



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



In the matter of:)
)
) ISCR Case No. 14-02300
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: J. Wyndal Gordon, Esq.

01/19/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant is a 48-year-old senior project manager employed with 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, disputing some of his debts, and addressing his financial obligations. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 24, 2013. On October 24, 2014, 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 March 18, 2015, and requested a hearing before an administrative judge. The case was assigned to me on July 1, 2015. The Defense Office

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.

of Hearings and Appeals (DOHA) issued a notice of hearing on July 24, 2015, scheduling a hearing for August 13, 2015.

At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified and submitted 16 exhibits (AE 1 through 16). AE 16 was initially offered, but later withdrawn. All exhibits were admitted without objection, except for AE 16 that was withdrawn. DOHA received the hearing transcript (Tr.) on August 21, 2015.

Findings of Fact

In his answer to the SOR, and at his hearing, Applicant admitted the SOR factual allegations with explanations. After a thorough review of the evidence, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 48-year-old senior project manager working for a federal contractor. He received his bachelor's degree in computer information systems in May 1990. He married in July 1996, and divorced in August 2012. He has two children from this marriage, ages 9 and 15, for whom he provides financial support.

Applicant has possessed a security clearance since 2000, resulting from his employment with federal contractors. In 2003, Applicant, his wife, and another couple established a company to do business with federal and state governments. He averred that the company held a facility top secret clearance, and that he also held a top secret clearance with access to sensitive compartmented information (SCI). (Tr. 39) Except for the pending SOR allegations, there is no evidence to show that Applicant has been involved in any other issues of security concern.

Applicant explained that in 2007-2008, his company's client (a federal agency) stopped all payments to the company during a four-month period while undergoing the implementation of a new payment system. Without the contract revenue, the company could not pay its employees' salaries. Applicant and his partners did not want to lay off their employees because of their technical expertise and the anticipated revenues the company would receive in the near future. Applicant withdrew money from his and his ex-wife's 401(k) retirement accounts to pay their employees' salaries. Additionally, Applicant claimed that he opened and personally guaranteed a business line of credit loan with a bank (SOR ¶ 1.a) to float the company's employees' salaries and the company's operational expenses.

Applicant and his partners did not have sufficient money to pay their employees' salaries and their taxes. They made the decision to pay their employees' salaries first and withheld paying their employees' taxes until after they received their anticipated contract revenues. As a result, the company acquired approximately a \$400,000 federal tax deficiency. In 2009-2010, the IRS started its collection efforts. Applicant established a payment plan with the IRS and paid approximately \$300,000 of the tax debt.

In 2010-2011, a rift developed between Applicant, his then wife, and his business partners. According to Applicant, his partners took control of the company and its financial accounts, and he was unable to continue making the scheduled payments to the IRS. He claimed that his partners received revenues from their contracts, but diverted the company's revenues for their personal gain and failed to continue making payments to the IRS. Applicant contacted the IRS in February 2012, and informed the IRS of his problems with his business partners and requested to be released from liability. The IRS denied Applicant's request because he and his business partners are considered by the IRS to be jointly and severally liable for all of their employees' delinquent taxes.

Applicant submitted documents to show his efforts to regain control of the company. In 2011, he filed criminal charges against his business partners. When the charges were dismissed, he filed a civil suit trying to prevent his business partners from taking over the company. (GE 2) In January 2012, Applicant and his business partners entered into a mediation agreement. In the document, his business partners agreed that the company was responsible for its IRS tax debt, and that the company would reimburse Applicant for about \$20,000 in billable hours. The mediation agreement was silent about Applicant's business loan (SOR ¶ 1.a). (AE 5)

In September 2013, March 2014, and November 2014, Applicant demanded that his business partners pay the IRS debt and the line of credit loan Applicant obtained in 2008 (alleged in SOR ¶ 1.a). (AE 10-12)

The status of the alleged SOR delinquent accounts follows:

SOR ¶ 1.a alleged a \$106,214 charged-off bank account. As previously stated, Applicant claimed that this was a corporate debt – a line of credit for the company that he opened in 2007-2008, and personally guaranteed. Apparently, the line of credit was later converted into a credit card account.

Applicant claimed his business partners initially agreed to reimburse him for the line of credit debt, but later reneged on their promise. Applicant averred that he started negotiations with the bank in 2010 trying to settle the account, but without success. His negotiations were over the telephone and he has no documentary evidence of his contacts with the bank. In his answer to the SOR, and at his hearing, Applicant again claimed that he had recently sent another settlement offer to the bank and he was waiting for their response. At his hearing, Applicant stated that the debt had been removed from his credit report.

SOR ¶ 1.b alleged a \$50 collection on behalf of a telephone service provider. Applicant explained that the debt became delinquent because of his oversight. He paid the debt in March 2015. (AE 13)

SOR ¶ 1.c alleged a \$22,000 legal fee in collection by the law firm that represented Applicant in his civil suit against his business partners. Applicant paid the debt on February 12, 2015. (AE 7)

SOR ¶ 1.d alleged Applicant owed a \$120,000 tax debt to the IRS for unpaid business taxes for tax years 2008 and 2009. Applicant admitted the debt and explained that he and his business partners were “jointly and severally” liable to the IRS for unpaid business taxes.

Applicant retained the services of a certified public accountant and a tax attorney to help him dispute the tax debt. At his hearing, he testified that he recently exhausted all of his appeals with the IRS, and instructed his attorney to make arrangements to establish a payment plan. He made two payments to the IRS in May and July 2015. (AE 14) Applicant has accepted responsibility for his participation in creating this debt. He believes that he has been diligently working to resolve the debt.

Applicant also 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 or pay his taxes, except for the SOR allegation.

Applicant believes he has learned a valuable lesson, and he promised never to repeat the mistake of not paying his employees’ taxes. He established a new company in 2011, and retained the services of a certified public accountant to make sure all tax payments are made in accordance with the law.

Applicant expressed sincere 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 for him to be eligible for a security clearance. Applicant believes that with his anticipated earnings from his job with the federal contractor, he will not have any problems paying his debts and current living expenses. He promised to maintain his financial responsibility.

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 has a history of financial problems that included a \$106,000 charged-off line of credit loan, two personal debts for about \$22,000, and a \$120,000 IRS unpaid business tax debt. Financial considerations disqualifying conditions AG ¶ 19(a): “inability or unwillingness to satisfy debts,” and AG ¶ 19(c): “a history of not meeting financial obligations,” 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;
- (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.

AG ¶ 20(a) does not apply because Applicant’s financial problems are ongoing and did not occur under circumstances making them unlikely to recur.

AG ¶ 20(b) partially applies. Applicant’s financial problems were caused or aggravated, in part, by the period during which the company was not being paid by its client, and the takeover of the company by his business partners. (However, Applicant’s illegal withholding of his employees’ taxes also aggravated his financial problems.) Applicant filed criminal charges and a civil suit against his business partners trying to recover control of the company. He maintained contact with the IRS and the bank, and has continued his efforts to resolve the debts. He disputed his financial liability; however, now that the disputes have been resolved against him, Applicant made two payments to the IRS and promised to establish payment plans with the IRS and with the bank. 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 efforts to resolve the debts started in 2009-2010. He obtained financial counseling from a certified public accountant and retained an attorney to assist him in resolving his financial problems. He paid two of the SOR debts, and made two payments to the IRS. 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 his remaining delinquencies. The credit reports in evidence show that he is not living beyond his means, and he has no new delinquent 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 48-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, paying two debts, and addressing his legal obligations. He understands that he is required to maintain financial responsibility for him to be eligible for a security clearance. I believe 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.d: 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