



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



In the matter of:)
)
) ISCR Case No. 07-16363
)
)
Applicant for Security Clearance)

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: Stephen Smith, Esquire

September 16, 2008

Decision

DAM, Shari, Administrative Judge:

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

On March 8, 2007, Applicant submitted a Standard Form 86 Security Clearance Application (SF 86). On March 31, 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.

Applicant answered the SOR in writing on April 15, 2008, and requested a hearing. DOHA initially assigned the case to another administrative judge and

reassigned it to me on July 2, 2008. DOHA issued a Notice of Hearing on July 15, 2008, and the case was heard on July 29, 2008, as scheduled. Department Counsel offered Exhibits (GE) 1 through 5 into evidence without objection. Applicant testified. At the conclusion of the hearing, I left the record open until August 14, 2008, to give Applicant an opportunity to submit information. On August 19, 2008, Applicant submitted four exhibits that I marked as AE A through D, and admitted into the record without objection by the Government. DOHA received the hearing transcript on August 15, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted the three factual allegations contained in ¶¶ 1.a through 1.c of the SOR. His admissions are incorporated into the following findings of fact:

Applicant is 49 years old and married. He has three children, ages 21, 18 and 11. He has a Bachelor of Arts in Business Administration and has been a Certified Public Accountant since 1981.

From June 1981 to January 2000, Applicant was a partner in an accounting firm. He left the partnership to begin making arrangements to purchase a steel company that had three separate locations. In July 2000, he acquired the company, after obtaining a \$5 million dollar loan from a bank that he secured with company assets and his personal guarantee. (Tr. 14). In August or September 2000, a recession started in the steel industry. By mid-2002, economic conditions had continued to spiral downward, and Applicant realized his company was undercapitalized. He then negotiated a \$400,000 loan with a state economic development group. The economy did not improve and in December 2003, Applicant and the bank decided the business was no longer viable. (Tr. 17).

By that time, Applicant had reduced the \$5 million dollar loan to \$3.1 million. After discussing the situation with the bank, Applicant agreed to liquidate the company's assets and avoid a corporate or personal bankruptcy. (Tr. 17). He received \$750,000 from the sale of the assets and used it to reduce the loan to \$2,450,000. In addition, he gave the bank 80% of the equity in his home and the bank wrote-off the remainder of the loan. (Tr. 19). In order to resolve the other outstanding loan, he withdrew \$90,000 from his 401(k) and obtained a \$40,000 loan from a friend. He paid the economic development group \$40,000 and used \$90,000 for additional payments to the bank and to resolve \$40,000-\$42,000 in credit card debt with seven or eight companies. (Tr. 19; 22).

Applicant hired a lawyer to negotiate a resolution with the bank and the unsecured creditors. He asked his lawyer to contact all of the credit card companies and negotiate a settlement. (Tr. 21). After notifying all of the unsecured creditors of Applicant's interest in settling the debts, his lawyer resolved all of them in 2005, for approximately 10-15% of the final balance, except for the three credit card companies

listed in the SOR. These are the only debts from the failed business that remain unresolved. (Tr. 66; 74).

As of December 27, 2007, the three debts alleged in the SOR, now total \$42,000, and include substantial finance charges and fees.¹ Since communicating with the three creditors between 2004 and 2005, neither Applicant nor his lawyer ever received any communication from the creditors, until ten days ago when Applicant received correspondence from the creditor listed in ¶ 1.a, who now asserts a \$26,000 debt. (Tr. 22; 59; GE 3). He did not pursue the creditors over the past two years because they never responded to his attorney's previous communications, and he did not have sufficient funds to pay them. (Tr. 67). After receiving the SOR in early April 2008, he discussed resolution of the debts with his counsel, but they decided not to re-contact the creditors because of Applicant's cash flow problems. (Tr. 67). He believes he could resolve the debts for about \$8,000 to \$10,000. (Tr. 34). He intends to do so in the future and will borrow money from his family, if necessary. (Tr. 67). Prior to this situation, he never experienced financial difficulties. (Tr. 67). He does not anticipate starting any business in the future.

Applicant spent approximately \$250,000 of his personal funds to resolve his loans, rather than filing for bankruptcy. He felt "like it was better to continue to work with all the unsecured creditors the best I had and took all the cash and equity that we had available and worked out settlements with everyone that we could that was willing to work [sic]." (Tr.20). He further elaborated that "I voluntarily took those assets out of the 401(k) and gave up future earnings and future security so that I could settle, come to grips with this financial disaster that we had as a result of the business closing." (Tr. 26).

After he completed the dissolution of the company in June 2005, Applicant became the president of an international investment company. In November 2006, he started his current position with a federal contractor. He is the president and Chief Operating Officer, with an annual salary of \$150,000. According to his budget, his net monthly income is \$9,746 and his expenses are \$8,895, leaving a remainder of about \$850. According to the November 2007 CBR, Applicant is managing his current financial obligations. (GE 4).

Applicant's direct supervisor and the company's security officer are aware of his previous financial problems. (Tr. 68).

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

¹SOR ¶ 1.a alleges a \$20,562 debt; SOR ¶ 1.b alleges a \$17,582 debt, although the November 2007 CBR lists the debt as \$10,446; and SOR ¶ 1.c alleges a \$3,938 debt.

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 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, and has the ultimate burden of persuasion to obtain 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."

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.

AG ¶ 19 describes two conditions that could raise a security concern and maybe be disqualifying in this case:

- (a) an inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated a significant amount of delinquent debt after his steel business failed in 2003. He resolved all of the financial obligations arising from that endeavor, except three credit card debts that remain unresolved today, partially because he has not had the money to do so. The evidence is sufficient to raise these potentially disqualifying conditions.

After the Government produced substantial evidence of those two 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.

The circumstances underlying Applicant's financial difficulties were "unusual," and were brought about by an unpredicted economic recession in the steel business starting after he purchased the company in 2000. Those circumstances were "beyond his control" and do not cast doubt on his reliability or good judgment. While winding down the multi-million dollar business, he resolved two loans, five or six credit card debts, and offered to resolve the three debts listed in the SOR. His actions demonstrated responsible conduct. It is particularly impressive that Applicant used his own retirement savings to resolve some of these debts, voluntarily foregoing his future financial retirement security to repay his business debts. He did not file bankruptcy for his business or his personal finances. He did not avoid or deny his financial obligations in closing out the steel business he operated, which only failed because of market conditions over which he had no control. He is currently employed and does not intend to start another business. Prior to this situation, he never experienced financial difficulties. Both AG ¶ 19(a) and AG ¶ 19(b) are applicable.

Applicant did not obtain financial counseling, but worked with his lawyer in resolving his failed business and the debts that resulted. He relied on his attorney's advice in these matters. At this time, there is no evidence that the three debts listed in the SOR have been resolved; hence, AG ¶ 19(c) has limited application.

Applicant's lawyer attempted to resolve the three debts a couple of years ago. Although his lawyer corresponded with the creditors in 2004 or 2005 with an offer to settle the debts, they never responded, until very recently. That previous offer can be construed as a "good-faith" attempt to resolve the matters, and is sufficient to trigger a partial application of AG ¶ 1(d). If he had documented a subsequent attempt to resolve the matter, full application of the mitigating condition would be warranted.

The record evidence does not support the application of AG ¶ 1.e and AG ¶ 1.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) 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.

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 had been in an accounting partnership for twenty years before he decided to buy a steel business in 2000. He received a \$5 million dollar loan from his bank and a \$400,000 loan from a local development group, indicating their strong support for the endeavor. When the business failed in 2003 because of economic changes in the marketplace, he worked with the bank to resolve the outstanding \$2,450,000 on the loan and with the development group to resolve a \$400,000 loan. At the time he was closing the business in 2004 to 2005, he also held seven or eight credit cards with an aggregate balance of \$40-42,000. Through the assistance of his lawyer, he resolved all of those accounts by 2005, but the three alleged in the SOR. Seemingly, the only reason they were not resolved at the time was because the creditors failed to respond to the lawyer's written inquiries. Recently, one of them contacted Applicant.

All of Applicant's actions, while closing the business, demonstrate a pattern of responsible behavior in managing his financial obligations, including the forfeiture of his 401(k) and equity in his home. At the time, he could have chosen to file bankruptcy, but did not. He acknowledged his three remaining debts and expressed an intention to resolve them. Prior to this financial predicament, he had not experienced financial difficulties and had managed to accumulate sufficient assets and reputation to warrant a bank's trust and support in his business. According to the most recent CBR, he continues to manage his current obligations. His employer is aware of the security concerns.

While Applicant could have been more persistent in seeking a resolution of the SOR debts, and especially after receiving the SOR and learning of the Government's concerns, I believe, based on his past performance of responsibly paying his debts, he will resolve the remaining debts in the near future. He made the attempt to pay them three years ago, and only the failure of the creditors to respond to his offers prevented his resolution of these debts before now. He is very aware of the effect that such obligations may have on his employment and is concerned about his credit rating. I do not believe similar financial problems will recur. I give great weight to the professionally responsible manner in which Applicant worked diligently to resolve the closure of his former business. These actions reflect favorably upon his honesty and his integrity. There is no other evidence in his background to indicate that his financial problems may create a security risk.

