



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 09-03764
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro Se*

December 17, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant incurred significant delinquent debts between 2000 and 2005 while unsuccessfully attempting self-employment as a consultant. He filed for Chapter 13 bankruptcy relief in 2007, but the case was dismissed for failure to comply with plan requirements. He recently began another Chapter 13 proceeding, but failed to show ongoing solvency or otherwise mitigate security concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application on December 3, 2008.¹ On March 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations).² 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*

¹Item 1.

²Item 2.

Clearance Review Program (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on July 20, 2009, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on August 11, 2009. A complete copy of the file of relevant material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on August 19, 2009, and returned it to DOHA. On September 15, 2009, he submitted additional evidence for consideration with a letter which contained no objection to consideration of any evidence submitted by Department Counsel. On September 18, 2009, Department Counsel initialed a memorandum to indicate that he did not object to the admissibility into evidence and consideration of the materials submitted by Applicant. I received the case assignment on September 23, 2009. Applicant submitted additional evidence for consideration on October 23, 2009, and November 9, 2009. Department Counsel initialed a November 13, 2009, memorandum indicating that he had no objection to consideration of this additional evidence.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor, where he has worked since August 2008. He has no military service, and has never held a security clearance. He is married with three children, ages 18, 7, and 4, and two stepchildren, ages 19 and 16.⁵ In his response to the SOR, he formally denied each allegation, but then made explanatory statements that admitted to each one. Applicant's admissions, including his statements in response to the FORM, are incorporated in the following findings.

The credit bureau reports submitted by Department Counsel establish the existence of Applicant's 21 delinquent debts, totaling \$304,663.⁶ Included in that amount are two Federal income tax liens, totaling \$71,918, and five state income tax liens for a total of \$20,495. Also included is the \$170,000 outstanding balance on a mortgage loan that was foreclosed in August 2005. Applicant claimed that the creditor resold the home and the outstanding balance was less than \$10,000 in his SOR response, but his June 15, 2009, credit report showed the full \$170,000 still outstanding. Applicant provided no

³Item 4.

⁴The Government submitted seven items in support of the SOR allegations.

⁵Item 1 at 6, 12, 18, 23-25, 29, 37.

⁶Items 5, 6, and 7.

evidence to substantiate his claim that this debt was partially satisfied through the sale of the home.⁷ If Applicant's reports concerning resale of the home are accurate, his present delinquent debt is between \$145,000 and \$150,000.

Applicant's financial problems first arose after he was laid off from a company where he worked from June 1997 to January 2000. Rather than seek other employment, he opened a management consulting business that was not successful. He continued this endeavor until September 2005, when he began working for another company. The vast majority of Applicant's delinquent debt arose during the 2000 to 2005 period.⁸

On November 15, 2007, Applicant and his wife filed for Chapter 13 bankruptcy relief. He made \$5,080 in required payments to the assigned trustee until July 2008. At the end of June 2008, he was involuntarily separated from the job he then held as part of a reduction in force. He received two weeks of severance pay, but could not afford to continue payments toward his Chapter 13 plan. He obtained his current job in August 2008, but the bankruptcy court dismissed the case on August 7, 2008, for failure to file information. After disbursing \$689 in attorney and trustee fees, \$994 to the Internal Revenue Service (IRS), and \$777 to another creditor, the trustee returned the remaining \$2,620 to Applicant on September 2, 2008. This case was terminated by the bankruptcy court on October 24, 2008.⁹

On July 20, 2009, Applicant and his wife filed another Chapter 13 bankruptcy petition. The schedule of creditors holding unsecured priority claims reflects a \$103,500 claim for Federal taxes by the IRS, and a state tax claim of \$18,500. The schedule for unsecured nonpriority claims lists 49 debts totaling \$103,384, including a contingent \$1 placeholder claim for "possible deficiency on foreclosed home," as discussed in footnote 7 below. The bankruptcy filing thus places his debt total at \$225,384. This Chapter 13 plan requires Applicant to make 10 monthly payments of \$300, followed by 47 monthly payments of \$550. The increase will coincide with the end of Applicant's obligation to pay child support for his eldest child. His total payments under the plan will be only \$28,850. The bankruptcy court directed Applicant's employer to make these payments directly to the trustee starting on August 19, 2009, and entered a final order confirming the plan on November 3, 2009.¹⁰

7

In Applicant's response to the FORM, he said that he could not find a copy of the document showing the final balance owed after the foreclosure sale, but it was less than \$15,000. The latest creditor report to the credit bureau on this debt was in September 2005, and there is no more current information in the record corroborating that a sale occurred or what balance remains outstanding. Applicant listed this debt on his bankruptcy schedule of unsecured creditors with an amount due of \$1.

⁸Applicant's responses to the SOR (Item 4) and FORM; Items 5 and 6.

⁹Item 4 at 1; Item 7 at 3; FORM Response at 1, Attachments 1 and 2.

¹⁰Item 4 at 3-4; Applicant's response to the FORM at 1, Attachments 3 to 5; Supplemental responses to FORM of Oct. 3, 2009, and Nov. 9, 2009.

Applicant submitted no evidence about his current income, living expenses, or ability to make the required bankruptcy payments without incurring further delinquent debt. He did pay required Federal income taxes up through 1999, and again from 2006 through 2008.¹¹ He neither claimed to have made, nor substantiated any payment toward any of his SOR-listed delinquencies. He also provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling protected information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he 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." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant 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."

¹¹Applicant's response to the FORM at 2, Attachments 6 through 10.

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are 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.

Department Counsel argued that the evidence established security concerns under four Guideline F DCs, as set forth in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.¹²

Applicant is unable to satisfy his substantial delinquent debts and has sought relief from having to pay the great majority of them through bankruptcy. He neither claimed nor documented any effort to repay any of the creditors involved, other than partial payments through his Chapter 13 bankruptcies. DC 19(a) is clearly established.

¹²FORM at 5, 7.

The evidence is insufficient to establish DC 19(b), in that Applicant's delinquencies primarily arose during the four and a half year period when he was attempting to support his family through an unsuccessful self-employed consulting business. I cannot confidently infer frivolous or irresponsible spending from the mere existence of about \$32,000 per year in delinquent debt under such circumstances, and the record is devoid of other evidence that would demonstrate such spending.

Applicant has demonstrated a history of not meeting financial obligations, including large Federal tax liabilities that he owes to the same Government he seeks to convince that he is sufficiently trustworthy and reliable to be entrusted with its classified information. Security concerns under DC 19(c) are also supported on this record.

Applicant regularly spent beyond his means from about January 2000 to about September 2005, while he was self-employed. DC 19(e) thus applied during that period of time. When he lost his home to foreclosure, and other delinquencies kept mounting, he finally gave up the business and resumed regular employment with other companies. Only a few minor new delinquencies could be considered to have arisen since that period based on credit reports in the record, and those are insufficient to demonstrate any consistent spending beyond Applicant's means since late 2005. Accordingly, DC 19(e) supports no present security concerns independent of those arising under DC 19(a) and (c), as discussed above. The evidence supporting these two disqualifying conditions requires a closer examination and balancing of resulting security concerns with any potentially mitigating matters, and shifts the burden to Applicant to rebut, explain, extenuate or mitigate those concerns.

The guideline includes several conditions that could mitigate security concerns arising from financial difficulties in AG ¶ 20. Under MC 20(a), disqualifying conditions may be mitigated where "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." Applicant's financial irresponsibility is recent, involves large sums and numerous creditors, and continues to date. He remains substantially in debt, and he provided no evidence concerning his current financial situation that would support a finding that delinquent indebtedness is unlikely to recur. The evidence does not support application of this potentially mitigating condition.

Under MC 20(b), it may be mitigating where "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." Applicant decided to begin his own consulting business after being laid off in early 2000, rather than seek another job. He offered no evidence that this decision was anything other than his own free choice. His business was unsuccessful, yet he continued pursuing it for four and a half years. He also did not demonstrate that he responsibly reduced non-essential spending in reaction to his mounting debts. The evidence indicates that Applicant chose to continue borrowing money on credit he knew he could not repay, and failed to pay his

Federal and state tax obligations. Even after regaining regular employment and income, he sought bankruptcy relief rather than addressing his obligations to those who had extended him that credit. Applicant has not established mitigation of his presently delinquent debts, or of his financial history as a whole, under this provision.

Evidence that “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” is potentially mitigating under MC 20(c). Similarly, MC 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant demonstrated the beginning stages of mitigation under these two provisions through his recently confirmed Chapter 13 bankruptcy proceedings. However, the absence of any evidence showing his current solvency or ongoing ability to support his family while meeting his bankruptcy obligations precludes present findings of “clear indications that the problem is being resolved or is under control,” or “a good-faith effort.” His failure to successfully meet the requirements of his first Chapter 13 bankruptcy in 2008 casts further doubt in that regard absent a more significant record of success on this attempt. Insufficient evidence was presented to alleviate the substantial security concerns raised by the length and degree of financial irresponsibility that continues to date.

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 the applicant’s conduct and all relevant 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.

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 relevant facts and circumstances surrounding this case. Applicant is a mature individual who is responsible for his voluntary choices and conduct that underlie the security concerns expressed in the SOR. He chose to attempt self-employment in an unsuccessful consulting business and incurred substantial and ongoing delinquent debt to private creditors, as well as state and Federal tax authorities, as a result.

Applicant failed to comply with the requirements of his first Chapter 13 bankruptcy proceeding, and only recently began the present Chapter 13 plan that involves over \$225,000 in debts and is scheduled to continue through May 2014. He failed to demonstrate financial rehabilitation or evidence of solvency from this point forward, so recurrence cannot be said to be unlikely. He continues to bear financial obligations for significant past debt and the ongoing support of his wife and their five children. He accordingly remains subject to pressure, exploitation, or duress. The record contains insufficient other evidence about his character, trustworthiness, or responsibility to mitigate these concerns, or tending to make their continuation less likely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations.

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:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	Against Applicant
Subparagraph 1.p:	Against Applicant
Subparagraph 1.q:	Against Applicant
Subparagraph 1.r:	Against Applicant
Subparagraph 1.s:	Against Applicant
Subparagraph 1.t:	Against Applicant
Subparagraph 1.u:	Against Applicant
Subparagraph 1.v:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge