



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



In the matter of:)
))
) ISCR Case No. 07-15622
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SSN:)
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Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

March 29, 2010

Decision

WESLEY, Roger C. Administrative Judge:

On February 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked. 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 (AGs) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant responded to the SOR on March 6, 2009, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on September 1, 2009, and responded within the time permitted with supplemental documentation. The case was assigned to me on October 15, 2009. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Summary of Pleadings

Under Guideline F, the government alleges that Applicant was ordered to pay a judgment of \$75,000 to a corporation. The SOR alleges that a judgment was formally entered against Applicant in July 2005, in the approximate amount of \$75,000, and remains unsatisfied.

In his response to the SOR, Applicant admitted the allegations and explained the circumstances that gave rise to litigation between himself and his partners on one side, and the corporate entity who sued them over a naming rights dispute associated with the building of a local hockey rink, and who ultimately prevailed with a judgment, holding Applicant and his co-obligors jointly and severally liable. Applicant claims he appealed the judgment and was unsuccessful. He claimed he was a well-regarded engineering professional with his employer and an active civic member of his community. He claimed he had been unsuccessful in trying to settle or arrange a payment resolution of the judgment with the judgment creditor.

Findings of Fact

Applicant is a 57-year-old senior engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant is married and has one 12-year-old son. He earned a bachelor's degree in industrial engineering in 1984, and a master's degree in industrial engineering from accredited universities (see Item 1). Applicant was employed in the engineering field from 1996 to October 2004 and in February 2005.

In 2001, Applicant and two individuals formed a partnership (A Group) for the sole purpose of constructing and operating an ice skating facility in their state. Each of the individuals committed different amounts of capital to the enterprise (with Applicant committing the largest monetary share: \$100,000, as compared to \$25,000 each for the other individuals), but shared equal percentages of ownership in the venture (see Item. 3). Applicant and his partners all shared a lifelong interest in ice hockey and were actively involved in the sport at both the youth and adult levels, as participants, coaches, and referees (Items 3 and 5).

To fund his portion of the funds needed to capitalize A Group, Applicant arranged a second mortgage on his home from B Bank. With the \$150,000 in raised capital, A Group was able to acquire (subject to a senior mortgage) the land necessary for the facility, secure the necessary construction plans and engineering studies, and complete market studies that reflected the need and viability of the project. While the forming A Group partners were able to secure other financial investors during this start-up phase, the contributions of these prospective investors were deferred pending receipt of the necessary approvals to proceed with the project.

After protracted negotiations, A Group reached agreement with RA that extended, *inter alia*, exclusive naming and broadcasting rights to RA with respect to the proposed ice skating facility (see Items 5 and 6). In return, RA committed to paying A Group \$2 million in six installments. After the initial \$300,000 in RA outlays to A Group under their agreement, RA committed to paying the remaining \$1.7 million upon achievement of certain construction goals (e.g., ground-breaking, completion of exterior walls and roof, 30 days preceding the first scheduled event, and the date the first public event was held). Several contingencies were included in the agreement as well, including a ground-breaking date of September 2001 (Items 5 and 6).

Applicant and his partners each executed separate personal guaranty agreements with RA (see Item 5). Each partner guaranteed A Group's obligations under the terms of their agreement with RA up to \$75,000, and permitted RA to take judgment against each partner in the event of a default. Each of the guarantors, in turn, were entitled to release from their guaranty obligations when A Group obtained a loan commitment which obligated RA to pay A Group the final installment called for under their agreement (see Item 3).

Soon after finalization of A Group's agreement with RA, A Group obtained a loan commitment from its lender (B Bank) in the amount of \$4.4 million. When A Group forwarded the loan commitment to RA, RA paid the last installment (\$125,000) to A Group but refused to satisfy a condition set by B Bank that RA either escrow its obligations or provide a letter of credit. RA also failed to agree to several alternative (and more moderate) security provisions suggested by A Group and B Bank. As a result, B Bank withdrew its loan commitment, and A Group forfeited a \$50,000 loan application fee (Item 3).

Unable to obtain bank financing, A Group could not continue on with its project and meet the other time-lines agreed to with RA. A Group and RA ultimately resolved their stalemate in February 2002 with an amendment to their agreement, which postponed A Group's ground-breaking deadline until September 2002. Their amendment also conditioned A Group's next installment payment (\$200,000) on A Group's obtaining new financing without additional security provisions (Item 3).

Despite A Group's obtaining new financing, RA gave notice to A Group in September 2002 that it was terminating the agreement for A Group's failure to meet the September 2001 ground-breaking dead-line (disputed by A Group) and demanded return of the \$300,000 total payments RA had made to A Group under its agreement. Brief negotiations ensued between the parties, but ultimately failed to produce any new amendments to the agreement.

In October 2002, RA notified A Group of its intent to terminate the agreement and repeated its demand for reimbursement of the \$300,000 in total payments it had previously made to A Group (ex. 3). Without any financing option available to it, A Group was forced to sell the land it had acquired for the ice skating facility. Records document that the buyer (C Realty) of the land ultimately developed the property as an ice skating facility, which is currently operating.

Litigation between the parties

Following C Realty's closing of its purchase of the project's land from A group, RA (in March 2003), A Group was able to settle with most of its creditors and received about \$40,000 in cash and a \$100,000 installment note in net proceeds from the sale, payable to Applicant and the other remaining member (Item. 3). Approximately \$25,000 of the cash proceeds were paid to a withdrawing member of A Group to cover his capital investment, in accordance with the A Group agreement's terms. Applicant received \$10,000 of the remaining cash proceeds; while the remaining member received \$5,000 (see Item 3).

In March 2003, RA filed suit against A Group, its three individual members, and C Realty, claiming A Group breached its naming rights agreement and was obligated, along with C Realty, to repay the \$300,000 previously paid to it by RA (Items 3 and 6). The complaint claimed Applicant and the three investors of A Group were obligated, jointly and severally, to RA under their \$75,000 guaranty (see Items 3 and 6).

Applicant and the other named defendants in RA's suit denied liability and counterclaimed, claiming they were not obligated to RA in any way because the guaranty agreement they executed released them from any obligations under the guaranty upon their obtaining a bank loan commitment that required RA to pay the required \$125,000 installment (see Items 3, 7, and 9). A Group's obtained bank loan commitment, in turn, triggered RA's requirement to pay the \$125,000 installment called for in their agreement with RA.

While the district court hearing the case dismissed C Realty from the proceedings (holding it not liable to any RA claims), it held A Group liable to RA in the

amount of \$300,000 plus interest, and Applicant and the other investors liable on their guaranties, jointly and severally (holding the bank's loan proposal was not the type of loan commitment contemplated by the naming rights agreement between A group and RA (see ex. 3).

Judgments were entered against A Group and the individual guarantors (inclusive of Applicant) in February 2006 (see Items 3 and 7). These judgments were sustained on appeal, and Applicant was determined to be jointly and severally liable to RA in the amount of \$75,000 (Item 8). RA ultimately recovered \$85,000 from C Realty on the separate garnishment action it initiated against C Realty to recover monies owed under the assigned \$100,000 note A Group received from Applicant (Item 3).

Settlement initiatives

Initial settlement efforts between Applicant and RA to settle the latter's claims against A Group and the individual guarantors were unsuccessful. Without sufficient funds of his own at the time to satisfy the judgment, Applicant was not able to make any payments. more recently, Applicant satisfied his personal judgment liability with RA (Item 3). In July 2009, a local mortgage company approved Applicant's refinancing application with conditions. These conditions included the release of Applicant from his judgment liability. RA supported Applicant's refinancing application and agreed to accept \$20,000 from Applicant from the proceeds of Applicant's proposed mortgage refinance, as full settlement of its claims against him pursuant to its judgments against A Group and Applicant personally.

Applicant's mortgage company accepted RA's settlement proposal and completed its refinancing of Applicant's home in August 2009. Applicant, in turn, satisfied the settlement terms specified by RA, and RA filed its satisfaction of judgment in August 2009 (see Applicant's response to FORM).

Character references

Applicant is highly regarded by his supervisors and colleagues. He has been an active member of his community. He continues to teach in his community, and has refereed ice hockey for more than 25 years. He has been a boy scout/cub scout leader for the past seven years and has been an excellent role model for his own 12-year-old son.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that

could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Financial Considerations

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known

sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG ¶ 18.

Burden of Proof

Under the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a trained and experienced industrial engineer for a defense contractor who had an adverse judgment (joint and several) entered against him in 2006 following efforts to resolve a business dispute between his venture group and the financing entity who financed his ice skating project. Unable to resolve its dispute with Applicant and his investment group amicably, this creditor filed suit and ultimately prevailed on its complaint in court. The \$75,000 joint and several judgments it obtained against Applicant and members of his venture group remained unsatisfied until recently and raised security concerns.

Applicant's accrued judgment debt warrants the application of two of the disqualifying conditions (DC) of the financial consideration guideline: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶ 19(c) "a history of not meeting financial obligations."

Holding a security clearance involves a fiduciary relationship between the Government and the clearance holder. Quite apart from any agreement the clearance holder may have signed with the Government, the nature of the clearance holder's duties and access to classified information necessarily impose important duties of trust and candor on the clearance holder that are considerably higher than those typically imposed on government employees and contractors involved in other lines of government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

Based on his evidentiary showing, Applicant's proofs are sufficient to establish some extenuating circumstances associated with the circumstances surrounding his business venture, ensuing disputes with RA over compliance with his contractual obligations, and the judgment that RA was ultimately able to obtain against Applicant and his A Group venture. As a result, MC ¶ 20(b) of the financial considerations guideline, "the conditions that resulted in the behavior 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)," has partial application to Applicant's circumstances.

More important, though, in evaluating Applicant's clearance eligibility are his concerted good-faith efforts to resolve his judgment debt after exhausting all appellate avenues available to him to reverse or remand the judgment. In his response to the FORM, he provided proof he satisfied the judgment with the aid of refinancing of his home mortgage. Applicant's documented judgment satisfaction entitles him to application of MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

From a whole-person perspective, Applicant's disputes with RA over compliance with construction conditions in the naming rights agreement he and his venture members signed with RA were manifestly waged in good-faith. In the end, RA prevailed and obtained a \$75,000 judgment in 2006 that was sustained on appeal.

For several years, Applicant did not have the resources to satisfy the joint and several judgment entered against him and his co-guarantors. As a consequence, interest continued to accrue on the judgment at the legal rate in his state. However, with the aid of mortgage refinancing of his home, he was recently able to settle his portion of the judgment debt with RA and obtain a documented satisfaction of judgment. This was a considerable achievement for Applicant, considering the size of the judgment and the limited amount of negotiating leverage he retained with the judgment creditor after the judgment was finalized. Full mitigation credit is available to Applicant based on his demonstrated judgment satisfaction.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's business venture, ensuing litigation with RA, his ultimate resolution of his only delinquency, and his overall professional and community standing, safe predictive judgments may be made about Applicant's ability to repay his accrued debts as they materialize in the future and maintain his finances at stable levels commensurate with his holding a security clearance. Favorable conclusions warrant with respect to the allegations covered by SOR subparagraph 1.a.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in ¶ 2(a) of the AGs.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE F (FINANCIAL CONSIDERATIONS): **FOR APPLICANT**

Subpara 1.a: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge