



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 08-05637
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

May 10, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant owed three different creditors over \$50,000 in debts that he deliberately stopped paying in June 2005 to make them delinquent as part of a program he entered to attempt negotiated resolutions for lesser amounts. These debts all remained delinquent when he denied their existence on his July 2006 security clearance application, but have since been resolved. Financial concerns were mitigated, but personal conduct security concerns were not. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application (SF 86) on July 3, 2006.¹ On July 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).² The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February

¹Item 5.

²Item 1.

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 adjudicative guidelines 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 August 11, 2009, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on November 6, 2009. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on November 13, 2009, and returned it to DOHA. He submitted further evidence and comments in response to the FORM on December 29, 2009, after requesting and receiving an extension of the response deadline until December 31, 2009. Department Counsel received Applicant's FORM response (AFR) on January 6, 2009, and included it in the record with a memorandum of the same date in which he expressed no objection to its consideration. I received the case assignment on January 20, 2009.

Findings of Fact

Applicant is a 62-year-old employee of a small business defense contractor that is owned and operated by his wife. He has no military service, and this is his first application for a security clearance. He and his wife have four adult children, and a fifth adult child of theirs passed away in December 2008. Applicant earned a bachelor's degree from a seminary, and completed two additional years of graduate theological studies in 1970. He also earned a college Registered Executive Housekeeping degree and is an authorized bilingual OSHA trainer.⁵ In his response to the SOR, he formally admitted the allegation in SOR ¶ 1.a, and denied the remaining allegations with explanations. Applicant's admissions, including his responses to the SOR, to the FORM, and to DOHA interrogatories, are incorporated in the following findings.

Applicant's wife's primary business is providing janitorial services, some of which are performed under contract to the Government. He worked as a city Management Information Systems Manager for two years, and for the Federal Social Security Administration for seven years. In 1997, he left Federal employment to assist his wife with managing her business. In 2000 his wife created another company to begin importing and selling a traditional Mexican alcohol product that was produced and sold

³Item 2.

⁴The Government submitted 11 Items in support of the SOR allegations.

⁵Item 5; AFR at Encl. 3.

by her brother in Mexico. Applicant worked for both of his wife's companies without direct remuneration. He used all of his financial resources in starting up the new business over the next four years, investing about \$200,000 and accumulating over \$50,000 in credit card debt. The product, which is relatively unknown in the United States, did not sell as well as they hoped, and they were unable to pay this debt on the agreed terms. In 2004, their 22-year-old daughter was diagnosed with a serious disease, which ultimately caused her death in 2008. They had no health insurance, so the medical expenses placed an additional financial burden on them. Moreover, Applicant had to spend considerable time assisting their daughter with medical appointments and procedures so he could no longer work on the alcohol importing business that was ultimately abandoned.⁶

Applicant unsuccessfully attempted to renegotiate credit terms with the three companies to whom he owed \$33,675; \$15,337; and \$15,768; respectively, by the time he made his last payments to them in May 2005. The \$35,102 debt, which was reduced to judgment in 2007 as alleged in SOR ¶ 1.b, involved two separate accounts owed to the first creditor. They were originally charged off in the amounts of \$8,794 and \$24,881. Department Counsel conceded that the \$8,794 debt, alleged in SOR ¶ 1.a, was part of the \$35,102 judgment debt.⁷

In June 2005, Applicant entered an agreement with a debt arbitration company to act on his behalf in negotiating resolution of the debts for less than the full amounts owed. This agreement called for him to stop all payments to the creditors and make monthly payments to the arbitration company for use in paying negotiated settlements after the debts became delinquent. He acknowledged that he understood the creditors would consider the debts to be delinquent and were not obligated to deal with the arbitration company on his behalf. Per the agreement, Applicant made no further payments to the three creditors, and began monthly \$650 payments to the arbitration company in July 2005.⁸

In June 2006, the arbitration company succeeded in negotiating a settlement of the \$15,768 debt, alleged in SOR ¶ 2.a(3), for \$8,455 (plus a \$2,121 fee to the company). Applicant completed making payments under this settlement in April 2007.⁹ The company advised Applicant in an August 3, 2006, letter that the creditor holding the two accounts that were later reduced to judgment would not deal with them, and recommended that he retain an attorney to deal with the pending lawsuit. He did so on September 11, 2006. Applicant followed his attorney's advice and terminated his participation in the debt arbitration agreement in early March 2007, to permit accumulation of funds for the attorney's use in resolving his other debts. The attorney

⁶Item 8; Item 10; AFR at Encl. 1, 3 and 4.

⁷Item 6; Item 12; FORM at 6-7.

⁸Item 2.

⁹Item 8; Item 12.

negotiated a settlement of the \$15,337 debt, alleged in SOR ¶ 2.a(2), during April 2009 for \$2,301.¹⁰ In September 2009, the attorney also succeeded in negotiating settlement of the \$35,102 judgment debt for \$31,200, which Applicant paid in October 2009 after refinancing their home to obtain the funds. The creditor executed a Release of Judgement Lien form on October 23, 2009, and provided Applicant with the original document to file with the court demonstrating his satisfaction of the judgment.¹¹ Accordingly, all delinquent debts alleged in the SOR have now been satisfied.

Applicant submitted his joint Federal income tax returns for 2006, 2007, and 2008, showing family adjusted gross incomes of \$19,187; \$47,708; and \$38,209; respectively. He also submitted a joint financial statement dated December 2, 2009, reflecting a net worth of \$237,257, an annual income of \$70,830, and estimated annual expenses of \$40,016. As noted above, Applicant and his wife were found to be sufficiently credit-worthy to refinance their mortgage on their principle residence in October 2009, to obtain the \$31,200 needed to resolve his final delinquent debt.¹²

When Applicant completed his SF 86 on July 3, 2006, he answered “No” to questions 28a and 28b, which asked whether he had any debts over 180 days delinquent during the past seven years, or was currently over 90 days delinquent on any debts.¹³ As discussed above, Applicant knowingly and intentionally stopped making payments to the three creditors listed in the SOR in June 2005, in order to make the debts delinquent and induce to creditors to negotiate resolutions for partial payments. In July 2006, the four accounts owed to those three creditors were all more than a year delinquent and should have been disclosed in response to both questions 28a and 28b. These debts totaled around three times his family adjusted gross income for that year, and Applicant was paying \$650 per month to the arbitration company in an attempt to resolve them.

Applicant was asked to explain why he did not list his overdue debts on his SF 86 in response to questions 28a and 28b in a DOHA interrogatory. On September 10, 2008, he responded:

When I signed up with [the arbitration company], I was not delinquent. Prior to the initial month of participation I notified all my creditors of my agreement since they had not cooperated in negotiating with me. I had contracted with [the arbitration company] to help me pay back what I owe. I therefore, started making my payments the next month as agreed. I was making a good faith effort to pay. I was instructed by the counselor not to pay the next month to become 30 days delinquent to trigger the process.

¹⁰Item 2; Item 8.

¹¹Item 14; Item 15; AFR at Encl. 5.

¹²Item 14; AFR at Encl. 5.

¹³Item 5.

Then I sent copies of all the statements showing all the due balances with copies of the letters notifying the credit companies of my agreement.¹⁴

In his response to the SOR, Applicant denied falsifying the answers with the following explanation:

Realizing that the credit companies were taking actions that were unreasonable and uncooperative and could create a financial hardship, I took the necessary action by enrolling with [the arbitration company] to protect myself, and preserve my ability to live within my means, and satisfy my debts. Utilizing a legal program available to the general public, I took the route that to the best of my knowledge and understanding was the most effective. Further, I enrolled before any possibility of delinquency was created. By 2(a)(2)(3) I have demonstrated that the decision has brought results.¹⁵

Applicant submitted letters describing his good character and trustworthiness from his wife and several neighbors, friends, and business associates.¹⁶ I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the national security." In reaching this

¹⁴Item 8 at I-70.

¹⁵Item 2 at 3. *Note*, "2(a)(2)(3)" refers to the SOR paragraphs describing resolved debts.

¹⁶AFR at Encl. 4.

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, “[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 concerns relating to the guideline for financial considerations are 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.

Department Counsel argued that the evidence established security concerns under four Guideline F DCs, as set forth in AG ¶ 19:

(a) inability or unwillingness to satisfy debts;

(b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;

(c) a history of not meeting financial obligations; and

(e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.¹⁷

Applicant was unable and unwilling to satisfy four credit card debts and stopped making payments to the creditors after May 2005. He immediately entered a program that he hoped would lead to negotiated settlements of the accounts for only a portion of what he owed. He has since reached and fulfilled such agreements with all three of the creditors. DC 19(a) was clearly established from 2005 to 2009, but is no longer supported by the record evidence.

