



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 07-15204
)
)
Applicant for Security Clearance)

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: John E. Bakke, III, Esquire

August 11, 2008

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On July 26, 2005, Applicant submitted a Security Clearance Application (SF 86). On February 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing 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.

On February 27, 2008, Applicant answered the SOR in writing and requested a hearing before an administrative judge. DOHA assigned the case to me on June 5, 2008, and issued a Notice of Hearing on June 5, 2008. The case was heard on June 25,

2008, as scheduled. Department Counsel offered Exhibits (GE) 1 through 5 into evidence without objection. Applicant testified and offered Exhibits (AE) A through C into evidence without objection. At the conclusion of the hearing, I left the record open until July 11, 2008, to give Applicant an opportunity to submit additional information. On that day, Applicant submitted two exhibits that I marked as AE D and E and admitted into the record without objection by the Government. DOHA received the hearing transcript (Tr.) on July 3, 2008.

Findings of Fact

In his Answer to the SOR, Applicant denied all factual allegations contained in the SOR, and offered explanations for the denials.

Applicant is 49 years old. He is married, but currently separated. He has two children, ages, 22 and 19. The 22-year old is married and the 19-year old attends college. He has a bachelor's and master's degree. From 1979 to 1997, he worked for a federal contractor in computer engineering. He held a Secret security clearance during those 17 years. (Tr. 66).

Applicant left his position with the federal contractor in 1997 to start a software company with a couple other individuals. Initially, he took \$60,000 out of his retirement funds to pay personal and business expenses. Subsequently, the company obtained a line of credit on which to operate the business. While working in the business, the owners developed a product that they thought would be purchased by the government. In order to pursue that contract, the company merged with a larger software company, a federal contractor. However, the contract never materialized and the business failed in 2001. When that happened, the business owed about \$60,000 in business loans. The partners divided the debt, and Applicant took another \$19,000 out of his retirement fund to retire his portion of the debt. (Tr. 60-61). Applicant continues to work for the company, as an employee, and applied for a security clearance in 2005.

As a result of the business venture, Applicant accumulated a substantial amount of personal debt from 1997 to 2001. (Tr. 45). Although he earned \$55,000 to \$60,000 per year from the new company, he was unable to manage his personal expenses and pay the business expenses. (Tr. 47, 44). Based on credit bureau reports (CRB) from October 2005, November 2007, and January 2008, the SOR alleged 20 outstanding delinquent debts, including one judgment, which accrued during that time period.¹ (GE 3, 4 & 5). The status of those debts listed in the SOR is as follows:

1. Applicant paid two debts: ¶ 1.b for \$127 and ¶ 1. h for \$1,930. (AE C & E).
2. Since June 2004, Applicant has attempted to resolve ¶ 1.a, which is a \$54,032 judgment entered against him by a credit card company. (The debts listed in ¶ 1.c for

¹The debts alleged in the SOR total about \$225,000; however, some of the allegations are duplicate debts. More accurately, the debt amount is approximately \$171,000, and possibly less.

\$49,043 and ¶ 1.d for \$4,980 total \$54,032, and are duplicates of ¶ 1.a.) Applicant's attorney had numerous conversations and correspondence with the creditor regarding the matter, and ultimately settled it for \$1,930. Applicant submitted a check for that amount to the creditor, which was cashed. (Tr. 36; AE C). Although Applicant's attorney repeatedly sought an executed final Release of Judgment from the creditor, he has yet to receive one. (AE C).

3. Fifteen debts listed on the SOR, totaling about \$115,000, remain unpaid or unresolved.² Several of them were charged off in 2000, some in 2001, and others in 2002. They are no longer legally enforceable, as the statute of limitations expired on all of them. At the current time, Applicant does not intend to pay the debts. He was previously advised by his attorney to pay his current bills, but not the delinquent credit card debt. After giving Applicant that advice, his attorney notified Applicant's unsecured creditors, viz., the credit card companies, that Applicant was financially unable to make payments. (Tr. 50; AE A). Applicant feels an obligation to pay the debts, which is a reason he did not file for bankruptcy. (Tr. 58). He would pay them if he won the "lottery." (Tr. 55).

Applicant began his current position in September 2001 and earns \$115,000 annually. After paying expenses for two households and college costs, he has about \$1,000 left a month for living expenses. He borrowed \$12,000 from his mother and owes about \$13,000 in credit card bills, some of which is attributable to his wife. Payments on all of his on-going obligations are current. (Tr. 54; AE A). Since the business failure, he has paid off some debts not listed in the SOR.

