



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-03233
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Department Counsel
For Applicant: *Pro se*

April 23, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on October 15, 2008. (Government Exhibit 5.) On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended) issued a Statement of Reasons (SOR) to the Applicant, which detailed 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 25, 2009, and he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government’s File of Relevant Material (FORM) to the Applicant on November 13, 2009. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on November 25, 2009, and submitted a reply dated December 16, 2009, with attachments. The case was assigned to the undersigned for resolution on February 5, 2010. Based upon a review of the case file, pleadings and exhibits, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 56 years old and married. He is employed by a defense contractor as an Quality Assurance Inspector 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). 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 clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

The Applicant indicates that he has held a Top Secret security clearance since 1984. The Applicant admits that he is indebted to seven separate creditors totaling more than \$75,000.00. (Government Exhibit 4.) All of the debts remain unpaid. Applicant states that he has retained an attorney to file a Chapter 7 Bankruptcy petition on his behalf that will include all of the debts set forth in the SOR. (Government Exhibits 4 and 6.) Applicant attributes his excessive indebtedness to two periods of unemployment from between May 2002 to October 2002, and November 1999 to June 2000. However, credit reports of the Applicant dated November 4, 2008, and August 2, 2009, reflect that the debts in the SOR did not become delinquent until 2003 or thereafter. Applicant has been steadily employed since October 2002. (Government Exhibits 5 and 12.)

The following debts remain owing. A debt owed to a creditor in the amount of \$6.00 remains unpaid. A debt owed to a creditor in the amount of \$12.00 remains unpaid. A debt owed to a medical facility in the amount of \$158.00 remains unpaid. A debt owed to a bank for a credit card in the amount of \$2,803.00 remains unpaid. A debt owed to a department store in the amount of \$4,056.00 remains unpaid. A debt owed to a creditor in the amount of \$3,953.00 remains unpaid. The most significant debt, a debt owed to a lender in the amount of \$64,328.00 remains unpaid. This debt is for a home foreclosure. (Government Exhibit 7). Applicant contends that he had entered into a lease option agreement with tenants who were to make the house payments directly to the lender for three years, and then pay the Applicant the remaining principal owed on the property. Applicant states that the tenants reneged on the contract. Applicant has failed to provide the court with a copy of this documentation. Applicant also claims that when he learned of the default, he contacted the bank and tried to resolve the matter but was unsuccessful. There is no supporting documentary evidence of this. There is no evidence of any efforts to pay or otherwise resolve the debts. Applicant also contends that he long ago destroyed all of his existing credit cards to alleviate any further accumulation of debt.

Applicant claims that the debts set forth in the SOR will be included in his Chapter 7 bankruptcy petition, and will be discharged. He submits no documentary evidence to support his assertions. Applicant submits a copy of a letter from his attorneys dated December 9, 2009, notifying him of an upcoming 341 meeting. There is also a Notice of Chapter 7 Bankruptcy Case, meeting of the Creditors and Deadlines, from a United States Bankruptcy Court. This documentation, however, does not show that the debts listed in the SOR were included in the Applicant's Bankruptcy petition nor does it show that the debts in the SOR were discharged.

Applicant received the FORM on November 25, 2009, and was given the opportunity to respond to the FORM concerning the present status of his bankruptcy case, which is critical in this case. (See file). He submitted two letters, one from his attorney, the other from the court, notifying him of a creditors meeting. (Applicant's Reply to the FORM). There is insufficient evidence in the record to demonstrate that he has resolved his current indebtedness. There is no documentary evidence that supports the fact that he has included the debts listed in the SOR in his bankruptcy petition, nor is there evidence that the debt have been discharged. There is no track record of systematic payments on any of his accounts, thus, his delinquent debts remain outstanding. Furthermore, there is no evidence in the record as to whether he has sufficient income at this time, even if the debts are considered discharged, to pay his current monthly expenses in a timely manner.

Paragraph 2 (Guideline J - Criminal Conduct) The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal activity that creates doubt about a person's judgment, reliability, and trustworthiness.

In June 1984, the Applicant sexually molested his, then, ten year old daughter. The details of the incidents described by the Applicant are inconsistent. Applicant stated that he and his daughter were home alone together when his daughter initiated sexual conduct with him. According to the Applicant in his personal subject interview dated January 14, 2009, and certified by the Applicant on July 2, 2009, his daughter touched and masturbated his penis without provocation. Applicant could not explain why his daughter touched his penis or why he allowed her to touch and masturbate his penis. He did admit, however, that he allowed her to do it again on two further occasions. Applicant claims that all three of these incidents occurred within a one month period. (Government Exhibits 4 and 7).

