



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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SSN: -----) ISCR Case No. 09-04536
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Applicant for Security Clearance)

Appearances

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

November 26, 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 granted.

On December 30, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain or renew 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 interrogatories¹ to clarify or augment potentially disqualifying information in his background. After Applicant responded to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to grant Applicant's request for access to classified

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.

information. On April 14, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise disqualifying 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 June 23, 2010. Pursuant to a Notice of Hearing issued the next day, I convened a hearing in this matter on July 15, 2010. The parties appeared as scheduled. The Government presented five exhibits (Gx. 1 - 7), which were admitted without objection. Applicant testified, presented three witnesses, and proffered five exhibits (Ax. 1 - 5⁴). All of Applicant's exhibits were admitted, with Ax. 3.o - 3.q admitted over Department Counsel's objection as to relevance. DOHA received the transcript of hearing (Tr.) on July 29, 2010.

Procedural Issue

The record closed at the end of the hearing on July 15, 2010, without any provision or request for additional time for post-hearing submissions. However, on August 2, 2010, Department Counsel forwarded to me a post-hearing submission from the Applicant regarding the mortgage debt listed at SOR 1.k. Department Counsel objected to its admission because it was not timely submitted and not properly before me as part of this record. In the alternative, Department Counsel submitted that, because the document "provides no definitive information" about the debt at issue, it "should be given little or no weight."

During the hearing, Applicant was asked by Department Counsel if he could document his claim that the \$86,000 mortgage debt at SOR 1.k had been satisfied through foreclosure. Applicant indicated that he had not received a response to repeated requests from the lender about the status of that debt. (Tr. 61 - 63) Applicant's post-hearing submission is a printout from a July 20, 2010, credit report indicating that the mortgage account in question had a balance of \$0. It also showed that the mortgage was foreclosed and that the last payment was made in April 2008.

The DOHA hearing process is intended to produce well-informed decisions based on all available information that is relevant and material to the issues presented. Applicant's post-hearing submission bears directly on the allegation at SOR 1.k. It also addresses questions posed by Department Counsel about that allegation, and the information it presents is consistent with Applicant's answers.

Department Counsel's objection is overruled, and Applicant's post-hearing submission is admitted as Ax. 3.k. I have considered this document in the context of 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 Ax. 3 is further subdivided into Ax. 3.a - 3.q. Ax. 3.a - 3.n provide information that directly corresponds to SOR allegations 1.a - 1.n. Ax. 3.e, 3.f, 3.i, and 3.k are blank because Applicant denied the debt, had disputed the debt, or admitted the debt but had nothing to submit regarding the debt.

record as a whole, and I am mindful of the need to assign appropriate weight to this document, as well as all of the documents presented by both parties.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes approximately \$1,235,631 for 14 delinquent debts (SOR ¶¶ 1.a - 1.n). In response to the SOR, Applicant denied the allegations at SOR 1.a - 1.d, 1.f - 1.h, and 1.j - 1.n. As to SOR 1.a - 1.d, 1.g, 1.h, 1.j, and 1.n, Applicant also averred that he has paid those debts. As to SOR 1.f, he averred that he was making payments on that debt, which he expected to be paid in full by July 2010. Applicant's denials of SOR 1.k - 1.m were based on his explanation that these mortgage accounts had been foreclosed and that he owed nothing further.

Applicant admitted the allegations at SOR 1.e and 1.i. Applicant stated that the terms of his divorce obligated his ex-wife to pay both debts, that he had recently been assigned the debt at SOR 1.i, and that he intended to pay it. Based on a review of Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

Applicant is 33 years old and employed by a defense contractor as an information assurance engineer, a job for which he requires a security clearance. Applicant was hired in April 2008, and he has earned the confidence of his company supervisors and the Government officials whom his company supports. All of Applicant's witnesses testified that they were aware of Applicant's financial problems, yet they all recommended him for a position of trust involving classified information. There have been no incidents of irresponsible behavior, such as misuse of his corporate travel credit card, or of other corporate or Government resources. (Gx. 1; Ax. 1; Ax. 2; Tr. 73 - 88) Applicant also served in the United States Army from June 1995 until June 1999. He first received a security clearance for his military duties. (Gx. 1)

Applicant has been married twice. His first marriage lasted from July 2001 until he was divorced in July 2009. He and his ex-wife separated in July 2007, and they have one child (age 4) together. Applicant remarried in January 2010. (Gx. 1; Tr. 56)

Throughout his first marriage, Applicant felt pressured by his ex-wife to make financial decisions with which he disagreed. For example, in about 2000 or 2001, she threw a tantrum until he finally agreed to buy a new car when neither was earning much money. He was working at a home improvement retailer at the time. (Gx. 1; Tr. 66 - 67) Applicant's first marriage began to deteriorate in 2003. It was around that time that Applicant's wife received an inheritance of about \$250,000. They disagreed on the best use of their windfall. Applicant wanted to invest the money, but his ex-wife wanted to use the money as down payments for two houses, which Applicant thought they would rent out. They had already bought the house they were living in for about \$240,000. In 2005, using his ex-wife's inheritance (Tr. 71 - 72), they financed the purchase of a large house at a beach resort area on the east coast for \$850,000, and another smaller house in the same area for about \$125,000. Applicant was the only named borrower for all of

their mortgages, which included an equity loan on their marital residence. (Gx. 2; Gx. 8; Tr. 43 - 46)

Applicant's wife wanted them to live in the large beach house and rent out the other two. Applicant knew at the time that they did not have the income to make the required monthly payments on that house. However, she eventually prevailed on him, and they moved into the beach house. (Gx. 2; Tr. 66 - 67)

The two rental properties were leased to friends of Applicant's ex-wife. They paid rent directly to her, and she paid the mortgages from the rents. In 2007, Applicant and his ex-wife separated, and Applicant moved to the west coast to take a new job. According to a temporary order (Ax. 5) pending a final divorce decree, Applicant would continue to pay the mortgage on all three houses and his ex-wife would live in the marital residence (the beach house). By that time, they were trying to sell the other two houses, but the housing market and the values of their properties had declined significantly, which virtually precluded receiving acceptable offers.

Applicant assumed that his ex-wife would continue collecting rents and paying the mortgages until the leases ended or the houses sold. However, she was collecting rents without paying the mortgages. The house they lived in before they moved to the beach house was eventually foreclosed. Applicant has no further obligation on this debt, which is alleged at SOR 1.i. (Ax. 3.i)

The other rental property was to be sold through a short sale for \$105,000 against a mortgage of \$125,000. However, the lender refused to approve the short sale and foreclosed on the mortgage. The house was sold at auction for about \$80,000. As with the other rental, the foreclosure ended Applicant's obligation for this debt, which is alleged at SOR 1.k. (Tr. 46 - 47; Ax. 3.k)

Applicant moved back from the west coast in early 2008. He thought he would be able to live in one of the two rental properties he and his ex-wife owned. However, tenants still occupied one house, but the mortgage was not being paid. It took more than two months to have them evicted. Tenants had abandoned the other house, and had damaged it so that it was uninhabitable. Applicant was thus faced with having to pay for his own accommodations, while taking on the expenses of two rental properties that produced no revenue. (Tr. 18 - 19, 44 - 46) These circumstances caused him to rely on credit cards to meet expenses, and he was unable to continue paying the mortgage on the marital residence. That mortgage was foreclosed as well. However, with all three foreclosures, Applicant incurred additional income tax liability stemming from the end of his mortgage obligations. There is no indication that he has not fulfilled his income tax obligations.

The divorce decree also allocated responsibility for marital debts between Applicant and his ex-wife. The debts alleged at SOR 1.e, 1.f, 1.i, 1.j, and 1.n were assigned to his ex-wife. However, she failed to pay them. Applicant has paid SOR 1.c, 1.j, and 1.n, and he intends to pay the other two beginning with SOR 1.f. (Answer to SOR; Tr. 52 - 54; Gx. 2; Ax. 3.c; Ax. 3.j; Ax. 3.n; Ax. 4)

The divorce decree requires Applicant to pay \$850 each month for support of his child. He actually pays about \$1,000 each month to help with daycare. There is no record of any missed or late support payments. Applicant is also required to provide medical coverage for his child, but his ex-wife is required to pay the first \$250 of any medical costs. Her practice has been to pay only the required co-payments. When the balance of the child's medical bills becomes past-due, she sends it to Applicant. The debts listed at SOR 1.a, 1.c, and 1.d arose in this manner. Applicant has paid all three debts. (Answer to SOR; Tr. 51 - 52; Ax. 3.a; Ax. 3.c; Ax. 3.d)

The debt alleged at SOR 1.b (\$3,636) was for a delinquent credit card Applicant used when he was trying to make ends meet during his divorce. Applicant paid that debt through a settlement with the collection agency that obtained a civil judgment against him for the debt. (Ax. 3.b)

Applicant incurred about \$20,000 in fees for legal services from two lawyers for his divorce and his real estate transactions. He has timely made monthly payments to both accounts as agreed to with the lawyers. (Tr. 48; Ax. 3.p; Ax. 3.q) Applicant has also kept a zero balance on the one credit card in his name. (Ax. 3.o)

Applicant began resolving his past-due debts about two years ago. He and his new wife, who also works full-time, have no debt. They live well within their means (Tr. 84 - 88). After all expenses, including payments on his remaining debts from his first marriage, they have about \$200 in positive cashflow. They try to put as much of any leftover income as possible into savings each month. Applicant estimates he now has about \$900 in savings. (Tr. 68 - 71) Applicant has not obtained any formal financial counseling; however, he is a regular listener to a financial expert radio program. That expert advises that someone in Applicant's position should avoid any new debt, and should pay off past-due debts starting with the smallest and working through to the largest. Applicant demonstrated that he is following that advice.

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 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

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

⁶ Directive. 6.3.

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).

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.n; that is, that Applicant owed \$1,235,631 for 14 delinquent debts. Available information showed that those debts were past due since at least 2007 and

⁷ See *Egan*, 484 U.S. at 528, 531.

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

that some of them are still being resolved. Accordingly, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*).

In response to the SOR and at hearing, Applicant established that the debts alleged were primarily the result of the failure of his marriage. While he shares responsibility for the financial decisions he and his ex-wife made, the foreclosures on the rental properties resulted from his ex-wife's failure to apply the rental income to the mortgages for those properties, and additional expenses incurred by Applicant when he returned from the west coast to be near his child. Applicant also established that he began resolving his debts well before the SOR was issued, and that he has, in fact, paid or otherwise resolved all but two of the debts alleged. Some of the debts he has paid, as well as one of the remaining debts, were actually assigned to his ex-wife in their divorce decree. Further, Applicant has no new debt, has paid as agreed all of his legal fees and child support obligations, and he has a positive cashflow each month.

Based on all of the foregoing, the record supports application of the mitigating conditions at AG ¶ 20(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*); 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*); AG ¶ 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*); AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*); and 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*).

The ongoing presence of past-due debts requires examination, but it is not the end of the inquiry into Applicant's suitability for a security clearance. Of equal importance is the manner of Applicant's response to financial adversity, and his ongoing management of his personal finances. Applicant acted responsibly to resolve the debts from his first marriage, his personal and financial circumstances have improved since his divorce, he is meeting all of his current obligations, and he manages his finances in a more prudent way so as to avoid such problems in the future. On balance, I conclude that the security concerns about his unpaid debt are 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, 33 years old, is a mature, responsible adult. He honorably served his country in the U.S. Army, and he has established a positive reputation for reliability and trustworthiness in the company where he has worked for the past two years. His

response to the financial problems from his first marriage reflects sound judgment and reliability, and his changed circumstances indicate that the adverse circumstances examined through his background investigation and subsequent adjudication are not likely to recur. A fair and commonsense assessment⁹ of all available information bearing on Applicant's past and current circumstances shows he has addressed satisfactorily the Government's doubts about his ability and willingness to protect the Government's interests as his own.

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:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a - 1.n: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge

⁹ See footnote 5, *supra*.