



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



In the matter of:)
)
) ISCR Case No. 07-11931
)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esq., Department Counsel
For Applicant: *Pro Se*

March 12, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns raised by his financial history. Eligibility for access to classified information is granted.

On November 9, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 27, 2007, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on January 9, 2008, and reassigned to me on February 4, 2008. DOHA issued a notice of hearing on January 28, 2008. I convened the hearing as scheduled on February 20, 2008. The government offered Exhibits (GE) 1 through 5,

which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through C, without objection. One witness testified on Applicant's behalf. I granted Applicant's request to keep the record open until March 3, 2008, to submit additional matters. Applicant submitted 90 pages of documents which were marked AE D through V, and admitted without objection. Department Counsel's memo is marked Hearing Exhibit (HE) I. The record closed on March 3, 2008. DOHA received the transcript of the hearing (Tr.) on February 28, 2008.

Findings of Fact

In his Answer to the SOR, dated November 30, 2007, Applicant admitted all the factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 58-year-old employee of a defense contractor. He served in the U.S. Marine Corps from 1967 to 1971, and was honorably discharged. He has an equivalency degree from high school obtained while he was in the Marine Corps. His marriage from 1970 to 1973 ended in divorce. He remarried in 1975. He and his wife have a 23-year-old daughter and he adopted his wife's two children.¹

Applicant's wife was laid off from her employment in about 1998, and was unemployed or underemployed until 2000. Applicant had continuous employment with a company from 1988 through 2000. His employer sold his division to another company in 2000. He continued to be employed by the successor company. Applicant traveled frequently for his company and received many hours of overtime pay. He and his wife came to rely on the overtime. After the events of September 11, 2001, his company changed their philosophy and essentially ended his travel and overtime. He was notified in 2002 that he was on the list of employees to be laid off and that he should start looking for other employment. Applicant started working on adding a garage to his house before his employment became a concern. He accumulated credit card and other debt for the costs of the addition. In preparation of their imminent financial issues related to his employment, Applicant went through a debt consolidation program as a means of lowering interest rates on their debts. The plan called for Applicant to pay \$1,635 per month to the company which disbursed the funds to his creditors. The payments were lowered to \$1,410 in January 2003. He made payments every month from March 2002 through May 2003.²

Applicant refinanced his mortgage in December 2002. Creditors were paid as part of the settlement. An auto financing company was paid \$17,528; a financing company was paid \$11,399 for his tractor; and two bank/financial institutions were paid \$10,158 and \$4,518.³

¹ Tr. at 17-18, 56-59; GE 1.

² Tr. at 19-20, 37-41, 44, 60; Applicant's Answer to SOR; GE 1, 2; GE A, F.

³ Tr. at 38; GE 2; AE E, G.

Applicant withdrew \$48,880 from his 401(k) retirement account in 2002, which triggered serious tax consequences. Applicant was ignorant of the tax ramifications. He was told that there was a 10% penalty, but did not consider that the \$48,880 would be taxed as income. Only \$799 in federal income tax was withheld from the disbursement. Applicant paid a professional \$1,000 to review his 2002 tax return and attempt to work out a payment plan with the state and the IRS, if necessary. The professional did not handle the return expeditiously. Despite numerous requests from Applicant, the return was not prepared to be filed until June 2004. He owed the IRS more than \$21,000 for tax year 2002. Applicant withdrew an additional \$14,924 from his retirement account in 2004. \$2,238 was withheld for federal income tax and \$746 was withheld for state tax.⁴

Applicant made a payment plan with the IRS in August 2004, to pay \$220 every month. The IRS also retained any refunds due Applicant for subsequent tax years. In February 2008, the IRS removed the penalties for failure to file and pay for tax year 2002. The IRS credited Applicant with \$5,272 for penalties and interest from his 2002 return. They applied \$3,708 toward his debt for tax year 2004, and stated he would receive at least \$1,560 in a refund. With this action, all the back taxes owed to the IRS have been resolved. He made a payment plan with his state to pay \$75 per month, which was increased to \$100 per month in August 2007. The balance owed to the state as of February 8, 2008 was \$2,235. Applicant intends to pay an additional \$220 to the state with the money he was using to pay the IRS. With the additional payments, the state will be paid within about seven months.⁵

Applicant was laid off from his company in about November 2003. He was unemployed or underemployed, working sporadically, until he was hired by his current employer in August 2005.⁶

The SOR alleges five delinquent debts totaling approximately \$63,227. Individual debts are discussed below.

SOR ¶ 1.a alleges a debt of \$18,588 to a financial institution for a credit card account. This debt was included in Applicant's debt consolidation program in 2002 and 2003. The financial institution forgave the debt and issued an IRS Form 1099-C cancelling the debt of \$16,564 on December 31, 2006. This means that Applicant no longer owes and the creditor no longer expects payment on the debt. This can have tax consequences and a taxpayer could be required to pay income tax on the amount of the forgiven debt. An exception is when the taxpayer is insolvent. Applicant addressed this on his tax return for tax year 2006, certifying that he and his wife were insolvent.⁷

⁴ Tr. at 20-22, 42-46, 68-69; AE I, K, M. Applicant's tax debts were not alleged in the SOR and are not considered for disqualifying purposes, but may be used when viewing Applicant's overall financial situation, when analyzing the "whole person," and the potential application of mitigating conditions.

⁵ Tr. at 32, 60-63; AE C, I-K, M, N, P, S, U.

⁶ Tr. at 20-22, 36; GE 1.

