



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-02248
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro Se*

September 22, 2009

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) dated January 7, 2009. (Government Exhibit 1). On April 29, 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.

Applicant answered the SOR in writing on May 14, 2009, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on June 11, 2009. A notice of hearing was issued on July 8, 2009, scheduling the hearing for July 29, 2009. The Government offered six exhibits, referred to as Government Exhibits 1 through 6, which were received without objection. Applicant offered twenty exhibits referred to as Applicant's Exhibits A through T, which were admitted without objection. The Applicant called one witness and testified on his own behalf. The record remained open until close of business on August 12, 2009, to

allow the Applicant the opportunity to submit additional documentation. The Applicant submitted three Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits A through C. The transcript of the hearing (Tr.) was received on August 17, 2009. 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, his testimony and the exhibits. The Applicant is 60 years old and has a Master's Degree in Electrical Engineering. He is employed by a defense contractor as a Project Engineer 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 to each of the allegations set forth in the SOR, namely that he is indebted in the amount of approximately \$100,000 for federal tax liens as well as other debts. Credit Reports of the Applicant dated January 13, 2009; March 27, 2009; June 10, 2009; and July 28, 2009; collectively reflect each of the outstanding debts listed in the SOR. (Government Exhibits 3, 4, 5 and 6). The Applicant has been employed for a defense contractor since December 2008.

The Applicant explained that a series of unexpected circumstances caused or contributed to his delinquent back taxes. The years between 1991 and 1998, presented serious financial difficulties for the Applicant brought on by his entrepreneurial efforts. In January 1991, the Applicant and his partner started a business venture, developing a controller for an electronic device. Eventually, the scope of their development changed, and they decided to build their own electronic device, and they filed for patent protection. The Applicant and his partner spent their own financial resources to finance the business, essentially sacrificing everything into building the company.

In 1994, Company A decided that they were interested in acquiring the Applicant's business, and acquired them through fraudulent representations. Although they proposed a pay out of 1.8 million dollars, the worth of the valuable consideration Applicant received in exchange for rights to his intellectual property was zero. Applicant continued to believe in his company project and continued operations. In 1996,

Company B became interested in acquiring the Applicant's company. Applicant found their offer attractive. Applicant was offered employment contracts, a golden parachute clause and equity participation. Unfortunately, there were also problems with this investor and in September 1998, the Applicant and was forced to shut down his business. Although the Applicant had developed patents for the investor, he received nothing for his efforts. (Applicant's Exhibits O, P, Q, R and T).

Applicant hired an attorney and filed a complaint with the labor board to recover money contractually owed to him by Company B that he calculated as approximately \$400,000. (Applicant's Exhibit I). Unfortunately the litigation was unsuccessful. Applicant believes that his attorney committed malpractice and failed to properly represent him, but has been unable to afford pursuing the matter.

During this period, the Applicant also made some poor financial decisions. Instead of paying his income taxes for tax years 1997 and 1998, he used the money to subsidize the business. His intention was always to pay his taxes, but he wanted to fulfill this obligation once his business became successful. In 2000, he also stopped paying his mortgage. His house was foreclosed upon and he no longer had that deduction. He under-with held on his taxes and became indebted to the IRS for a tax lien in the amount of \$25,058.00, a tax lien in the amount of \$38,671.00, and a tax lien in the amount of \$33,505.00. (See Applicant's Exhibits A, B and C).

In January 2001, the Applicant filed for Chapter 7 bankruptcy and his debts were discharged in May 2001. Several of his debts were not discharged in bankruptcy and the Applicant has worked hard to resolve them. In early 2008, the Applicant began to make settlement arrangements to pay off these creditors. A delinquent debt to a creditor in the amount of \$848.00 was settled by June 30, 2009. (Applicant's Exhibit D). A delinquent debt to a bank in the amount of \$959.00 was paid on March 2, 2009. (Applicant's Exhibit E). A delinquent debt to a bank in the amount of \$1,800.00 was paid on June 5, 2009. (Applicant's Exhibit F). A delinquent debt to a bank in the amount of \$1,279.00 was paid. (Applicant's Exhibit G). Other debts not listed in the SOR were also paid. (Applicant's Exhibit S).

In an effort to resolve his tax indebtedness, the Applicant testified that he had submitted three offers of compromise to the IRS regarding tax years 1997 and 1998. The first offer was made in 2002, and the two others after that. (Applicant's Exhibit L). All were rejected. Applicant also made payments to the IRS totaling \$5,000.00. (Applicant's Exhibit M). Recently he submitted another offer of compromise to the IRS dated July 31, 2009, and included a check for \$500.00. (Applicant's Post-Hearing Exhibit B). A letter from the IRS in response to the Applicant's offer of compromise indicates that they are still processing the Applicant's request. (Applicant's Post-Hearing Exhibit C). In December 2007, the Applicant and his wife moved in with his mother-in-law so that he could further reduce his expenses. His plan is to pay off his tax liens and resolve his tax indebtedness.

Letters of recommendation submitted on behalf of the Applicant from his Section Manager and other professional colleagues collectively indicate that the Applicant is an upstanding, intelligent and honorable individual with high work ethics. He is considered forthright and up front about his financial difficulties of the past. He has demonstrated that he is trustworthy, loyal, dedicated, respectable and responsible and is considered a true asset to the organization. He is highly recommended for a position of trust. (Applicant's Exhibit H).

Testimony from a coworker and fellow engineer, who has known the Applicant for two years, worked on a Government program for one year, and holds a security clearance, indicated that the Applicant is security conscious, trustworthy, honest, responsible, kind, candid, and a diligent worker. The Applicant is highly recommended for a position of trust. (Tr. pp. 34 - 40).

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 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;

20(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;

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 16-17, 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 and surrounding circumstances
- 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 behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- 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 predicted 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.

The evidence shows that circumstances largely beyond the Applicant's control contributed to his financial indebtedness. Although Applicant's efforts to start his own business seemed successful, the two efforts to acquire his company were unsuccessful and had unexpected and devastating financial impacts. As a result, the Applicant became excessively indebted, and lost his job and his home. The Applicant also made some poor financial decisions concerning his taxes during this time that did not help his situation. Although he has always had every intention to pay his back taxes and has tried to do so on three separate occasions by an offer of compromise, his offers were rejected by the IRS. Since starting his current employment in 2008, he has contacted the IRS once again and recently made another offer of compromise to resolve his indebtedness. He is currently awaiting a response from the IRS concerning his offer of compromise. His other debts have been paid off. He has incurred no new debt. He has moved in with his mother-in-law to further reduce his overhead. He plans to complete and follow a payment plan or otherwise resolve his indebtedness in full immediately. Under the circumstances, the Applicant has done his best to be responsible and has made a good faith effort to resolve his debts. He realizes that he must live within his means and must always pay his bills on time. In the event that he has any future financial problems, his security clearance would immediately be in jeopardy. Considering all of the evidence, the Applicant has introduced persuasive

evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Under Guideline F, 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 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*, 20(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, 20(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply.

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, his favourable character references and 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.

There is evidence of financial rehabilitation at this time. The Applicant has initiated 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).

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.

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