



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-04801
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro se*

July 26, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 1, 2009. (Government Exhibit 3.) On January 27, 2010, 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.

The Applicant responded to the SOR on February 17, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on March 24, 2010. A notice of hearing was issued on April 2, 2010, scheduling the hearing for May 13, 2010. The Government presented nine exhibits, referred to Government Exhibits 1 to 9, which were admitted without objection. The Applicant presented six exhibits, referred to as Applicant's Exhibits A

through F, which were admitted without objection. The Applicant also testified on his own behalf. The record remained open until close of business on May 23, 2010, to allow the Applicant to submit additional documentation. The Applicant submitted three Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits 1 through 3, which were admitted without objection. The official transcript (Tr.) was received on May 19, 2010. 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, the testimony and the exhibits. The Applicant is 59 years old, and finished high school in the Phillippines, took GED courses, and then took PACE (Program Afloat for College Education) courses in the military, and acquired his Associates Degree. He is employed by a defense contractor as a Machinist 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 the delinquent debt set forth in the SOR in the amount of \$307,000. Credit Reports of the Applicant dated April 25, 2009; September 12, 2009; and March 22, 2010; collectively reflect the delinquent debt set forth in the SOR. (Government Exhibits 4, 7, 8.)

The Applicant joined the United States Navy in 1970, and served honorably until 1991, when he retired as a Chief. During his 21 years of service, he was a Steward and later a Machinist. He received numerous accolades and awards for his dedication and service to the United States. Among the many awards and commendations he received are the Vietnam Service Medal with two bronze stars, a Meritorious Unit Commendation, a Navy Expeditionary Medal, a Navy Unit Commendation, and the Sea Service Ribbon. (Applicant's Post-Hearing Exhibits 2 and 3)

The Applicant testified that in 2004, the housing market was booming. Like friends of his were doing successfully, he wanted to take advantage of the investment opportunity to make a profit. He decided to buy an investment house to keep for a couple of years. His plan was to live in the house for two years, sell the house, and then move back to his original home. (Tr. pp. 30 - 31.) In 2005, he borrowed \$100,000

dollars from the equity in his primary residence, and purchased an investment property outside of the area for approximately \$388,000. (Tr. p. 51). He put \$78,000 down on the house and spent the rest on upgrades. He immediately moved into the investment house, which then became his primary residence. He lived in the house for two and a half years and commuted to his job located outside of the area. The mortgage payments on the house were approximately \$1,800 monthly. (Tr. p. 34). His payments on his first residence increased from \$1,000 a month to approximately \$1,600, as a result of him borrowing the down payment for the investment property. At that point he owed about \$200,000 on his first house.

In about November 2007, since the commute to his job was getting more and more difficult, he moved back into his first home. He rented the investment property for approximately \$1,550 a month and paid the difference in the mortgage with his own money for about a year. By then, the housing market had collapsed. He was unable to find a tenant to pay the amount of rent needed to help cover the mortgage, as the rents in the area had decreased. The mortgage on the house was no longer affordable for the Applicant and so he hired a realtor to sell it. (Tr. pp. 35 - 40.) This was unsuccessful, so he tried to short sale the property, but there were still no offers.

In early 2008, he attended a seminar on foreclosures conducted by an attorney, who advised that because there was only one original loan on the property, it was best to allow it to be foreclosed upon. Applicant's credit reports indicate that the mortgage account was placed into collection by a bank. The account was then in foreclosure status with a total loan balance of \$307,000. (Government Exhibits 4, 7 and 8.) The Applicant believes that the investment house was sold at auction in October 2009. (Tr. p. 40.)

In January 2010, the Applicant received a Form 1099-A for 2009, from a bank that states under Section 5, "Was borrower personally liable for repayment of the debt?" The box marked by the bank is, "No." (Applicant's Exhibit F.)

The Applicant's current financial statement indicates that after paying his regular monthly expenses, he has about \$1,000 left at the end of the month. (Applicant's Exhibit B.) He receives a Navy retirement plus his salary. He is putting 25% of his salary into a 401(k) in preparation for the future. (Applicant's Exhibit D.) He has no intentions of buying any more houses for investments. He currently owes \$215,000 on his primary residence that in 2004, was valued at \$430,000. He does not know its current value. (Tr. p. 42.) His monthly mortgage is approximately \$1,821.00, and it is current and always has been. (Applicant's Exhibit B). He currently has \$3,434 in his checking account, and \$4,181.49 in his checking account. (Applicant's Exhibit A.)

Applicant's performance appraisal for the periods from January 1, 2009, to December 31, 2009, reflects that he either "met" or "exceeded" expectations. (Applicant's Exhibit C.)

A letter of recommendation from the Applicant's supervisor indicates that the Applicant has worked for the company for more than seven years, that he started as a machinist and quickly advanced doing the job of quality inspector and supervisor of the machine shop. He is responsible, trustworthy, and self reported the past due debt at issue. (Applicant's Exhibit E.)

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; and
- 19(c) a history of not meeting financial obligations.

Conditions that could mitigate security concerns:

20(b) the condition 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 circumstance; and

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 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."

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 delinquent debt set forth in the SOR was for a mortgage on an investment home the Applicant purchased in order to make a profit. Unfortunately, the declining real estate market that he could not foresee, was a circumstance beyond his control, that caused his financial indebtedness. This situation resulted in a \$100,000 increase in his indebtedness on his first home. When he was no longer able to afford the investment house, he exercised prudent and reasonable judgment, and made a good faith effort to resolve it. He tried to rent the house with no success. He tried to sell the house, but had no offers. He was eventually forced into foreclosure. He did everything humanly possible to resolve the debt.

Since the Applicant's investment property had only a first trust deed and was not refinanced, under applicable state law, commonly known as the "one action rule", the Applicant has no personal liability. (Tr. p. 74). The Form 1099-A indicates that the lender has accepted the real property in partial satisfaction of a secured debt. Foreclosure does not per se cancel the debt; it merely satisfies that part of the total debt which is equal to the value of the property. Given the drastic decline in the real estate market, it is understandable that the properties value substantially decreased since the time of purchase. Therefore, under the circumstances, a reasonable person would assume that the Applicant is not personally liability for the deficiency, nor is it legally enforceable. He may however, be subject to State and Federal income tax as a result of the deficiency forgiven by the lender, as indicated in the 1099-A. (Applicant's Exhibit F.)

The Applicant's current financial situation is stable. He is paying his bills on time and living within his means. He demonstrates financial rehabilitation. He has presented sufficient evidence to demonstrate a track record of financial responsibility and has resolved his financial indebtedness.

There is sufficient evidence of financial rehabilitation at this time. 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. 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 circumstance and 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts also apply. The Applicant has indeed made 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).

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 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.

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.

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