Applicant provides a different account of the situation in his sworn statement dated December 2003. He stated that he molested a twelve year old girl by touching her inappropriately. He did not disclose that the girl he molested was his daughter, and that she was only ten years old at the time of the molestation, not twelve. (Government Exhibit 12).

Four years later, in 1988, when his daughter became angry with him, she reported her father's sexual abuse to the local authorities. The Applicant was subsequently arrested, booked, and charged with Lewd and Lascivious Acts with a

Child Under 14. He was found guilty, sentenced to counseling, placed on home detention for one year and given five years probation. He is obligated to register as a Sex Offender on a quarterly basis with the state. (Government Exhibit 11 and 13.) Applicant states that the only other persons aware of his sexual offense are his wife and his son. His employer, friends and other family members are unaware that he sexually abused his daughter.

Following these incidents, the Applicant's entire immediate family attended counseling for one year. The Applicant received extensive counseling and rehabilitation in order to effectively deal with his problems. He had three years of individual counseling on an average of once a month, and attended support group meetings to help himself understand why it occurred in the first place. He has confronted his demons, is remorseful and ashamed, and committed to never engaging in any sexual misconduct again.

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.

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:

None.

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple lesser offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Condition that could mitigate security concerns:

32(a) so much time has elapsed since the criminal behavior happened, or it happened under such usual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

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.”

CONCLUSION

In the defense industry, the security of classified industrial secrets 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 clearance may be involved in instances of financial irresponsibility and criminal conduct 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), and has engaged in criminal conduct (Guideline J). 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.

In regard to the Applicant’s criminal conduct, I find for the Applicant. Although repulsive, egregious, detestable, and of a heinous nature, and his recollections of the events were not identical, the misconduct occurred in the distance past, over twenty years ago, and there is no evidence of recurrence. In addition, the fact that he must register in the state as a Sexual Offender on a quarterly basis, publishes this fact to all, and therefore, it is not a basis for coercion, exploitation or duress. Mitigating Condition 32(a) *so much time has elapsed since the criminal behavior happened, or it happened under such usual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment clearly applies.*

Considering all of the evidence, however, the Applicant has failed to introduce persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case. Under the circumstances, he has failed to make a good faith effort to resolve his indebtedness. He has submitted insufficient documentary evidence to support the fact that he has listed any of the debts in the SOR in his bankruptcy petition, or that they have been discharged. He did not submit a copy of the actual bankruptcy petition, nor did he respond to the FORM and provide documentation concerning the status of his delinquent debts. Other than two letters notifying him of a creditors meeting, he failed to provide relevant documentary evidence. Without more, it is impossible to determine that the Applicant has resolved his indebtedness or that he is sufficiently financially responsible for access to classified information. He has failed to demonstrate that he can properly handle his financial affairs.

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. None of the mitigating conditions are applicable. Based upon the large amount of debt owed by the Applicant, his failure to provide sufficient documentary evidence as to why he became indebted in the first place, what he has done to resolve it, and how he has changed or reformed his past spending habits, the Applicant has failed to provide sufficient evidence of financial rehabilitation. Accordingly, I find against the Applicant under Guideline F (Financial Considerations).

The evidence in the record is void concerning the status of the delinquent debts set forth in the SOR. Furthermore, the Applicant has no favorable recommendations or sufficient documentation to support his allegations. Accordingly, I have no choice than to find that he is not sufficiently trustworthy to have access to classified information.

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 poor judgement, untrustworthiness, unreliability, a lack a candor, and an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

I have considered all of the evidence presented and it does not sufficiently mitigate the adverse information brought against him. On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR. As stated above, Paragraph 2 is found for the Applicant.

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: Against the Applicant.
Subpara. 1.a.: Against the Applicant.
Subpara. 1.b.: Against the Applicant.
Subpara. 1.c.: Against the Applicant.
Subpara. 1.d.: Against the Applicant.
Subpara. 1.e.: Against the Applicant.
Subpara. 1.f.: Against the Applicant.
Subpara. 1.g.: Against the Applicant.

Paragraph 2: For the Applicant.
Subpara. 2.a.: For the Applicant.
Subpara. 2.b.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge