



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 13-00687

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Corey Williams, Esquire, The Edmunds Law Firm

December 12, 2013

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on August 21, 2012. (Government Exhibit 1.) On July 30, 2013, the Department of Defense (DoD), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DoD 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on August 5, 2013, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on September 13, 2013. A notice of hearing was issued on September 23, 2013, scheduling the hearing for October 25, 2013. The Government presented five exhibits, referred to as Government Exhibits 1 through 5, which were admitted without objection. The Applicant called two witnesses and presented twenty-two exhibits, referred to as Applicant's Exhibits A through V, which were admitted without objection. The Applicant also testified on his own behalf. The

record remained open until close of business on November 1, 2013, to allow the Applicant to submit additional documentation. Applicant's Counsel submitted a written closing argument dated November 1, 2013, and two Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits W and X, which were admitted without objection. The official transcript (Tr.) was received on November 4, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 50 years old, married, has a Bachelor's of Science degree in Business Information Systems and a Doctorate degree in Business Administration. He is employed with a defense contractor as an Information Assurance Specialist and is seeking to obtain a security clearance in connection with this employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

The Applicant denied the allegations set forth under this guideline. Credit Reports of the Applicant dated August 31, 2012; May 31, 2013; and August 28, 2013, reflect that the Applicant is indebted to each of the creditors set forth in the SOR for an amount totaling at least \$60,000. (Government Exhibits 3, 4 and 5.)

The Applicant is indebted to the Social Security Administration (SSA) for overpayment of benefits in the amount of \$25,689. His most recent credit report shows this as a collection account. The Applicant explained that in 2000 he had lasik surgery. The physician programmed the laser inaccurately, and the Applicant was left blinded by the procedure. Applicant had to undergo 59 to 60 surgeries on his eyes in order to regain his vision. From 2000 to 2004 Applicant received long term disability from his employer and at some point started receiving social security benefits to off-set their payments. Applicant returned to full time work in 2004, with another employer, but continued to receive social security benefit payments on a monthly basis for about three years, until sometime in 2007. He claims that about every six months or so when he received paperwork from SSA, he filled it out and sent it in to inform the SSA that he was now working full time, however the benefit payments kept being directly deposited into his account. He states that he had no idea that he was getting something he did not deserve. (Tr. p. 45-46.)

In 2008, Applicant was eventually contacted by the Social Security Office, who asked him to meet with them to discuss his overpayment. (Tr. p. 70.) Applicant went to

the meeting at the Social Security Office and was told that he has been receiving overpayments that he needed to pay back. Applicant agreed to a monthly payment plan of \$600 monthly that they accepted. Applicant's payment history (Applicant's Exhibit B) shows that he has made a payment each month since October 29, 2011, but Applicant indicates it started shortly after he entered into the payment agreement. Applicant stated that he had a "hunch" that the SSA was not doing something correctly. (Tr. p. 72.) In 2005, Applicant received a one million dollar settlement for the malpractice lawsuit for his eyes. His attorney fees were \$270,000, and he received \$607,000.

Following the above situation, the Applicant also became indebted to a bank on a real estate loan that is past due in the amount of \$34,042 on an approximate balance of \$617,000. He explained that he purchased his house in October 2005. The terms of the purchase required him to put a 30% down payment, which was \$300,000, and he obtained a 30 year fixed loan, at 5.75%. At that time the house was worth close to one million dollars. Applicant states that he and his wife were able to afford their monthly house payment of \$5,200 which included an impound account for taxes. In 2010, Applicant's wife experienced some medical problems for a few months and was unable to work. Applicant obtained a loan modification in September 2010, and his monthly house payments were reduced to \$4,208. By then, the value of his house had dropped to about \$450,000. His wife returned to work and they continued to make their house payments.

In December 2011 Applicant lost his job. He borrowed \$50,000 from his IRA to live on. He also applied for the Unemployment Assistance Program that the bank had that allowed him to put six months of his house payments on the back of the loan. In July 2012, he started working part-time for his current employer and although he states that he is not technically full time now, he works 40 hours a week at \$55.00 an hour and also gets paid as a adjunct professor for teaching on the side. He and his wife bring home at least \$7,000 monthly. (Tr. p. 92.) Applicant has applied for another loan modification and is currently waiting to find out if he qualifies. Upon the advice of his attorney, Applicant has not made any house payments for the past year, however he remains living in the house. When Applicant stopped making the house payments he did not escrow the money into a loan account. Portions of an undated letter from Applicant's attorney indicate that in exchange for dismissing a federal lawsuit that Applicant filed against the bank, Applicant would receive a loan modification based on a realistic evaluation of the property. Applicant is currently awaiting a response from the bank representatives. (Applicant's Exhibit W.)

After receiving the money from his lawsuit, in 2005, Applicant loaned his father \$300,000 to purchase a house in another state for his sister to live in. His sister currently resides in the house and pays his dad the rent. Applicant's father pays him 3% interest on the loan which is about \$117.00 monthly. (Tr. p. 95.) Applicant owns the home and has title to the property. (Applicant's Post-Hearing Exhibit X.) Applicant did not use his money from the lawsuit settlement to pay off any of his delinquent debts.

Two witnesses testified on behalf of the Applicant. His immediate supervisor, who hired him and has known him since the summer of 2012, and a company director, who sees the Applicant on a daily basis, find the Applicant to be honest, responsible and trustworthy. He is considered to be a person of strong moral character. They do not consider him a security risk or that he would ever compromise the national interest. (Tr. pp. 26-41.)

Numerous letters of recommendation were submitted on behalf of the Applicant from professional colleagues, work associates and friends who know him in and outside of the work place. These individuals attest to the Applicant's professionalism, good character, and trustworthiness. Applicant is known to be reliable and dependable, and a person of high morals, ethics, integrity and loyalty. He has consistently performed his duties at work in an exemplary fashion through many challenges. His expertise in business and public administration is said to be an asset to the organization. (Applicant's Exhibits C, D, E, F G, N ,O, P and Q.)

Applicant calculates his net worth to be over one million dollars. (See Applicant's Exhibit R.)

Applicant's achievement in his field of expertise are vast and impressive. He was recognized as 2011 IT Executive of the Year as a nominee or finalist, has received numerous computer administration certifications, and has been a highly successful information technology professional over the years. He has also been an adjunct instructor for various universities. (Applicant's Exhibits A, H, I, J, K, L, and M.)

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. *The Concern.* 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.

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts; and

19.(c) a history of not meeting financial obligations.

Conditions that could mitigate security concerns:

20.(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.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct and surrounding circumstances;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavior changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions

based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility, which demonstrates poor judgment or unreliability.

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 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 or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). The evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that the Applicant has experienced some circumstances beyond his control that have negatively impacted his finances, namely, about a year of unemployment, which caused financial hardship. However, the problem was compounded by the fact that the Applicant has made a series of poor financial decisions. Applicant was overpaid for social security benefits for about three years while he was working 40 hours a week. He had a "hunch" that something was wrong but did nothing about it. The money was directly deposited into his account and he spent it. There is no excuse for his inaction here. No action is an action. Common sense would dictate that a prudent person would call, report, meet with, and send letters to the SSA to inform them of the immediate problem, as it will ultimately just come back to haunt him. Now he is stuck reimbursing the Government on this collection account in the amount of \$600 monthly. He would not owe the money had he made a reasonable and prudent decision to inform the authorities of their mistake. It is noted that he has not missed a payment since entering into the agreement. However, the facts that led to this situation are distasteful. Nevertheless, Applicant is paying the debt according to the agreement and plans to continue to do so until the amount owed is reimbursed. Accordingly, I find for the Applicant under subparagraph 1.(a).

In regard to the debt owed to the bank, I find that the Applicant has played the game legally, but it still looks bad. He is currently waiting on his second loan modification. He has not made a mortgage payment in over a year and still resides in the house and is enjoying the property. He obviously owes more on the property loan than what the property is currently worth and so he is trying to avoid paying the debt. Its called getting into a bad loan. That is unfortunate, but he remains indebted to the bank. There is no indication whether he will be approved for his second loan modification or whether he can afford to make the payments if he is unable to obtain one. He states that if he does not obtain a loan modification he may need to short sale his home. Clearly, he needs a new approach to handling his finances. Financial counseling and a set budget for him to follow would be extremely helpful.

What stands out as being very odd here is the fact that the Applicant received a one million dollar lawsuit settlement and did not use any of the money to resolve his delinquent indebtedness. Instead, he purchased houses. This is an example of another poor financial decision and his unwillingness to satisfy his debts. At best, his delinquent debts were simply not a priority to him.

The Applicant has not done enough to show that he is fiscally responsible. Although he seems to understand the importance of paying his bills on time, he simply has not been able to tackle all of his delinquencies. At this time, there is insufficient evidence of financial rehabilitation. The Applicant has not demonstrated that he can properly handle his financial affairs, or that he is fiscally responsible.

Under the particular circumstances of this case, the Applicant has not met his burden of proving that he is worthy of a security clearance. He does not have a concrete plan as to how he will sufficiently address his delinquent debt in the SOR or how he will manage his finances in the future. Thus, it cannot be said that he has made a good-faith effort to resolve his past due indebtedness. He has not shown that he is or has been reasonably, responsibly or prudently addressing his financial situation. Assuming that he starts to resolve his debt and continues to do so, and then shows that he has not acquired any new debt that he is unable to pay, he may be eligible for a security clearance in the future. However, not at this time. Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Under Guideline F (Financial Considerations), Disqualifying Conditions 19.(a) *inability or unwillingness to satisfy debts*; and 19.(c) *a history of not meeting financial obligations*, apply. Mitigating Condition 20.(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* also applies, but is not controlling here. Admittedly, the Applicant and his wife did experience some periods of unemployment, which contributed to his financial hardship. However, Applicant has been working for his current employer for over a year, and he remains excessively and

delinquently indebted to the bank for his home loan. Accordingly, I find against the Applicant under Guideline F (Financial Considerations).

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole-person assessment of poor judgement, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

I have considered all of the evidence presented. It does not mitigate the negative effects of his financial indebtedness and the effects that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has not overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.
Subpara. 1.a.: For the Applicant.
Subpara. 1.b.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge