxes and other business-related administrative responsibilities. (Tr. 13-15) He did not timely file his income tax returns for tax years 2005 and 2007, because he believed he was owed a small refund, and he would face no penalties for filing late. He acknowledged that he and his wife were not organized and that contributed to their financial problems. Applicant stated that as of the day he submitted his 2012 SCA, he had filed his late income tax returns, and had paid or was paying his debt to the IRS.

Applicant also disclosed on his 2020 SCA that he had been over 120 days delinquent on some debts, including his mortgage, and that his mortgage was foreclosed. Applicant explained that the proceeds of the foreclosure sale were sufficient to satisfy his mortgage and leave him a \$200,000 profit.

The status of the alleged SOR delinquent accounts follows:

SOR ¶ 1.a alleged a \$236,150 deficiency balance on a foreclosed mortgage. This allegation is not substantiated. Applicant's property sold in auction and he netted a \$200,000 profit on October 15, 2010. The mortgage balance was paid with the proceeds of the auction. (AE A and AE 1) This debt is resolved for Applicant.

Applicant explained that he purchased a home with a 15-year mortgage and the payment was above his financial means. At the time of the purchase, he was making about \$150,000 a year and he believed he would be able to afford the mortgage payments. In 2008, Applicant changed jobs and was unemployed for a period. His income decreased, and when he realized they could not afford the mortgage payments, he contacted the creditor and asked for a mortgage modification or loan restructuring. His efforts were unsuccessful, apparently because of the creditor's failure to process the loan modification-restructuring properly.

Applicant testified that the U.S. Comptroller of the Currency and the State's Attorney General Office brought class action suits against the mortgage holder for improperly processing Applicant and other peoples' mortgages. Applicant received two small payments as a result of settlements on the class action suits. (Tr. 31-32)

SOR ¶ 1.b alleged a \$595 charged-off account. Applicant explained the he was selling merchandise on the Internet and a dispute arose with a buyer. The dispute was resolved against him, and he settled for less than what he owed sometime in 2009-2010. Applicant paid the debt in 2011-2012. AE 2, dated June 2015, indicates the debt was paid and that the account balance is "0."

SOR ¶ 1.c alleged a \$180,000 IRS tax lien entered against Applicant in March 2011, for unpaid income taxes for tax years 2004 and 2005. Applicant explained that due to an accounting error, the IRS believed he had made twice the income he earned during those years. The problem was compounded by Applicant's failure to timely file his income tax returns. After filing his income tax returns, Applicant convinced the IRS of the accounting mistake. The IRS reduced the tax owed, Applicant paid the debt, and the IRS released the tax lien on June 3, 2015. (AE B)

SOR ¶ 1.d alleged Applicant failed to file his income tax returns for tax years 2005, 2007, and 2010. Applicant's documentary evidence shows he filed his 2004 and 2005 income tax returns late. His 2007 income tax returns were filed in December 2011; and his 2010 income tax returns were filed in November 2011.

Applicant started working with the IRS to resolve his 2004, 2005 and 2007 delinquent income tax returns and to pay his tax debt in 2010. Concerning his 2010 income tax return, Applicant explained that because his home was foreclosed in October 2010, his documents were placed in storage. He applied for an extension to file; however, he was negligent and filed the income tax return one month late.

Applicant claimed that he owed about \$10,000 for tax year 2004. He entered into a payment plan with the IRS and the debt was paid in 2015. He owed \$2,000 for tax year 2011. He established a payment agreement with the IRS and anticipated the debt would be paid in 2015.

SOR ¶ 1.e alleged Applicant owed \$962 for a judgment filed against him by his homeowners' association in March 2011. This allegation is not substantiated. AE A shows that the homeowners' association debt was paid with the proceeds of the foreclosure sale. (AE A)

SOR ¶ 1.f alleged Applicant owed \$3,825 for a judgment filed against him by a bank in June 2012. Applicant settled the debt in April 2015, for less than what he owed, and paid it. He was supposed to receive an IRS Form 1099-C for the cancelled debt. (AE 3, dated September 2015)

Applicant believes that his work history and past behavior show that he has been a reliable, trustworthy, and responsible federal contractor and employee. There is no evidence to show that he has any other outstanding IRS debts, or that he has failed to timely file his taxes, except for the SOR allegations. Applicant believes he has learned a valuable lesson. He promised never to file his income tax returns late again, or to fail to pay his income taxes.

Applicant expressed remorse for his financial situation and accepted responsibility for his financial problems. He believes that he has been truthful and forthcoming during the security clearance process. He has learned a valuable lesson by going through the security clearance process. He understands that he is required to maintain financial responsibility to remain eligible for a security clearance.

Applicant testified that during the last three or four years, he and his wife have worked very hard to fix their financial problems with their creditors and the IRS. He believes that their financial situation has improved substantially. They are now financially stable, paying their obligations on time, and have sufficient funds to pay their living expenses. Their current income is sufficient for them to live the lifestyle they want, and they are not in a position that would make them susceptible to blackmail, coercion, or undue influence. He promised to maintain his financial responsibility. (Tr. 16)

Applicant purchased another home outright with the \$200,000 he received from the sale of his foreclosed home. His adjusted gross income is \$150,000 a year, he has no mortgage payment, and only about \$1,200 of monthly expenses. He testified that he has 401(k) and IRA accounts, and \$20,000 in a savings bank account. Applicant noted

his many years working for government contractors while possessing access to classified information without any security concerns, except for those raised in the current SOR.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter 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 those who must protect national interest as their 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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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 ¶ 18)

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

Applicant failed to timely file and to pay his federal and state income tax returns for tax years 2005, 2007, and 2010, and acquired a significant debt to the IRS. Additionally, he had a home mortgage foreclosed, and at least three delinquent accounts. Financial considerations disqualifying conditions AG ¶ 19(a): "inability or unwillingness to satisfy debts," AG ¶ 19(c): "a history of not meeting financial obligations," and AG ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required of the fraudulent filing of the same;" apply.

AG ¶ 20 lists conditions that could mitigate the financial considerations security concerns:

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

All of the above mitigating conditions apply and mitigate the financial considerations concerns. Applicant's documentary evidence show that he has paid, or is in the process of paying, all the accounts alleged in the SOR.

I considered that Applicant may have been negligent when he purchased a home above his financial means. He also failed to timely file and pay his income taxes, and he failed to timely pay other creditors. However, it appears that Applicant had some periods of unemployment, and his earnings diminished as a result of a change of employment.

Applicant should have been more diligent in addressing his delinquent income tax returns and other financial obligations. Nevertheless, by 2010, Applicant was already in contact with his creditors, established payment plans, and started the process to resolve his delinquent accounts. As of the hearing date, Applicant's documentary evidence shows he resolved all the SOR accounts. Considering the evidence as a whole, I find Applicant has shown sufficient financial responsibility for AG ¶ 20(b) to apply.

AG ¶¶ 20(c) and (d) apply. Applicant's efforts to resolve the debts started in 2010. Applicant has gained a better grasp of his financial situation and his finances are under control. With his current job earnings, Applicant will be able to establish viable payment plans to address any remaining debts. Considering the evidence as a whole, Applicant has shown financial responsibility and sufficient progress in the resolution of his debts.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). 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.

Applicant is a 56-year-old employee of a federal contractor. His financial problems were caused, in part, by circumstances beyond his control. He established financial responsibility by maintaining contact with his creditors, addressing his legal obligations, filing his late income tax returns, and paying all the debts alleged in the SOR. He understands that he is required to maintain financial responsibility to remain eligible for a security clearance. For all these reasons, I believe that Applicant will continue to responsibly pay his debts and maintain his financial responsibilities.

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.f:

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 eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge