



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-03392
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

November 24, 2010

Decision

HOWE, Philip S., Administrative Judge:

On December 9, 2008, Applicant submitted his Security Clearance Application (SF 86). On November 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 30, 2009. He answered the SOR in writing on December 16, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 12 2010, and I received the case assignment on March 30, 2010. DOHA issued a Notice of Hearing on April 26, 2010, and I convened the hearing as scheduled on May 27, 2010. The Government offered Exhibits 1 through 5, which were received without objection.

Applicant testified and submitted Exhibits A and B, without objection. DOHA received the transcript of the hearing (Tr.) on June 8, 2010. I granted Applicant's request to keep the record open until June 10, 2010, to submit additional matters. On June 9, 2010, he submitted the paper copies of Exhibits A and B. The record closed on June 10, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.c, 1.d., and 1.e of the SOR, with explanations. He denied the factual allegations in ¶ 1.b of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 33 years old. He married in September 2008 and has a 10-month-old son. His wife is employed and earns more than Applicant. Together they earn nearly \$140,000 gross income annually. Their monthly net income is about \$7,000. Applicant pays his wife \$820 monthly to pay his share of the mortgage, food, utilities, and other monthly household expenses. They keep their personal finances separate. That separation is why he did not list his wife's income on his personal financial statement in 2009. Applicant has been employed in his current job since April 2007. (Tr. 24, 30-35, 47; Exhibits 1-3)

In 2004, Applicant started a business buying, repairing, and selling used motorcycles. He obtained a Small Business Administration (SBA) loan for \$188,000. He paid \$190,000 for a building to house his business. In 2006, the business started to fail. Applicant closed it in 2007 and started his computer engineering employment for a defense contractor where he continues to work. The SBA loan was paid by debt insurance and the building was foreclosed by the bank and sold.

The SOR lists five delinquent debts totaling \$45,484. These debts resulted from Applicant's operation of the business during which he used personal credit cards to borrow over \$30,000 to fund the business operation. Applicant knowingly used sales tax revenue to keep his business in operation from 2005 to 2007. He admitted his action was wrong and he performed it knowingly. (Tr. 15-23, 37, 41; Exhibits 1-5)

Applicant sought an offer in compromise of his sales tax debt (Para. 1.b) from his state's revenue department. On June 2, 2009, that department approved a compromise of \$4,900 to satisfy the debt. The state gave Applicant an installment payment agreement to repay that compromised amount. The down payment of \$1,200 was paid by Applicant's wife. The monthly payments are \$155 for 24 months. Applicant makes those payments. The state also took Applicant's 2008 income tax refund of \$891.07 for application to the balance due on the sales tax offer in compromise. Applicant's payment obligations on that debt will not conclude until 2011. (Tr. 16-18, 25, 37, 38; Exhibits 2-5, A, B)

Applicant owes four other delinquent debts. They total \$39,801. Applicant has not paid them nor has he contacted the debt collectors for these creditors. Three of the debts are owed to credit card companies for sums he charged on his cards to keep his business operating from 2004 to 2007. In 2009, Applicant told the government investigator conducting the background check that he would contact the creditors on the debts. He has not contacted the collectors or creditors because no time period was specified in his statement to the government investigator who did the background check in 2009. Applicant also stated he made no contact because any money he paid the collectors now would only be applied to interest and not the principal amounts owed. He wanted to save a large amount of money so he could offer lump sum payments. He has not saved any money in the past three years with which to make these payments. Applicant is paying an \$8,000 debt owed on another credit card he also used to pay his business expenses. This debt is not listed in the SOR. He has a balance of \$1,000 owed at the present time on that debt. He pays that credit card debt because the credit union card issuer did not sell the debt to a collector and he wants to maintain his credit status with that credit union. Applicant stated when he pays off that credit card and the state revenue department he would contact the next creditor. He did not specify which creditor would be the next to pay among the four remaining SOR-listed debts. (Tr. 15-21, 29, 30, 42, 43, 50; Exhibits 2-5)

The credit card in Paragraph 1.a of the SOR is \$21,385. The creditor obtained a judgment against Applicant. With interest and court costs, the debt now exceeds \$30,000. This debt remains unresolved. (Tr. 16, 42, 43; Exhibits 2-5)

The credit card debt listed in the SOR at Paragraph 1.c is \$12,420. It is unresolved. (Tr. 19; Exhibits 2-5)

The debt listed in the SOR at Paragraph 1.d is \$5,226. It is for a third credit card Applicant used in his business and has not repaid. This debt is unresolved. (Tr. 19; Exhibits 2-5)

The final debt listed in the SOR at Paragraph 1.e for \$775 is owed to a bank on a credit card terminal rental agreement. Applicant disputes the debt though not in any formal manner. This debt is unresolved. (Tr. 19; Exhibits 2-5)

Applicant claims he and his wife prepared a budget and put it on a spreadsheet. He did not submit a copy of the budget or proof he complies with it. He has not sought or obtained any financial counseling. (Tr. 44, 45)

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 and mitigating conditions, which are useful 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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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 national security." In reaching this 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, an "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."

A person who seeks access to classified information enters 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is 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.

The guideline at AG ¶ 19 contains nine disqualifying conditions that could raise security concerns. Three conditions are applicable to the facts found in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust.

Applicant accumulated \$45,484 in five delinquent debts listed in the SOR dating from 2004 to 2007. He has been employed since 2007. During the past three years Applicant has not taken any steps to resolve the four credit card debts. His actions are deliberate and intentional. AG ¶ 19 (a) and (c) apply.

Applicant pays one debt, the state sales tax debt. He incurred that debt when he converted the state sales taxes he collected from his customers to his own business use. His diversion of the sales tax revenue to his own use is a deceptive and illegal financial practice. That money is supposed to be kept separate from his personal funds and remitted to the state revenue department on a regular basis. It is an intentional action by Applicant breaching the trust the state put in him to collect and pay the state the taxes. AG ¶ 19 (d) applies.

The guideline in AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. Two conditions may be applicable:

- (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 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;

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

(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; and

(f) the affluence resulted from a legal source of income.

Applicant's debt obligations are currently owed. They arose six years ago and have not been resolved. They are part of a pattern in which he used money for his business that he knew he could not repay. He has not exerted any efforts in the past three years of employment to repay more than the sales tax debt. These decisions and actions cast doubt on Applicant's current reliability, trustworthiness, and good judgment. He exercised very poor business judgment in the past. AG ¶ 20 (a) does not apply.

Applicant operated a failing business for two years, from 2005 to 2007. He used credit cards to borrow money with which to operate the business in those years. He used state sales tax revenue to support his business at the same time. The use of the sales tax money in that way is illegal. Applicant did not act responsibly under the circumstances. Therefore, AG ¶ 20 (b) has no application.

Applicant has not sought or received any financial or debt counseling. He has no plan to repay the delinquent debts listed in the SOR except when he thinks he has accumulated sufficient funds to attempt to negotiate a settlement. This expectation is not an objective and responsible plan to resolve the debts. His debt problem is not under control or being resolved. AG ¶ 20 (c) has no application.

Applicant is paying one debt, the state sales tax debt. AG ¶ 20 (d) partially applies because of Applicant's good-faith efforts to repay this one debt. However, he has not taken any action to repay the other \$39,801 in delinquent debt.

Applicant has not stated a reasonable basis to dispute the delinquent debts. He did not submit any documented proof to support the basis of the dispute. Applicant did not present evidence of actions to resolve the dispute. AG ¶ 20 (e) does not apply.

Finally, there is no evidence that any affluence from his own efforts, gifts, or his marriage were being used to resolve the debts. His net family income of about \$7,000 monthly resulted from legal employment. But his affluence is not an issue in the debt resolution problem. AG ¶ 20 (f) has no application.

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 an applicant’s conduct and all the 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 facts and circumstances surrounding this case. Applicant incurred a large amount of delinquent debt. He has not resolved any of it, except his sales tax debt, in the past three years. During those three years, he has been earning a good salary and has his wife’s income with which to repay the smaller debts in Paragraphs 1.d and 1.e of the SOR. He told the government investigator in 2009 that he would contact the creditors to arrange repayment plans, but failed to do so. His explanation and lack of action to accumulate money with which to make lump sum payments diminishes substantially his credibility.

Applicant engaged in his debt-accumulating practices over a two-year period in a deliberate and willful manner, including diverting tax money to his business. He was a mature business man when he engaged in this course of conduct.

Applicant has no viable plan to repay the debts. He has had ample time and opportunity to develop one over the past three years. The totality of his actions, particularly his diversion of state tax money, demonstrates a serious lack of good judgment and trustworthiness.

Overall, the record evidence leaves me with questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his financial considerations. I conclude the “whole-person concept” against Applicant.

Formal Findings

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

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

PHILIP S. HOWE
Administrative Judge