



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-07531
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: Joseph Testan, Attorney At Law

July 19, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 8, 2008. (Government Exhibit 1.) On October 5, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR on November 2, 2009, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on January 22, 2010. Due to a previously scheduled period of medical leave, a notice of hearing was not issued until April 12, 2010, scheduling the hearing for June 8, 2010. The Government presented ten exhibits, referred to Government Exhibits 1 to 10, which were admitted without objection. The

Applicant called two witnesses and presented thirteen exhibits, referred to as Applicant's Exhibits A through M, which were admitted without objection. The Applicant also testified on his own behalf. The official transcript (Tr.) was received on June 22, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 52 years old, and married with four children. He is employed by a defense contractor as a heating and air conditioning mechanic and is seeking to obtain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR.) After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for a security clearance because he is financially overextended and at risk to engage in illegal acts to generate funds.

The Applicant admits each of the delinquent debts set forth in the SOR under this guideline, except 1(k). He explained that the reason he denied the debt in 1(k) was because he thought that it had been paid. He later learned that it had not. Credit Reports of the Applicant dated April 22, 2008, August 22, 2009, and January 12, 2010, collectively reflect each of the delinquent debts set forth in the SOR. (Government Exhibits 5, 6 and 7.)

The Applicant served honorably on active duty in the United States Navy from 1976 to 1980. In 1992, the Applicant opened up his own heating and air conditioning business. After struggling for several years, business picked up and became lucrative. In 2000, a fire at the business caused the Applicant to lose business files and computers that had to be replaced. The business eventually recovered and again became lucrative. In mid 2006, the business experienced a severe down turn which caused financial difficulties.

At some point, the Applicant learned that his accountant, who had been tasked with doing the payroll, failed to pay the quarterly payroll taxes for the business. The Applicant testified that although she was writing up the checks for the tax deposits and having the Applicant sign them, she did not submit them for payment. (Tr. p. 60). In late 2007, the Applicant was contacted by the IRS demanding full payment of past payroll taxes. (Tr. p. 61). At that time, the Applicant owed about \$40,000 in payroll

taxes. An agreement was reached with the understanding that payments of \$10,000 a month would be made to catch up. Applicant's business made one payment of \$10,000. (Tr. p. 61). Contractors were failing to pay for services rendered by the Applicant's business and he was unable to fulfill his obligation to the IRS. As a result tax liens were filed against the Applicant's business and other business debts were incurred. The Applicant was unable to support his family and so he took on a second job working for a defense contractor in April 2008. He also closed his place of business and moved it into his garage at home. (Tr. p. 90).

Since then, the Applicant has been working diligently to resolve his delinquent indebtedness. Tax liens owed to the State in the amounts of \$10,251.00 and \$2,190.00 are being paid. An installment agreement between the Applicant and the state dated May 2009, indicates that the Applicant was to resolve the debts with monthly payments of \$500.00 beginning June 15, 2009. (Applicant's Exhibit A). Since then he has made regular monthly payments without difficulty or interruption and plans to continue doing so until the debt is paid in full. (Tr. p. 77). The debt has been reduced from \$11,173.00 to \$5,322.72. (Applicant's Exhibits B and H).

Federal tax liens owed to the Internal Revenue Service (IRS) are in the amounts of \$1,338.00, \$9,169.00, \$3,937.00, \$908.00, \$9,324.00, \$20,279.00 and \$3,029.00. In an effort to resolve this indebtedness, over two years ago, the Applicant filed an Offer in Compromise in 2007, or early 2008. It was rejected because the IRS claimed the Applicant was late in making a payment. The Applicant was subsequently audited. It was determined that there was a small discrepancy in the amount of money owed by the Applicant. He paid it, and it was determined that he was not negligent in any way. (Tr. p. 68 and Applicant's Exhibit J).

It was then recommended by the IRS collection officer that the Applicant submit a second Offer in Compromise. (Applicant's Exhibit F). In January 2010, the Applicant submitted a second Offer in Compromise. He testified that the collections officer was of the opinion that the Applicant's offer of \$15,000 was a generous one that he thought would be accepted. (Tr. p. 72). With the offer, the Applicant submitted a 20 percent payment of \$3,000 and \$350.00 for filing the offer. Both checks were cashed. (Tr. p. 72). The Applicant is currently waiting to find out if the second Offer in Compromise is accepted. If it is accepted, his payments are expected to be approximately \$1,200 a month. If it is not accepted, he plans to pay it off as soon as possible.

