



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 09-05813 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

April 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on March 25, 2009. He was interviewed about his financial issues by an authorized investigator from the U.S. Office of Personnel Management (OPM) on June 23, 2009. On December 7, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations. DOHA took this action 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 effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. His answer was undated. DOHA received his answer on January 4, 2010. The case was assigned to me on February 2, 2010. To ensure that Applicant had sufficient time under the Directive to prepare his case,¹ his hearing, initially scheduled for February 24, 2010, was postponed and rescheduled for March 24, 2010. I convened the hearing as rescheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced three exhibits, which were marked Exs. 1 through 3 and admitted to the record without objection. Applicant testified on his own behalf and called no witnesses. He submitted no exhibits for admission to the record.

At the conclusion of the hearing, I left the record open until close of business on March 31, 2010, so that Applicant could, if he wished, provide additional information for the record. On March 31, 2010, Applicant requested an extension of time until April 5, 2010 to provide additional information for the record. I granted Applicant's request. Applicant timely submitted documents comprising nine exhibits. I marked the exhibits as Exs. A through I, and they were admitted to the record without objection. DOHA received the transcript (Tr.) of the hearing on April 1, 2010.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline F, Financial Considerations. (SOR ¶¶ 1.a. through 1.d.) In his Answer to the SOR, Applicant admitted the four allegations. His admissions are included herein as findings of fact.

Applicant is 32 years old, married, and the father of three young children. Applicant's wife is a homemaker, and she is not employed outside the home. Applicant has been employed as a project manager by a government contractor since October 2008. He seeks a security clearance for the first time. While his current duties do not require a security clearance, his employer is sponsoring him for a clearance because, in the future, he wants to task Applicant with projects that require a security clearance. (Ex. 1; Tr. 28-36.)

In 1999, Applicant received a Bachelor of Science degree in construction management. From 2003 until 2008, he owned and operated his own construction company, which employed six people. (Ex. 1; Tr. 28-29, 33-34, 74.)

In about 2000, Applicant purchased a residence, where he and his family lived until he sold the home in November 2009. When he sold his home, Applicant realized a profit of \$12,000. (Ex. 3 at 15, 26-35; Tr. 37-38.)

¹ See ¶ E3.1.8. of Enclosure 3 of DoD Directive 5220.6

In December 2006 and August 2007, Applicant purchased two houses as investment properties. He intended to use his construction skills to repair or improve the properties and then sell or “flip” them. (Ex. 3 at 11-12; Tr. 43-44.)

His first purchase was half of a duplex house. The second unit in the building was not habitable and had been abandoned for ten years. Applicant’s ownership in the property was secured by a mortgage of \$93,500. His monthly payments on the mortgage were \$900. Applicant was unable to sell the property. When he decided to rent the property, he was unable to find reliable tenants. The SOR alleged at ¶ 1.c. that Applicant was 120 days past due in paying the mortgage and owed the creditor approximately \$10,000. Applicant admitted the delinquent debt. At his hearing, he reported that his mother, who is a real estate investor, had purchased the property from him. In a post-hearing submission, he provided documentation establishing that the property had been purchased by his mother and his mortgage obligation had been satisfied in full. (Ex. 3 at 11; Ex. F; Ex. G; Ex. H; Ex. I; Tr. 44-47.)

The second house that Applicant purchased as an investment property was secured by a mortgage of \$270,000. His monthly mortgage payment was \$1,800. After renovating the property, Applicant tried to sell it in March or April of 2008, but he was unable to do so. In November 2008, he executed a one-year lease-to-purchase agreement with tenants. The tenants failed to follow through with the agreement, and Applicant had them evicted in November 2009. In about January 2010, Applicant contacted his lender to discuss a short sale of the property.² As of the date of his hearing, he had not found a realtor to assist him with the short sale. The SOR alleged at ¶ 1.d. that Applicant was 120 days or more past due on his mortgage payments and owed \$9,000 to the creditor holding the mortgage on the second property. Applicant admitted the delinquent debt. (Ex. 3 at 12; Ex. D; 47-53.)

When he purchased his two investment properties, Applicant was confident that he could renovate them and sell them for a profit. In November 2007, however, Applicant’s construction business began to feel the effects of the national downturn in the housing market. In January 2008, he lost a large contract with an apartment complex. He carried on with smaller projects, but, by March 2008, he became financially strapped and had difficulty paying his bills. He closed his business in July 2008 and looked for other work. (Tr. 34-35, 76.)

In addition to his two delinquent mortgages, Applicant is responsible for two delinquent credit card debts. In September 2009, one of the credit card creditors obtained a judgment against Applicant for \$5,094. The debt, which Applicant admitted, is alleged at SOR ¶ 1.a. In November 2009, the creditor obtained a court order to execute a levy against Applicant’s property, and \$4,244 was removed from Applicant’s bank account to satisfy part of the judgment. The creditor accepted Applicant’s offer to satisfy the remainder of the debt with \$100 monthly payments. In a post-hearing

² Applicant testified that he was “upside down” on the mortgage. The mortgage balance was \$272,000, and the property was appraised at approximately \$250,000. (Tr. 27-28.)

submission, Applicant provided documents that established that he had made \$100 payments to the creditor in November and December of 2009 and in March of 2010. (Ex. 2; Ex. B; Ex. C; Tr. 53-55.)

In 1995, Applicant acquired a credit card that he later used to purchase supplies and materials for his construction business. He paid the creditor approximately \$700 a month on the account and estimated that the high balance on the account was approximately \$14,000 in August or September of 2008. In March 2008, when his business was falling off, Applicant contacted the creditor to state that he could no longer stay current on the account. The creditor advised him that he could pay the whole debt at once or continue to pay \$700 a month. Since neither option was possible for Applicant, he asked the creditor if he could reduce his monthly payments to \$200 a month. The creditor told Applicant he could make lower payments but his interest rates would not be cut, and the account would continue to grow. SOR ¶ 1.b. alleges that this account is currently in charged-off status and that Applicant owes the creditor \$23,000. Applicant admitted the debt, although he believed the debt had grown because the creditor continues to charge interest on the unpaid debt. Applicant has not been in contact with the creditor since March or April of 2009. (Ex. 2; Ex. 3 at 10; Tr. 55-58.)

Applicant's current net monthly income is \$5,300. His monthly fixed expenses of \$2,750 are broken down as follows: rent, \$1,650; groceries, \$300; clothing, \$100; utilities, \$250; car expenses, \$300; life/other insurance, \$50; and miscellaneous, \$100. Additionally, each month Applicant is responsible for a mortgage payment of \$1,800 on the house he purchased as an investment in August 2007. He also pays \$600 each month on a vehicle he is purchasing, and he invests \$200 in his 401(k) plan. Applicant has a negative net remainder of \$50. (Ex. 3 at 5; Tr. 61-64.)

Applicant's employer provided a letter of reference on his behalf. He stated that he found Applicant to be honest, conscientious, and an effective member of the project management team. He also observed:

I am aware of his financial issues and believe they are primarily due to the economic crisis that affected many Americans. [Applicant] dared to follow his dreams and unfortunately was not able to achieve all of them. He has been extremely resilient and has not appeared defeated or forlorn. He has not allowed his financial trouble to interfere with the performance of his work [with this company].

(Ex. E.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine

whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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 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, the administrative judge applies these guidelines 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking to obtain a favorable security 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 notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated substantial delinquent debt and was unable to pay his creditors. This evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. Unresolved financial delinquency might be mitigated if it “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(a)) Additionally, unresolved financial delinquency might be mitigated if “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(b)) Still other mitigating circumstances that might be applicable include 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” (AG ¶ 20(c)) or “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” (AG ¶ 20 (d)) Finally, security concerns related to financial delinquencies might be mitigated if “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.” (AG ¶ 20 (e))

In December 2006 and August 2007, Applicant purchased two houses to renovate and sell. Beginning in about November 2007, Applicant, who was self-employed and owned a construction company, experienced financial uncertainties and loss of income resulting from the downturn in the housing market. In July 2008, he was forced to close his business. In October 2008, Applicant acquired his present job. At his hearing, he presented documentation to establish that he had resolved one of his mortgage debts and had a payment plan in place to satisfy one of his credit card debts.

Despite these good-faith efforts to satisfy two of his debts, Applicant has significant unresolved delinquent debt. He is \$9,000 in arrears on a mortgage of over \$270,000 on the remaining house he purchased as an investment, and to date, he has been unable to initiate action on a short sale of the property. His \$23,000 debt to a credit card company also remains unresolved. He has a negative monthly net remainder, leaving few resources for paying his delinquent debts and meeting unforeseen emergencies. It is not clear at his time that Applicant will be able to manage his finances and avoid financial delinquency in the future. I conclude that AG ¶¶ 20(b) and 20(d) apply in mitigation to the facts of Applicant's case. However, I also conclude that AG ¶¶ 20(a), AG 20(c), and 20(e) do not apply in his case.

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 facts and circumstances surrounding this case. Applicant is a competent and thoughtful person who took some financial risks and purchased properties he hoped to renovate and sell. After he renovated his properties, he was unable to sell them when the housing market took a serious downturn and he was unable to find buyers for his properties. Moreover, he incurred operating expenses that he could not satisfy when his business was affected by the economic downturn.

Applicant receives credit for taking action to resolve two of his debts. However, these actions are recent, and two other significant debts remain unresolved. Applicant has not yet demonstrated a track record showing consistent payment of his delinquent debts. He needs more time to resolve his outstanding delinquent debts.

Applicant can reapply for a security clearance one year after the date that this decision becomes final. If he wishes, he can produce new evidence that addresses the Government's current security concerns.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies.

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:

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

Joan Caton Anthony
Administrative Judge