⁷ Tr. at 19-20, 63-71; Applicant's Answer to SOR; GE 1, 2; AE A, F.

An IRS Form 1099-C, cancelling the debt of \$6,946 as alleged in SOR ¶ 1.c, was issued by the creditor on November 1, 2007. This debt was also included in Applicant's debt consolidation program in 2002 and 2003.⁸

Applicant admitted to the debts of \$12,813, \$5,652, and \$19,228, as alleged in SOR ¶¶ 1.b, 1.d, and 1.e. He entered into a payment plan in March 2005, with the creditor from SOR ¶ 1.d to pay \$75 per month. Applicant made payments of \$2,625 to that creditor. The balance on the debt as of February 25, 2008, was \$4,969. Once the tax debt to his state is paid, he will then use that additional money to pay the debt in SOR ¶ 1.d. Applicant has not made any payments on the debts in SOR ¶¶ 1.b and 1.e. His intent is to pay all his delinquent debts. His plan is pay the debt in SOR ¶ 1.d, then move to the next debt.⁹

Applicant's debt consolidation program in 2002 to 2003 did not include financial counseling and he has not received any counseling since then. He chose not to file for bankruptcy because he wanted to pay his debts. Applicant and his wife help their daughter in college, but otherwise they have severely cut back on their expenses and live frugally. He still has not finished building the garage because of the costs.¹⁰

Applicant's manager wrote a letter on his behalf noting his professional job performance and integrity. Applicant discussed his financial situation with his manager and his manager recommends him for a security clearance.¹¹

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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.

⁸ Applicant's Answer to SOR; GE 2; AE Q.

⁹ Applicant's Answer to SOR; GE 2; AE A, U.

¹⁰ Tr. at 35-36, 49-51, 76; Applicant's Answer to SOR; GE 2; AE A.

¹¹ AE C.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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 accumulated a number of delinquent debts and was unable to pay his obligations for a period of time. The evidence is sufficient to raise the above potentially disqualifying conditions.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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 had steady employment with the same company for 13 years and earned a good salary with plenty of travel and overtime. This continued after the company was bought in 2000. He planned on building a garage and accumulated credit card and other debt for the addition. Things started to change in about the fall of 2001. His company curtailed his travel and overtime, which substantially lowered his income. He was notified in 2002 that a lay off was coming and he was laid off in about November 2003. He was unemployed or underemployed until he was hired by his current employer in August 2005.

Applicant started preparing for the financial consequences of his diminished pay and loss of employment well in advance of the lay off. He went through a debt consolidation program and paid \$1,635 into the program every month from March 2002 through December 2002, and the lowered \$1,410 payments from January 2003 until May 2003, when he could no longer maintain the payments. He refinanced his

mortgage in December 2002, and paid creditors more than \$43,000 as part of the settlement.

Applicant withdrew \$48,880 from his 401(k) retirement account in 2002. Through ignorance or poor advice, he was unaware of the tax consequences. He owed the IRS more than \$21,000 for tax year 2002. He made a payment plan with the IRS in August 2004, to pay \$220 every month. The debt to the IRS is now paid. He made a payment plan with his state to pay \$75 per month, which was increased to \$100 per month in August 2007. He intends to pay an additional \$220 to the state with the money he was using to pay the IRS. The state will be paid within about seven months.

Two of the debts in the SOR were formally forgiven by the creditors. He has paid one creditor \$75 per month since March 2005. His intent is to pay all his delinquent debts. Once the state is paid, he will then use that additional money to add to the \$75 he is paying the one creditor. He will then move to the next debt.

Applicant's financial problems are directly related to his unemployment and underemployment. These are conditions that were largely beyond his control. He started addressing his financial issues even before he was laid off, when his overtime was cut off. He handled his debts as well as he could for as long as he could. Once he was working consistently again, he started paying his debts. He began regularly paying the IRS in 2004, and he also instituted payment plans with the state and the creditor from SOR ¶ 1.d. The debt to the IRS is paid, and the debt to the state will be paid within a reasonable period. He will then use the extra money on the remaining debts. I find that Applicant is acting responsibly under the circumstances and his actions constitute a good-faith effort to repay overdue creditors. AG ¶ 20(b) is applicable and AG ¶ 20(d) is partially applicable. He has not received counseling but there are clear indications that his financial problems are being resolved and are under control. AG ¶ 20(c) is partially applicable. No other mitigating condition is completely applicable.

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 the 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 common sense 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 the facts and circumstances surrounding this case. Applicant served honorably in the Marine Corps from 1967 to 1971. He worked for the same company from 1988 through 2000. He was earning a good salary, traveling and working many hours of overtime. His job continued after his company sold his division in 2000. The new company essentially eliminated his travel and overtime in 2001, and he was laid off in 2003. Applicant has not ignored his financial responsibilities; he has attempted to address them to the best of his ability. He refinanced his mortgage in December 2002. Creditors were paid more than \$43,000 as part of the settlement. Applicant withdrew \$48,880 from his 401(k) in 2002, and an additional \$14,924 in 2004. He was unprepared for the serious tax consequences triggered by the withdrawals. It took him years, but he paid the IRS, and is on the verge of paying off the state. He has regularly paid one creditor since March 2005. Applicant chose not to file bankruptcy. His intent is to pay all his delinquent debts. The money that was used to pay the IRS will go to pay the state, and then the next creditor. He has worked for his current employer since August 2005, and is highly regarded. He and his wife live very frugally. He sincerely, candidly, and credibly testified about his finances, and his desire to correct his problems.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his financial issues.

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.e: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge