



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



In the matter of:)
)
) ISCR Case No. 09-07478
)
)
Applicant for Security Clearance)

Appearances

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

August 13, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

On March 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. 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 Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 22, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government’s File of Relevant Material (FORM) on May 11, 2010. The FORM was mailed to Applicant and it was received on May 13, 2010. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.

Applicant did not object to the FORM and submitted additional material dated June 5, 2010. Department Counsel had no objection and the material was considered. The case was assigned to me on July 19, 2010.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 62 years old. He is married and has three grown sons. He has been employed by a federal contractor since November 2008.

Applicant admitted that he owes the 19 delinquent debts alleged in the SOR, totaling approximately \$331,116. He filed for bankruptcy under Chapter 7 on March 10, 2010, after issuance of the SOR. The delinquent debts include a court judgment, bank loans, and credit card debts. The debts are unpaid and the bankruptcy proceeding is pending.

Applicant claims all of the debts were the result of a failed business and his use of credit cards as a means to finance the venture. He indicated in his answer to the SOR that his delinquent debts will be resolved through a Chapter 7 bankruptcy.

Applicant purchased a business in 1991 and had one retail store. The business did well during its first two years, so he opened another store. In 2005, Applicant indicated the sales in his stores dropped because of legislation restricting smoking. Part of Applicant's inventory involved the sale of smoking products. Applicant also claimed the business suffered a decline due to the economy. He used credit cards to purchase inventory and pay bills, which caused him to be financially overextended. He took out a bank loan for \$40,000 in 2005 to pay the high interest credit cards, but subsequently had difficulty making the loan payments. Applicant stopped paying the creditors in late 2007 or early 2008. He closed his stores in January 2008.

Applicant liquidated some retirement accounts and assumed a second mortgage on his home. He was unable to sell the inventory he held. Along with his full-time job he worked a part-time job. Applicant indicated that he restructured his mortgage to decrease his monthly payments. He owns a time-share property that he stated is up for sale.¹ No documentation was offered to substantiate those statements. Applicant also indicated that he had overdue tax debts for both personal income taxes and business taxes. He did not file the tax returns because he did not have money to pay someone to prepare the tax returns. He believed that he would not owe a tax debt for his personal income tax returns for 2007 and 2008 tax years, but did owe for 2006. He filed his 2006, 2007, and 2008 federal income tax returns in August 2009. It appears he filed his 2006,

¹ Item 4.

2007, and 2008, state income tax returns in December 2009.² He indicated in his answer:

I believe I have again demonstrated financial responsibility by paying all of my other bills on time and paying off thousands of dollars in delinquent [f]ederal and [s]tate business and personal taxes. Unfortunately, my current income is simply too low to allow me to pay the accumulated business debt and I am forced to file for bankruptcy.³

No documentation or other evidence was provided to corroborate Applicant's statement that he was making reasonable and responsible business decisions regarding the businesses he owned. He did not elaborate on why he failed to pay his business taxes. He was advised by his attorney that he was required to satisfy all of his tax debts before he could file for bankruptcy. It appears that he has satisfied his tax debts.⁴

No information was provided to indicate that Applicant has received any financial counseling or sought debt management services.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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, these guidelines are applied 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

² Item 5.

³ Item 4.

⁴ Items 1. I have not considered for disqualifying purposes Applicant's previous delinquent tax debts, but I will consider them when analyzing Applicant's business practices and responsible financial planning, and when analyzing the "whole-person."

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, 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 and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant owes approximately \$331,116 in delinquent debts. He is unable to pay the delinquent debts and they remain unpaid and unresolved. Applicant has filed for bankruptcy under Chapter 7. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under 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;

(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;

(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; and

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

The \$331,116 in delinquent debt is unpaid. Applicant's bankruptcy proceeding is pending and the debts have not been discharged. Therefore, Applicant remains responsible for his delinquent debts. I find AG ¶ 20(a) does not apply. Applicant attributes his financial problems to a failed business venture. I have not had an opportunity to question Applicant regarding his business practices. He did not provide documentation to substantiate that his business failures were beyond his control. He stated it was the downturn in the economy and a new no-smoking law that caused the demise of his business. However, he did not file his federal business tax returns, his federal personal tax returns, or his state tax returns, which causes concern about his business practices. He commented that he acted responsibly by paying his delinquent taxes, but does not explain how failing to file tax returns is a responsible act. In addition, he did not take steps to resolve his tax issues until he was advised by his bankruptcy attorney that he could not proceed to file for bankruptcy until his tax issues were resolved. I have not been provided sufficient evidence to conclude that the conditions that resulted in Applicant's financial problems were beyond his control and he acted responsibly under the circumstances. I find AG ¶ 20(b) does not apply.

Applicant has taken some steps to reduce his personal expenses and live within his means by working two jobs. He stated that all of his delinquent debts are business related. It appears Applicant's rationale is that because his debts were due to a failed

business he should somehow not be held accountable or responsible for repaying his loans and credit cards. He did not provide a reasonable explanation for why he failed to file his tax returns. I have not been able to make a credibility determination. Although bankruptcy is a legal means to resolve debt and creates a new financial start, it does not necessarily constitute a good-faith effort to pay overdue creditors. Applicant has not sought financial counseling and the bankruptcy is not completed. There are too many issues that without further corroboration and explanation remain unresolved. I find AG ¶¶ 20 (c) and 20(d) do not apply.

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 accumulated \$331,116 in delinquent debts, which he attributed to a failed business venture. He only recently filed for bankruptcy under Chapter 7, and that action is pending. Although his debts may be eventually discharged in bankruptcy, Applicant's decision to resolve them through that process does not reflect a good-faith effort and responsible conduct toward paying his creditors based on the circumstances in this case. I did not have an opportunity to question Applicant about his finances and make a credibility determination, or elicit other evidence that could address issues regarding his reliability and judgment. There was insufficient evidence to substantiate his assertions regarding his business and personal finances.

Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for 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 E: AGAINST APPLICANT

Subparagraphs 1.a-1.s: Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge