



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-05700
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

October 19, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated February 24, 2009. (Government Exhibit 1.) On February 19, 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 March 5, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on March 30, 2010. A notice of hearing was issued on April 2, 2010, scheduling the hearing for May 10, 2010. Prior to the hearing, the Government moved to amend the Statement of Reasons in writing on March 27, 2010, to add an additional Guideline and allegation under Paragraph 2, Guideline E. The

proposed amendment under Guideline E, allegation 2(a), is as follows, "You were separated from the United States Navy with an Other Than Honorable Discharge." Applicant had no objection to said amendment and admitted the allegation. (Tr. pp. 10-12.) Said amendment was added to the SOR. At the hearing, the Government presented six exhibits, referred to Government Exhibits 1 to 6, which were admitted without objection. The Applicant presented nine exhibits, referred to as Applicant's Exhibits A through I, which were admitted without objection. The Applicant also testified on his own behalf. The record remained open until May 20, 2010, to allow the Applicant the opportunity 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 21, 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 33 years old, and has a GED and two years of college. He is employed by a defense contractor as an Electronics Technician 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.

Prior to joining the military in 2001, the Applicant purchased two rental properties with money he inherited from his grandmother. He joined the United States Navy and served from November 2001 to July 2005. For the first three years of his military career, he had no problems, and received awards for his service. In 2004, he purchased a personal residence. (Tr. p. 43.)

In June 2004, the Applicant was re-assigned to another command and to a ship, the USS Nimitz, for the first time. His experience on the ship was not pleasant. He was bored, he felt trapped, and he was agitated all of the time. He began to experience anxiety, and mental and emotional problems. His pay was significantly less than it had been since he no longer received isolated duty pay. Thus, he found it difficult to pay his bills. Because of his height, of 6'4", a special rack (bed) that had the foot kicked out was required for him to sleep in. He still hit his head several times. He discussed his problems with medical to see what they could do for him, and he was told by his

command to “suck it up.” (Tr. p. 50.) As time passed, the situation worsened and he decided to take matters into his own hands. On two separate occasions, while the ship went out to sea to conduct training exercises, the Applicant failed to show up for work and simply stayed at home. He returned to work after the ship returned to port. For the first offense, the Applicant went to Captains Mast and was restricted to the ship. (Tr. p. 51.) On the second offense, the Applicant was reduced in rank and placed on bread and water for three days. (Tr. p. 53.) This misconduct, known as “missing the ship’s movement” that occurred on two separate occasions resulted in his Other Than Honorable Discharge from the Navy in 2005. (Tr. p. 48.)

Following his discharge from the Navy, the Applicant had difficulties finding suitable employment. (Tr. p. 57.) He was unable to financially keep up with the mortgage payments on his house and his rental properties. He could not find suitable tenants and ended up borrowing from the equity on one property to pay the mortgage on another. Eventually, he exhausted the equity in the houses. He tried to sell the properties but was unsuccessful. In 2008/2009, all three properties of the Applicant were foreclosed upon.

In addition to the real estate difficulties, the Applicant was unable to find employment until August 2006. He was unemployed again from September 2006 to December 2006, and from September 2008 to February 2009. During periods of unemployment the Applicant stopped making payments on some of his debts. He became employed again in February 2009. Shortly thereafter, his wages were garnished by the state tax authority for back taxes. The Applicant decided that it was time to resolve his indebtedness.

The Applicant admits one of the five delinquent debts and denies the others set forth in the SOR under this guideline that total approximately \$35,000. (See Applicant’s Answer to SOR.) The debts he denies, he has either resolved or is paying through a scheduled payment plan. Credit Reports of the Applicant dated March 13, 2009; January 22, 2010; February 9, 2010; and March 27, 2010, collectively reflect each of the delinquent debts set forth in the SOR. (Government Exhibits 3, 4, 5 and 6.) The Applicant testified that there were other delinquent debts not listed in the SOR that he has paid. (Tr. pp. 69, 79-81.)

The Applicant became indebted to the following creditors listed in the SOR. Allegation 1.(a) a debt to a state tax authority for a lien filed against him in 2008 for back taxes in the amount of \$19,432.00 has been resolved. The Applicant testified that he failed to timely file his state and federal income tax returns for tax years 2005, 2006 and 2007. He explained that he frequently moved and kept his paperwork in storage. In February 2009, he filed his income tax returns for the years in question and his refunds were applied toward his back taxes owed. He testified that he received a refund all three years from both tax authorities. The tax lien has now been released. (Tr. p. 64 and Applicant’s Answer to the SOR.)

Allegation 1.(b) a credit card debt owed to a bank in the amount of \$4,582.00 that the Applicant used to pay for living expenses during his periods of unemployment is being paid through a payment plan. Since September 2009, the Applicant has been making monthly payments of \$220.00 toward the debt. (Applicant's Post-Hearing Exhibit 3.) The final payment of \$1,081.00 was made on May 18, 2010. The account is now paid in full. (Applicant's Post-Hearing Exhibit 1.)

Allegation 1.(c) a credit card debt in the amount of \$8,096.00 remains outstanding. (Tr. p. 68.) The Applicant testified that when he initially contacted the creditor he felt that the monthly payment they requested was unreasonable. (Tr. p. 70.) Since then he has entered into an agreement with the creditor to make a down payment of \$2,500 on May 31, 2010, and then pay \$350.00 monthly until the debt is paid in full. (Applicant's Post-Hearing Exhibit 2.) Allegation 1.(d) a debt to a creditor in the amount of \$1,884.00 was paid in full on March 1, 2010. (Tr. p. 70.)

The Applicant's personal financial statement dated October 15, 2009, indicates that at the end after paying his monthly expenses, he has approximately \$380.00 left in discretionary money to pay his debts. (Government Exhibit 2 and Tr. p. 72.) He and his fiancé are currently living with her parents and saving money to purchase a house. The Applicant is paying both his and his fiancé's monthly expenses, and his fiancé is saving money for the down payment on the house. Once they close escrow, the Applicant will be responsible for half of the mortgage. At the end of the month, after his regular monthly expenses, the Applicant testified that he will have several hundred dollars left in discretionary money to finish paying off his delinquent debt.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for a security clearance because his conduct involves questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his reliability, trustworthiness and ability to protect classified information.

As discussed above, in 2005, the Applicant received an Other than Honorable Discharge from the United States Navy. (Applicant's Exhibit I.) Letters of recommendation from the Applicant's supervisor, while he was aboard the Navy ship, a Lieutenant Commander and past supervisor, a retired Correctional Lieutenant who is the brother in law of the Applicant, a coworker, and a Naval retiree, indicate that the Applicant was and still is an excellent technician, and trustworthy in all aspects of his job. His integrity has never been in question. He is known as a responsible and diligent individual who works well with his peers. He is recommended for a position of trust. (Applicant's Exhibits A, B, C and D.)

The Applicant received the Navy and Marine Corps Achievement Medal for the superior performance of his duties. (Applicant's Exhibit E.) He also received a Certificate of Appreciation for his work in electronics school. (Applicant's Exhibit H.) A letter of recommendation dated April 12, 2004, from his command indicates that he possessed the maturity, leadership skills and intelligence necessary to excel as a Naval

Officer and had the highest recommendation for Naval Officer's Training School. (Applicant's Exhibits F and G.)

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;

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;

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

Guideline E (Personal Conduct)

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

16.(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Condition that could mitigate security concerns:

17.(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique 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."

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 and questionable judgment 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 personal misconduct (Guideline E). 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.

With respect to his finances, most of the Applicant's delinquent debts were due to periods of unemployment or underemployment that he had little or no control over. Since 2009, he has been working hard to resolve his debt. He has filed his taxes, paid his delinquent taxes, set up payment plans with creditors, and paid off others. Only one debt remains owing and he is currently in the process of setting up a payment plan to pay it. He currently demonstrates financial rehabilitation. He has presented sufficient

evidence to demonstrate a track record of financial responsibility, and has almost 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 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* 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).

The Applicant received an Other than Honorable Discharge in 2005, over five years ago. He has significantly matured since then. The letter from his supervisor on the ship indicated that the Applicant's real problem centered on the fact that he did not sleep well on the ship. The sleeping accommodations are designed for individuals between 4 and 6 feet tall. As noted earlier, the Applicant is 6'4" and was miserable in his situation when he engaged in the misconduct in the Navy. Since then he has demonstrated responsibility and trustworthiness.

Under Guideline E (Personal Conduct), Disqualifying Conditions 16.(c) *credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*, and 16.(f) *violation of a written or recorded commitment made by the individual to the employer as a condition of employment* apply, are applicable, but not controlling here. Mitigating Condition 17.(c) *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment* is more applicable. Under the circumstances, it is unlikely that the Applicant's misconduct of the past would recur, and the fact that it occurred over five years ago, and he has demonstrated responsibility since then, it no longer casts doubt on his reliability, trustworthiness, or good judgment. Accordingly, I find for the Applicant under Guideline E (Personal Conduct).

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 questionable judgement, untrustworthiness, unreliability,

lack of candor, unwillingness 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 Paragraphs 1 and 2 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.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.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