



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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SSN: -----) ISCR Case No. 08-10457
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Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro se*

May 27, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On April 8, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two sets of interrogatories¹ to clarify or augment information about potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

consistent with the national interest to grant Applicant's request for access to classified information. On October 19, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for financial considerations (Guideline F).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on February 5, 2010. Pursuant to a Notice of Hearing issued the same day, I convened a hearing in this matter on February 24, 2010. The parties appeared as scheduled. The Government presented six exhibits (Gx. 1 - 5), which were admitted without objection. Applicant testified on his own behalf and proffered three exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - C. DOHA received the transcript of hearing (Tr.) on March 4, 2010. The record closed on March 15, 2010, when I received Applicant's post-hearing submission, which is admitted as Ax. D.

Procedural Issue

At the hearing, Applicant disclosed in response to questions from Department Counsel that he has not filed or paid his income taxes for at least the past ten years and that the Internal Revenue Service (IRS) had recently begun garnishing his pay. (Tr. 74 - 82, 87 - 90) Whereupon, Department Counsel moved to amend the Statement of Reasons to conform to the evidence.⁴ Applicant indicated that he understood the reason for the Government's motion and did not object to it. I granted Department Counsel's motion (Tr. 91) and the following allegation was added to the SOR as subparagraph 1.g:

"You have not filed your federal or state tax returns as required for approximately the past ten years."

Applicant admitted to the new allegation (Tr. 91). The facts established through the new allegation and Applicant's admission are incorporated in my findings of fact, below.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes approximately \$152,291 for six delinquent debts (SOR 1.a - 1.f). In response to the SOR, Applicant admitted with explanation all of the SOR allegations. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

Applicant is 50 years old. Since February 2005, he has been employed as a long distance truck driver for a trucking company hauling loads under contracts with the

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ Directive at E3.1.17.

Department of Defense. Because of the sensitive nature of the loads, he requires a security clearance. Applicant is a high school graduate and attended college between 1979 and 1981. His marriage in May 1993 ended by divorce in September 1996. Applicant has no dependents and is not obligated to pay support to his ex-wife. (Gx. 1)

Applicant has worked as a long distance truck driver for at least 15 years, but he has never before held a security clearance. He currently drives company-owned trucks, but in the past has driven his own tractor-trailer rigs. In 1999, the trucking company for whom he was working told him he had to buy his own tractor trailer to haul their loads. He financed the purchase of a used truck for \$30,000. In 2001, he financed the purchase of a used trailer for \$20,000. Shortly thereafter, when the trucking company went out of business because the owner retired, Applicant went to work for a trucking company located in the Gulf Coast region of the United States. The owner of that company (his boss) offered to sell a 2003 model used truck in exchange for Applicant's 1997 model truck and \$8,000. Applicant agreed and turned over his truck to the owner. He also financed the purchase of a \$40,000 trailer to use with the new truck. (Gx. 2; Tr. 34 - 37, 42 - 54)

Applicant's understanding was that this transaction would satisfy the loan on the older truck and trailer he traded, with the \$8,000 paid making up the difference in loan values. He agreed to the transaction verbally, but never received the newer truck. Available information suggests that his boss was engaged in a series of fraudulent transactions with Applicant and other drivers working for that company. (Ax. A; Ax. B) In February 2003, after several months waiting for a truck to drive, Applicant financed the purchase of another truck for about \$52,000 so he could resume earning a living. However, that truck developed significant mechanical difficulties and Applicant voluntarily returned it to the bank. All of Applicant's purchases, except for the fraudulent transaction with his old boss, were financed through the bank identified in SOR 1.a. Applicant still owes that bank about \$150,000 with interest and penalties. (Gx. 2; Tr. 63) He is unable to repay this debt.

Applicant and other employees contacted local law enforcement in the Gulf Coast area to complain about their experience with the trucking company that defrauded them. Applicant also explored possible civil action through telephone conversations with lawyers whose names he does not recall. Any law enforcement or court records associated with this matter were lost in 2005 during Hurricane Katrina. (Tr. 55- 57)

While Applicant was waiting for the newer truck that was never delivered, he used two credit cards to help pay his living expenses. Those accounts have been delinquent (SOR 1.c and 1.e) for at least five years. As of the hearing, Applicant had not paid or otherwise resolved those debts.

In the past five years, two other delinquent debts have been attributed to Applicant. One was for an unpaid \$153 utility bill incurred when Applicant moved in 2007. (SOR 1.b) He paid that debt in full in February 2010. (Ax. C) The other debt is a \$426 bill for propane gas to heat a home he occupied in 2001. (SOR 1.d) When he moved in to that home, the gas tank was almost empty. When he vacated the home, he

left the same amount of gas as when he moved in. However, the landlord filled the tank after Applicant moved out and charged Applicant for the gas. (Gx. 2) The debt alleged in SOR 1.e is a duplicate of the debt alleged at SOR 1.d. SOR 1.e is resolved for the Applicant.

Applicant has not filed either his state or federal tax returns as required for at least the past ten years. He does not know when his pay is due to be garnished or how much will be diverted. For most of the past ten years, Applicant has claimed more exemptions from withholding of taxes from his pay so he would receive as much of his pay each week as possible. However, he estimates that he may owe as much as \$14,000 to the IRS.

Applicant is able to meet all of his current monthly obligations and has a positive cash flow of \$625 remaining each month. However, he is not making any payments on any of his past due obligations.

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 18 (Guideline F - Financial Considerations).

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁸

Analysis

Financial Considerations

The security concern about Applicant's finances, as stated in AG ¶ 18, is that:

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 Government presented sufficient information to support the allegations in SOR 1.a - 1.f, and the information disclosed at hearing was sufficient to support the additional allegation at SOR 1.g; that is, that Applicant owed \$152,291 for six delinquent debts, and that he has not filed federal or state tax returns for at least 10 years and may owe as much as \$14,000 in unpaid taxes. However, one of the debts alleged (SOR 1.f) is a duplicate of another (SOR 1.e), and Applicant has paid one of the remaining debts (SOR 1.b). Nonetheless, he is still obligated to repay as much as \$150,000 for financed purchases of two trucks and trailers (SOR 1.a), and he still owes almost \$1,300 for two delinquent credit card accounts (SOR 1.c and 1.d). Finally, information shows that Applicant owes about \$426 for a disputed propane gas bill (SOR 1.e). Accordingly, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*), AG ¶ 19(c) (*a history of not meeting financial obligations*), and AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*). As to AG ¶ 19(a), it should be emphasized that Applicant is willing to pay his debts but is unable to do so.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

In response to the SOR and at hearing, Applicant established that the debt at SOR 1.a arose largely from circumstances beyond his control. Despite the absence of corroborating documents lost during Hurricane Katrina, his account of his experiences with a trucking company owner who defrauded him out of a new truck was credible. It was also supported by two letters he submitted. Applicant's credit card debts were incurred while he was unable to work because he had no truck. When he subsequently bought a truck and trailer, he experienced numerous mechanical problems that further hindered his ability to haul loads and earn income. These facts require consideration of the mitigating condition at AG ¶ 20(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*). Further, the record shows that, although Applicant used poor judgment in agreeing to the deal with his boss, there was little he could do to resolve the matter. Without a truck, he could not work. The next truck he owned broke down and produced more debt. It is unlikely Applicant will ever resolve this debt because his profession simply does not pay enough. AG ¶ 20(b) applies to SOR 1.a.

As to his delinquent credit card accounts (SOR 1.c and 1.d), these can also be attributed to the fact that he was without a truck for the better part of two years. However, since he has been working for his current employer, it appears he has had enough money remaining after expenses to make some payments on both accounts. Because he has not paid or otherwise acted to resolve these debts, none of the AG ¶ 20 mitigating conditions apply.

As to his disputed propane gas bill (SOR 1.e), Applicant's explanation was plausible. Such circumstances are hardly unusual, and more likely to occur where, as here, an individual moves frequently to pursue job opportunities. Available information requires consideration of AG ¶ 20(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*). Despite the lack of documentation, I found Applicant to be credible regarding this issue, and I resolve SOR 1.e in his favor.

Applicant had no explanation for why he has not filed his federal or state tax returns for the past decade. He testified that his conduct "was just laziness" (Tr. 88) As of the hearing, he anticipated his pay being garnished, thus reducing his positive cash flow and further hindering his ability to pay his debts. He has not mitigated the security concerns about his unpaid taxes alleged in SOR 1.g.

The mitigating condition at AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) applies only to the debt at SOR 1.b, which Applicant paid before the hearing. However, other than already discussed, Applicant has not established the applicability of this mitigating condition or any others listed under AG ¶ 20. Even though much of Applicant's remaining debt was not his fault, the totality of information about his finances, including his deliberate failure to file his taxes over a prolonged period, presents an unacceptable risk that he would resort to

improper or illegal conduct to obtain money to pay his debts. I conclude that the security concerns about his unpaid debt are not mitigated.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Available information shows that Applicant, 50 years old, has been trying to make an honest living as a truck driver. He has experienced unforeseen circumstances that have resulted in financial problems that are beyond his ability to resolve. They are also, in part, beyond his willingness to resolve. He has been able to pay his smaller debts for at least five years but he has not done so. At the same time, he has deliberately avoided his tax-paying obligations and has deliberately tried to minimize the taxes withheld from his pay. His poor decision-making far outweighs the bad luck he has experienced. Thus, a fair and commonsense assessment⁹ of all available information bearing on Applicant's past and current circumstances shows he has not addressed satisfactorily the Government's doubts about his ability and willingness to protect the Government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the Government.¹⁰

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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|----------------------------------|-------------------|
| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraph 1.a, 1.c, 1.d, 1.g: | Against Applicant |
| Subparagraph 1.b, 1.e, 1.f: | For Applicant |

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

⁹ See footnote 6, *supra*.

¹⁰ See footnote 8, *supra*.