



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



In the matter of:)	
)	
)	ISCR Case No. 08-02786
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Tom Coale, Esq., Department Counsel
For Applicant: *Pro Se*

May 29, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has mitigated the Financial Considerations security concerns. Eligibility for access to classified information is granted.

On July 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 on August 25, 2008 and October 3, 2008, and requested a hearing before an administrative judge. The case was assigned to an administrative judge on December 8, 2008, and reassigned to another administrative judge on January 5, 2009. DOHA issued a notice of hearing on January 12, 2009, scheduling the case for January 27, 2009. Applicant was granted a continuance based

upon a death in the family. The case was reassigned to me on March 20, 2009. DOHA issued another notice of hearing on March 23, 2009, and the hearing was convened as scheduled on April 9, 2009. The Government offered Exhibits (GE) 1 through 5, which were received without objection. The Government also offered a demonstrative exhibit which was marked Hearing Exhibit (HE) I. Applicant testified on his own behalf but did not submit any documentary evidence. The record was held open for Applicant to submit documentary evidence. Applicant submitted 14 pages of documents, which were marked AE A through I, and admitted without objection. Department Counsel's memorandum is marked HE II. DOHA received the transcript of the hearing (Tr.) on April 17, 2009.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. He has worked for his current employer since 1998. From 1998 through 2002, he worked in one state. In 2002, his company transferred him to the state where he currently lives. He served on active duty in the U.S. Air Force from 1980 to 1993, when he was honorably discharged as a technical sergeant (E-6). He has maintained a security clearance throughout his military career and most of his post-military employment. He has an associate's degree awarded in 1992. He has been married since 2003, having been married and divorced twice previously. He has three children from his first marriage, ages 23, 21, and 19. He also has a seven-year-old stepchild.¹

The SOR alleges 13 delinquent debts. Twelve of the debts total \$69,131, and there is a delinquent mortgage loan. Applicant denied all the allegations in his answer to the SOR.

Applicant was married to his second wife from 1991 to 2002. The marriage ended abruptly when he discovered his wife was being unfaithful. She moved out of their house and she filed for divorce shortly thereafter. She was represented by an attorney; he was not. Applicant consented and the court ordered, that he pay \$300 per month in spousal support for three years. Division of liabilities was apparently not specifically addressed in the court order.²

Applicant's former wife filed for Chapter 7 bankruptcy about the same time as the divorce was pending. The exact dates when the bankruptcy was filed and her debts discharged are unclear, but Applicant believes they occurred before the divorce was final. When he learned that she filed bankruptcy, he discussed it with his supervisor. The supervisor advised him to obtain legal advice and, if necessary, that he would lend Applicant the money for a lawyer. Applicant stated that he refused the loan because he did not want to borrow money from a supervisor and he realized that he would have to pay the money back. He sought and received free legal advice at the local legal aid office. He asked the legal aid attorney how his wife's bankruptcy petition affected him.

¹ Tr. at 17-21, 37-38, 41; GE 1.

² Tr. at 19-23, 30; GE 2; AE B-I.

He was advised that their joint debts were discharged and that he was no longer responsible for the debts. The attorney told him that he should inform any creditors that the debts were discharged in bankruptcy and were no longer his responsibility. He informed the creditors of this fact and he stopped receiving collection phone calls and collection notices. He was also informed that the debts would remain on his credit report for some time, but would eventually fall off the report.³

Applicant's separation and divorce exacted a financial toll on him. He was paying a large amount in child support to his first wife. He and his wife were barely making ends meet with their combined incomes when they were together. She handled the family's finances because he was frequently traveling for work. After the separation, it became difficult to meet all the bills. In the summer of 2002, Applicant was offered the opportunity to transfer and work with the same company in another state. He relocated shortly after the divorce was finalized. The house in the original state went into foreclosure and was eventually lost to foreclosure. It is unclear if there was any deficiency owed on the mortgage after the house was sold. Applicant thought the mortgage was included in his wife's bankruptcy and he was absolved of any liability if there was a deficiency.⁴

Applicant denied owing the debts in the SOR because he honestly believed they were no longer valid debts. The only debt that he does not admit was a legitimate debt before the bankruptcy is the \$199 debt to a collection company on behalf of a public utility. He thought this was a utility bill from while he was still in the Air Force, which he thought he had paid. This debt is listed on the June 14, 2007 credit report, but not the credit report of January 22, 2009. Applicant was very credible and convincing in his testimony about the advice from the legal aid attorney, and his actions in reliance upon that advice. When he was informed that the discharge of his wife's debts in bankruptcy did not affect his liability for the debts, he appeared genuinely surprised and distraught.⁵

After the bankruptcy, Applicant continued to pay the accounts that were solely in his name. He paid the spousal support for the full three years. He maintained his child support payments. He was informed that he owed the IRS for his 2001 taxes and he paid the IRS through a 12-month payment plan. Several of the debts listed in the SOR are not listed on the most recent credit report in evidence. Many of the remaining debts will soon reach the seven-year credit report limit for reporting adverse entries. Applicant is current on his taxes. His children are now adults and he no longer pays child support. He does not owe any back child support.⁶

³ Tr. at 21-25; GE 2.

⁴ Tr. at 26-30; GE 2, 4, 5.

⁵ Tr. at 22-28, 36; GE 2-5.

⁶ Tr. at 30-31, 38-41; GE 2-5.

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 to be used 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.

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 the 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 adverse 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 *a/so* 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 did not pay his obligations for a period of time. The evidence is sufficient to raise the above disqualifying conditions.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 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's financial problems were related to a costly separation and divorce. His wife had her debts discharged in bankruptcy. Applicant sought legal advice from the local legal aid office to find out how his wife's bankruptcy affected his legal liabilities. He was told that the bankruptcy also absolved him of liability for the debts. He acted on the advice and has not done anything in the last seven years to address the debts. The advice was legally incorrect, but Applicant's reliance on the advice was not unreasonable. I find that the bad legal advice clearly is a circumstance that it is unlikely to recur and the behavior happened so long ago that it does not cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is applicable. I find that both the divorce and the bad legal advice qualify as conditions that were outside his control. AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant followed what he considered to be valid legal advice. That is not irresponsible conduct even if the advice was legally incorrect. AG ¶ 20(b) is partially applicable. No other mitigating condition is 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. 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. This is a unique case. Applicant honestly believed the legal advice that when his ex-wife's bankruptcy discharged the joint marital debts, his responsibility for the debts was also discharged. That advice was wrong, but he acted in good faith upon it. The divorce and bankruptcy

were both almost seven years ago. His finances are otherwise in order. He is an honorably discharged veteran and has a stable work history. AG ¶ 18 sets out the security concern relating to the guideline for Financial Considerations. It discusses two similar but not identical concerns. The first is that “[f]ailure 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.” Applicant has lived within his means for the last seven years. He reasonably followed legal advice and did not pay debts that he honestly thought were no longer valid debts. Under the unique circumstances of this case, that did not indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. It also does not raise questions about his reliability, trustworthiness and ability to protect classified information. The second concern identified in AG ¶ 18 is that “[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.” Applicant is not truly overextended. While some of the debts still appeared on the credit report of January 22, 2009, many have likely already fallen off or will shortly fall off his credit report. The creditors have long ago stopped pursuing Applicant and they are very likely barred from judicial action by the various statutes of limitations. The Appeal Board has looked with skepticism at an applicant who relies on the statute of limitations to avoid paying his or her debts.⁷ That is clearly not the current case. Applicant did not initiate the bankruptcy; he did not join in his wife’s bankruptcy petition; he did not file his own bankruptcy; and he did not sit idly by waiting until the creditors could no longer enforce their debts. He simply and honestly followed what turned out to be bad legal advice. That does not adversely reflect on his judgment, reliability, and trustworthiness.

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 Financial Considerations security concerns.

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.m:	For Applicant

⁷ “The fact that Applicant may be insulated from collection actions with respect to a number of [his] debts due to the running of [his] state’s statute of limitations is of little mitigative value. The Board has previously noted that reliance on a statute of limitations does not constitute a good faith effort to resolve financial difficulties.” ADP Case No. 06-18900 at 5 (App. Bd. Jun. 6, 2008).

Conclusion

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

Edward W. Loughran
Administrative Judge