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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching 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

²Some of these debts may be duplicates, but it is unclear in the record.

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 to obtain a favorable security decision. 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.”

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.

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, two of which may be applicable in this case. Under AG ¶ 19(a) “an inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly, under AG ¶ 19(c) “a history of not meeting financial obligations” may raise security concerns. From 1997 to 2001, Applicant accumulated a significant amount of delinquent debt, a large portion of which remains unresolved. The evidence is sufficient to raise those two potentially disqualifying conditions.

After the Government produced substantial evidence of those disqualifications, the burden shifted to Applicant to produce evidence and prove mitigation of the resulting security concerns. AG ¶ 20 includes six conditions that could mitigate security concerns arising from financial difficulties:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant started accumulating debt in 1997 and continued accumulating it into 2002 (the date of several charged-off accounts). Given the amount of the delinquent debt, which is owed to numerous creditors and accrued over a five-year period of time, the debts were not infrequent and occurred in the recent past, such that AG ¶ 20(a) is not applicable.

Applicant's financial issues arose as a result of a business opportunity that failed to materialize. That situation was outside of his control. Applicant's attorney subsequently notified his creditors of his financial problems, in order to resolve the situation. AG ¶ 20(b) has some application.

Applicant received financial advice on the management of his delinquent debts through his attorney, but he has not participated in a program specifically designed to address budgeting, money management, credit card issues, and other financial concerns, as generally contemplated under this condition. Currently, he is on a very tight budget and has accumulated \$13,000 in credit card obligations over the past

couple years. There is no evidence that fifteen of his previous debts are resolved, other than a determination that they are legally unenforceable. Hence, the evidence does not demonstrate that he received credit counseling and/or that there is a clear indication that his financial situation is under control, as required under AG ¶ 20(c). This condition does not apply.

Applicant's attorney repeatedly contacted a credit card company in order to resolve a large judgment. Applicant also paid two debts. Those actions demonstrate a "good faith" effort to pay or resolve the debts alleged in SOR ¶¶ 1.a., 1.b, 1.c., 1.d, and 1.h, triggering the application of AG ¶ 20(d). However, this condition does not apply to the fifteen debts that remain unresolved or unpaid.

There is no evidence that Applicant disputed any of the debts for which the statute of limitations expired and remain unpaid. Hence, AG ¶ 20(e) is not applicable. Nor is there any evidence to support the application of AG ¶ 20(f).

"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). They include the following:

- (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) 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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 the facts and circumstances surrounding this case. Applicant is a 49-year-old man, who started a business that appeared to have great potential for success. While pursuing that endeavor for five years, he supported it with personal funds and assumed a significant amount of personal debt. Unfortunately, in 2001, the business failed. He managed to pay off the business loan, pay some other debts, and stay current with on-going obligations. However, he could not pay about \$171,000 of personal debt. In 2004, his attorney began negotiating the settlement of a \$54,000 judgment, which did not begin to resolve until 2007. Although he has maintained a good paying position since 2001, he has not taken any steps to resolve the remaining \$117,000, owed to numerous

credit card companies over the last seven to eight years. He honorably chose not to file a Chapter 7 bankruptcy because he would like to resolve the debts in the future.

Applicant initially defended his case on the theory that the statute of limitations expired on most of the debts, and therefore, he was not legally responsible for the debts. Although that defense is pertinent in civil matters, the Appeal Board has held that even though an applicant's delinquent debts were not legally collectible because of the statute of limitations, that fact did not preclude the administrative judge from considering the applicant's failure to resolve the delinquent debts before the statute of limitations ran. ISCR Case No. 98-0349 at 2-1 (App. Bd. Feb. 3. 1999). In this instance, Applicant has not taken any steps to resolve the \$117,000 of debt that was charged off in 2000. At the time he completed his security clearance in 2005 and forthrightly disclosed the multiple debts, he should have realized that the Government would have concerns about those outstanding debts and his finances. While those debts no longer pose a potential for coercion, his failure to seek resolution of the \$117,000 for the past eight years raises concerns about his reliability and judgment.

Overall, the record evidence leaves doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under financial considerations.

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
Subparagraphs 1.a through 1.d:	For Applicant
Subparagraphs 1.e through 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraphs 1.i through 1.t:	Against Applicant

Conclusion

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

SHARI DAM
Administrative Judge