This record contains no evidence to establish that Applicant's debts were caused by frivolous or irresponsible spending on his part. The evidence indicates that he and his wife made substantial investments and incurred the SOR-listed debts while trying unsuccessfully to expand into a new business venture. To the extent he participated in that arrangement, he is responsible for the debts he incurred. His actions in that regard have not been shown to be frivolous, however. Accordingly, DC 19(b) is not supported by the evidence.

Applicant had a relatively brief and now-ended history of not meeting some of his financial obligations from May 2005 to October 2009. However, he was actively participating with the debt arbitration company and his attorney in efforts to resolve each of his delinquent debts throughout this period. Some security concerns under DC 19(c) are supported on this record, but this is not a case of Applicant ignoring his financial obligations.

Similarly, the evidence is insufficient to support application of DC 19(e). His substantial net worth and resolution of formerly delinquent debts do not indicate consistent spending beyond his means. He and his wife took a legitimate business risk, lost money on the venture, and resolved the resulting debts.

The guideline includes four conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's 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

¹⁷FORM at 5.

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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's financial irresponsibility was relatively recent, involved several creditors, and was largely the result of a voluntary business risk. About \$31,000 of his delinquent debt was resolved through compelling two creditors to accept payments totaling \$10,756 in full settlement of those debts. The evidence does not support application of MC 20(a).

Applicant and his wife voluntarily assumed debts they could not afford to repay when the business venture they started did not generate revenue as quickly as they had hoped. While the lack of success was largely beyond Applicant's control, his decision to take that risk was wholly voluntary. His financial situation was exacerbated by his daughter's emergent medical problems in 2004, but he did not demonstrate the degree to which this factored into his financial problems. He acted in what he thought to be the most responsible manner available by entering the debt arbitration program to attempt to resolve the debts he could not afford to fully repay. Only slight mitigation under MC 20(b) was established.

Applicant promptly sought counseling and assistance from the debt arbitration company in 2005 when it became evident that he could not otherwise resolve the debts in question. He made regular payments into that program leading to resolution of one debt in 2007, and subsequently to his attorney who resolved the remaining debts in 2009. All SOR-listed debts are now fully resolved. Accordingly, Applicant established substantial mitigation under MC 20(c) and MC 20(d).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The potentially disqualifying condition alleged in this case is:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant falsely answered “No” to two questions on his security clearance application. His explanation for denying the existence of his several, substantial delinquent debts was unconvincing. He admitted knowledge of the circumstances giving rise to the debts, and to intentionally causing them to become delinquent in order to leverage negotiated attempts to resolve them for partial payments. Appellant is highly educated, with two years of post-graduate theological studies, and experienced in business and financial matters. He knew that he had a large amount of significantly delinquent debt and denied that fact twice on his SF 86. Serious security concerns under AG ¶ 16(a) were raised by these facts.

Other than self-serving statements that his falsifications were not intended to deceive the government, Applicant offered no evidence that would tend to support any mitigating condition under Guideline E. After careful review of the record, I find that none of them apply. His then-incomplete attempts to negotiate partial-cost settlements of the SOR-listed debts that were more than a year delinquent at the time he signed and certified the truth of his SF 86 answers did not relieve him of the duty to truthfully disclose their existence.

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 relevant 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 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 relevant facts and circumstances surrounding this case. Applicant is a mature, educated and experienced individual who is responsible for his voluntary choices and conduct that underlie the security concerns expressed in the SOR. He chose to leave Federal employment to pursue a risky business venture with his wife that ultimately failed. He resolved the resulting delinquent debts by defaulting on payments and negotiating settlement agreements for reduced amounts. Two of the debts were settled for about 35% of the total claims, and the remaining judgment debt was paid by refinancing the family home. This has alleviated the potential for coercion, exploitation or duress from the SOR-listed financial concerns.

However, the deliberate attempt to conceal relevant information about his delinquent debts on his SF 86 raises serious and unmitigated security concerns. The record contains insufficient other evidence about his character, trustworthiness, or responsibility to mitigate these concerns. A number of people wrote to express their high opinions of his character, but none expressed knowledge of, or a legitimate rationale for, his SF 86 falsification. Recurrence of this disregard for the fundamental integrity of security procedures and requirements was not shown to be unlikely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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.

DAVID M. WHITE
Administrative Judge