A debt owed to a creditor in the amount of \$5,567.00 has been paid. (Applicant's Exhibit I).

The only debt not paid is a debt owed to a creditor in the amount of \$3,590.00. The Applicant testified that he has made efforts to resolve the debt by discussing the possibility of monthly payments, but the creditor wanted payment in full. (Tr. p. 79). Applicant's Exhibit K is a letter written by the Applicant to the creditor concerning the matter. (Tr. pp. 79-80). Recently, the Applicant has received a summons from the attorney representing the creditor in the case, suing him for approximately \$4,050 that

includes attorney fees. The Applicant testified that it is his intention is to pay off the debt before he is required to answer the complaint. (Tr. p. 81).

The Applicant has recently filed his federal income tax returns for 2009. (Applicant's Exhibit M). His proposed refund is \$5,056.00. (Applicant's Exhibit E).

The Applicant's business income fluctuates with the seasons. His projected monthly net income from his heating and air conditioning business during the summer months, on the low side, after expenses, is approximately \$2000.00 monthly. His projected net income during the winter after expenses is between \$500.00 and \$1,000.00 monthly. His financial budget indicates that there is sufficient income available to him to continue to resolve his indebtedness. (Applicant's Exhibit C).

A close friend of the Applicant, and the Applicant's wife, both testified at the hearing. His close friend is a general contractor, who met the Applicant at church twenty years ago. He testified that the Applicant has been an exceptional friend who is honest, reliable, trustworthy and exercises good judgment. (Tr. pp. 40-42). The Applicant's wife testified that she has been married to the Applicant for twenty years. She considers him to be extremely responsible and trustworthy. She has been working with him to get their debts resolved. Both of them recommended the Applicant for a position of trust. (Tr. pp. 49-51).

A letter of recommendation from the Applicant's current supervisor indicates that the Applicant's work ethic, performance, and output have met or exceeded standards set for Air Conditioning Mechanics by the company. The Applicant has proven that he is reliable, dependable and fits in well with his co-workers. (Applicant's Exhibit G).

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. 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.

Conditions that could raise a security concern:

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

Conditions that could mitigate security concerns:

20(b) the condition 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 circumstance;

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

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . 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."

CONCLUSIONS

In the defense industry, a security clearance is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for such access may be involved in instances of financial irresponsibility which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Each of the delinquent debts set forth in the SOR are business related, and have either been resolved or are in the process of being resolved. Circumstances largely beyond the Applicant's control, mainly his business down turn and accountant/payroll tax difficulties, contributed to his financial indebtedness. Since learning of these problems he has been prudent and exercised good judgment in an effort to resolve his debts. He has taken on a second job and moved his place of business into his garage. He is either in the process of setting up payment plans with his creditors, has already set up payment plans that he is following, and/or he has paid off the debt in full. In regard to his federal tax debt, the largest of his delinquencies, he is waiting to see

whether his Offer in Compromise is accepted. If it is, he is prepared to make regular monthly payments toward the debt until it is paid in full, if not, he will resolve it as soon as possible. With respect to the debt that has not been paid at all, (the creditor who has recently started to sue him), the Applicant is prepared to immediately negotiate a settlement or otherwise resolve the debt. He is current with all of his income tax returns filings. He is living within his means and currently demonstrates financial rehabilitation. He has presented sufficient evidence to demonstrate a track record of financial responsibility and has resolved his financial indebtedness.

There is sufficient evidence of financial rehabilitation at this time. Under Guideline F (Financial Considerations), Disqualifying Conditions 19(a) *inability or unwillingness to satisfy debts* and 19(c) *a history of not meeting financial obligations* apply. However, Mitigating Conditions 20(b) *the condition 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 circumstance* and, 20(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply. The Applicant has indeed made a good faith effort to repay his overdue creditors or otherwise resolve his debts. Accordingly, I find for the Applicant under Guideline F (Financial Considerations.)

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Subpara. 1.f.: For the Applicant.

Subpara. 1.g.: For the Applicant.
Subpara. 1.h.: For the Applicant.
Subpara. 1.i.: For the Applicant.
Subpara. 1.j.: For the Applicant.
Subpara. 1.k.: For the Applicant.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge