



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



In the matter of:)	
)	
-----)	ISCR Case No. 10-00194
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

October 25, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On March 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) enumerating security concerns arising 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 (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006..

Applicant responded to the SOR on March 25, 2010, and requested a hearing before an administrative judge. DOHA assigned the case to me on May 13, 2010. The parties proposed a hearing date of May 24, 2010. A notice setting that date for the hearing was issued on May 5, 2010. I convened the hearing as scheduled. Applicant affirmatively waived the 15-day notice requirement.¹ He then gave testimony and presented 11 documents, which were accepted into evidence without objection as

¹ Tr. 11.

exhibits (Exs.) A-K. Department Counsel offered four documents, which were admitted as exhibits (Exs.) 1-4 without objection.² Applicant was given until June 8, 2010, to submit any additional materials. DOHA received the transcript (Tr.) of the proceeding on June 2, 2010. On June 8, 2010, Applicant submitted 13 additional documents, which were forwarded to me by Department Counsel on June 21, 2010. Those documents were accepted into the record without objection as Exs. L-X. The record was then closed. The record was reopened on September 10, 2010, when Department Counsel forwarded one additional document from Applicant. In the absence of an objection from the Government, the document was accepted as Ex. Y and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant met his burden in mitigating security concerns. Clearance is granted.

Findings of Fact

Applicant is a 47-year-old engineer working for a defense contractor. He was awarded a bachelor of science degree in 1993. Applicant is married.

In 2004, Applicant became the co-owner of a restaurant he operated with his wife and brother. The restaurant proved to be successful. Three months after they began operation, the roof collapsed in the “walk-in box,” an area used for food refrigeration. The restaurant was closed for two days while the building’s landlord repaired the roof and charged the restaurant for the needed repairs. In December 2005, neighboring construction caused the collapse of a large piece of concrete from underneath their restaurant’s bar area. Upon examination, it was discovered that five piles that were supporting the building had physically snapped in half. Applicant immediately contacted the landlord, who refused to do anything about the damage to his tenant’s property.

Applicant hired a law firm to review the matter. An engineer examined the property, who concluded that the floors were not up to code and that the certificate of occupancy was not proper for the building’s used as a restaurant or bar.³ The engineer advised Applicant that either the landlord contact the local government or he would. For two-and-a-half months, the landlord dithered until he informed Applicant that he would fix the five piles. As a result, the restaurant would have to be shut down for four days. No mention was made of the improper certificate of occupancy. When work was to commence, the engineer asked for the needed permits, which the landlord could not provide. It was soon discovered that the landlord had not been working with the local government about the property’s various issues. The engineer reported the situation to the local government. As a result, the restaurant was closed for the entire month of April 2006 so that all the necessary repairs could be made. Unbeknownst to Applicant, the builders informed the local government that the restaurant was operating under a temporary certificate of occupancy.

² In addition, Department Counsel noted that the allegations at SOR ¶¶ 1.f and 1.n relate to the same account. Tr. 21.

³ Tr. 24.

At the end of 2006, the restaurant was still thriving after its high season, which ran from about St. Patrick's Day through Halloween in its waterfront location. They were starting to keep business at its peak during the winter months as well. Then, Applicant discovered structural problems with the roof. The landlord dismissed Applicant's demands for necessary repairs, noting that it was part of "the price of doing business."⁴ Three weeks later, the water heater failed. Again, the landlord refused to make any repairs. Appalled at the landlord's failure to provide the restaurant with an environment in which they could operate, Applicant informed the landlord that they would not continue paying rent until he started "bringing the property up to code and honoring the contract that [they] had with him."⁵ The landlord said the court could decide how the issues would be resolved and Applicant agreed. Meanwhile, costs and interruptions to the restaurant hindered Applicant's ability to make sufficient profit to pay all of his bills, including his quarterly taxes.

With litigation pending, the local government reinspected the building. Water damage was found behind the walls. The plumbing, piping, and electrical wiring was found to be illegal. Header beams in the kitchen were determined to be broken. Aesthetic repairs had been previously made that disguised other faults. Applicant's insurance agent advised Applicant to shut the restaurant because criminal negligence could be found if anyone was harmed in the restaurant. The agent concluded that due to the landlord's negligence, Applicant's only option was to sue to landlord. Soon thereafter, the local government closed the restaurant, citing to the fact the building needed extensive repairs.⁶ As a consequence, Applicant and his wife were unemployed and unable to pay their business taxes.⁷

Applicant hired a lawyer and the matter went to trial. The judge physically viewed the building, noting that the "place was a dump."⁸ The judge found in favor of the restaurant, noting the landlord's contractual neglect of the site. He ordered an accounting of the restaurant's losses and expenses. In August 2010, the judge revisited a portion of his early decision. He determined that because Applicant failed to tender the keys to the landlord when the restaurant was shuttered in November 2007, the principle of constructive eviction did not apply. Therefore, the landlord was owed rent for the time period during which rent was not paid for the property before the keys were

⁴ Tr. 27.

⁵ Tr 28.

⁶ Tr. 29.

⁷ Tr. 37.

⁸ Tr. 30.

returned. However, that did not disturb his ultimate finding that the restaurant was entitled to seek all damages related to being put out of business.⁹

As a result of both the related costs and the loss of business in this saga, Applicant and his wife incurred significant state tax issues. Applicant and his attorney have been working with the state, keeping them informed of the situation and any developments.¹⁰ The state chose not to seize any of the business assets, which are shown to have had a fair market value of about \$21,000, to satisfy the tax liens.¹¹ Once firm figures are devised regarding the amount of quarterly taxes owed, they will be in the list of related expenses submitted to the court for reimbursement by the landlord.¹² Applicant is to meet with the state regarding his tax liability when recoupment from his landlord is resolved.¹³ The precise amount of his liability remains undefined by the state taxing authority.¹⁴ Requested damages for actual costs and the impact of his landlord's negligence on the business, along with Applicant's available net income resources, will provide sufficient funds to satisfy Applicant's tax lien liability.¹⁵ Applicant and the state are currently reviewing a repayment plan while Applicant's case against his landlord draws to a close.¹⁶

While the amount of state taxes owed is based on an estimate, tax liens were entered against Applicant in 2007 for \$55,127, noted at SOR allegation ¶ 1.b, and in 2008 for \$15,725, noted at SOR allegation ¶ 1.a.¹⁷ The liens are for sales taxes collected by the restaurant. Collected tax monies were deposited in the general business account. These debts to the state were acquired around the time the business incurred repair costs that were paid out of the general business account, thus impacting the total general business account, including the state sales taxes collected. Applicant incurred the debt as a corporate officer of the restaurant's ownership.¹⁸ Applicant

⁹ Ex. Y (Email, dated Sep. 10, 2010, and attached Order, dated Aug. 2, 2010). Applicant originally thought the amount of damages would be assessed in the summer of 2010, but as of September 10, 2010, there was no evidence that the amount has yet been awarded. Tr. 85-87.

¹⁰ Tr. 33, 38-41. See also Ex. X (Letter, dated Jun. 8, 2010).

¹¹ Tr. 81. See also Ex. C (Forensic accountant's income analysis, undated).

¹² *Id.*

¹³ Tr. 64.

¹⁴ Tr. 79.

¹⁵ See, e.g., Ex. C (Business spreadsheets) and Tr. 77.

¹⁶ Ex. V (Letter, dated Jun. 3, 2010).

¹⁷ *Id.* See also Tr. 79.

¹⁸ Tr. 113.

disputes tax liability for the period following the restaurant's closure in November 2007 through July 2008.¹⁹

In December 2007, a month after the restaurant ceased operations, Applicant found consulting work as an engineer. In March 2009, he started another position that he maintained until beginning his current work at a similar salary in January 2010.²⁰ Applicant currently has a net monthly income of about \$6,800, with about \$1,938 remaining after monthly expenses.²¹ Money retained after expenses has been mostly devoted to personal expenses, including medical costs related to his wife, who has a serious medical condition. Any other retained income is being used to pay his attorneys in his suit against his former landlord and "to solve the lien issue first."²²

Applicant was unaware of the non-tax related debts alleged in the SOR until after he completed his security clearance application and he met with investigators.²³ When apprised of those alleged debts, Applicant disputed them on-line with the credit reporting bureaus as a method to identify their origin.²⁴ Among those debts are those noted at SOR allegations ¶¶ 1.k, 1.o, 1.p, and 1.q, amounting to about \$2,409. Applicant has a very common name and he is accustomed to having erroneous information attributed to his credit report.²⁵

Applicant stated that he paid two of the smaller unknown accounts, noted at SOR allegations ¶¶ 1.n (\$253) and either 1.h (\$10) or 1.i (\$10), but provided no evidence that they were paid.²⁶ At the hearing, I suggested that Applicant submit documentary evidence of payment, successful dispute, or other efforts to address the debts noted at SOR allegations ¶¶ 1.c through 1.r.²⁷ Applicant's post-hearing submissions show the status of those debts. Exhibit P provides an accurate summary

¹⁹ Tr. 80.

²⁰ Tr. 77.

²¹ Tr. 78.

²² Tr. 85. "Once that issue is resolved we will then be trying to set up a [tax lien] payment plan and work with the state to figure out what exactly the issue is, how much it is, and we'll work out a payment plan with them and try to use the funds that we would normally be using for our attorney [sic]will now be used to satisfy that until the judgment is paid."

²³ Tr. 66.

²⁴ R. 68. See also Ex. N (Equifax message, dated Jun. 1, 2010). Applicant's post-hearing submissions demonstrate considerable effort disputing and verifying accounts since before the issuance of the March 18, 2010, SOR.

²⁵ See, e.g., Tr. 72-73.

²⁶ Tr. 73-74.

²⁷ Tr. 90-103. Those alleged debts amount to about \$4,400.

of his disputes and corresponding action by the credit reporting bureaus. It is supported by the other post-hearing submissions. The vast majority of accounts at issue have been disputed and deleted by one or more of the three credit reporting bureaus, e.g., ¶¶ 1.c, 1.d, 1.e, 1.f, 1.g, 1.h, 1.i, 1.j, 1.m, 1.o, and 1.p. The accounts cited under SOR allegations ¶¶ 1.l (opened in September 2004), 1.n (opened in December 2006), and 1.q (opened in March 2007) are unknown accounts that no longer appear on Applicant's credit reports. It is noted, however, that these items were deleted despite the fact they are sufficiently recent not to have been removed as dated information. Applicant notes the debt at SOR allegation ¶ 1.k as being the same as 1.e, but does not provide any material linking the two alleged accounts. Ex. M, an extract from a credit report dated March 3, 2010, however, still notes the balance of \$238 as charged-off. Although Applicant has not received financial counseling, his post-hearing submissions demonstrate considerable effort in disputing and verifying his credit report entries, including the accounts now at issue, that predates the issuance of the March 18, 2010, SOR.²⁸

Applicant is well regarded in his community. He was given a Certificate of Recognition from the Department of Defense for his efforts in promoting peace and stability for this nation.²⁹ His employer finds him to be trustworthy, loyal, and efficient.³⁰ A former business contact described him as professional, courteous, and an excellent employee.³¹

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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

²⁸ Tr. 82; see generally, Exs. M-S..

²⁹ Ex. G (Certificate).

³⁰ Ex. F (Reference, dated May 17, 2010).

³¹ Ex. H (Reference, dated May 18, 2010).

decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”³² The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.³³

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 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³⁴ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.³⁵

Based upon consideration of the evidence, Guideline F (Financial Considerations) is pertinent to this case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Under Guideline F, “failure or an inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or an unwillingness to abide by rules and regulations, all of which can raise questions

³² See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

³⁴ *Id.*

³⁵ *Id.*

about an individual's reliability, trustworthiness and ability to protect classified information."³⁶ The guideline sets out several potentially disqualifying conditions. Here, Applicant admitted to significant delinquent debt. The majority of that debt is owed for sales taxes collected by his restaurant. That tax liability remains unpaid. Such facts are sufficient to raise Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts) and FC DC AG ¶ 9(c) (a history of not meeting financial obligations). With such conditions raised, the burden shifts to Applicant to overcome the case against him and mitigate security concerns.

The delinquent debts acquired or attributed to Applicant were mostly, if not all, incurred within the past few years. The two largest debts, the tax liens, were incurred during and after a tumultuous period, when Applicant's restaurant business was being adversely affected by his landlord's neglect. As a result of that neglect, Applicant's restaurant's general business account was overwhelmed with extraneous expenses and diminished income. As a result, the business was unable to pay its estimated sales taxes. During this time and since, Applicant has worked openly with the state regarding his plight. The state has not proceeded against Applicant further. It refrained from seizing the restaurant's possessions. It appears to be willing to wait until Applicant's lawsuit against his landlord is resolved and damages paid, to conduct a final audit as to the true extent of Applicant's sales tax liability. Such factors give rise to Financial Considerations Mitigating Condition (FC MC) 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).

The facts are replete with adverse incidents that physically affected Applicant's restaurant's structure and his ability to maintain normal business operations. His responses to those physical calamities were persistent and responsible. If anything, they were too persistent, given the overwhelming and successive series of problems they faced.

Applicant's responsible reactions, however, did not necessarily extend to all aspects of the restaurant's business. With regard to the state tax liens, for example, Applicant or his agent chose not to segregate collected taxes from the general business ledgers. Given Applicant's increasing knowledge of the buildings' problems and related costs, this decision, while legally permissible, was not responsible. However, pursuing his landlord for compensation shows resolve and responsibility. FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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) applies in part.

Applicant has not received financial counseling. He has done an effective job, however, disputing the many inaccuracies on his credit report, a situation possibly created by having a common name. He also provided evidence that he has been

³⁶ AG ¶ 18.

working with the state regarding his tax liens for some time.. That evidence reflects the state's patience pending his lawsuit against his landlord, resolution of which should soon be forthcoming. Their plan is to wait until damages against Applicant's landlord are assessed and paid, then to have an accounting of the ultimate sales tax liability. With the damages collected for the business income affected by the landlord's negligence, Applicant will then pay the commensurately affected sales taxes collected on the restaurant's receipts. While the plan is fluid, it apparently has the state's interim approval and Applicant's commitment behind it. FC MC ¶ 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) and FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) apply.

Applicant showed that a majority of the debts at issue have been addressed through formal dispute with the three leading credit reporting bureaus. Remaining are the liens imposed by the state for the restaurant's sales taxes. The state and Applicant have worked closely together. The state is aware of Applicant's problems, his lawsuit, and his plan to repay his tax liability with, or partly with, his awarded damages. Applicant is committed to honoring the debt. While no financial headway has been made in terms of actual payment, there is sufficient evidence of a coordinated and approved plan. Given these factors, financial considerations security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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, as well as the "whole-person" factors. Applicant is a credible and educated man. He is a devoted husband who, in his 40s, decided to open a restaurant with his wife and brother. Their venture was fraught with problems, not through inexperience, the economy, or an inferior product, but by a string of structural and zoning problems affecting their restaurant through the negligence of the restaurant's landlord. The remedy to those problems is now being concluded by the court.

The majority of debts at issue, represented in SOR allegations ¶¶ 1.c through 1.r, represent about \$4,400. The evidence shows that the overwhelming majority of these debts were addressed through successful dispute with the credit bureaus. Applicant testified that his common name is often the problem behind erroneous information, and that appears to be the case here.

The crux of this case rests on the unresolved 2007 and 2008 tax liens imposed for state sales taxes collected by Applicant's restaurant and not forwarded to the state. In the wake of the on-going financial drain caused by one calamity after another, and the affect of those problems on business, the restaurant's general business account was used to perpetuate operations in all respects, including repairs, assessments, and fees. Applicant's expenses adversely impacted his ability to preserve monies collected for state sales taxes. He did so focused on keeping the restaurant operational, not with the intent to defraud the state. In so doing, he kept the restaurant open for a period of time, generating additional revenue for the state. No evidence was presented indicating that this methodology was proscribed. The state apparently had and has no objection to his methods, other than the logical demand that the estimated sum for those taxes ultimately be paid. To that end, it has worked with him through his litigation against his former landlord to recoup his lost earnings. It has not seized restaurant property or garnished Applicant's current wages. It is willing to meet with him to assess the estimated tax liability and identify the actual sums owed. Together, Applicant and the state are currently working on a repayment plan while the litigation against the landlord concludes. Such extensive accommodations are impressive and indicate that the state's taxing authority condones the methodology employed.

Applicant showed demonstrated and successful efforts to clear up his credit report. His documents establish a track record of addressing credit report inaccuracies that pre-dates the issuance of the SOR. The record shows that he lives within his means. In addition, Applicant has worked diligently with the state regarding his tax liabilities. He incurred these debts through his role as a corporate officer. There is no evidence that Applicant, in his corporate role, lacked self control or manipulated rules, laws, or regulations to his benefit. His on-going efforts to work with the state, and the state's ready acceptance of his efforts, demonstrate a reasonable and genuine attempt to jointly execute a mutually satisfactory plan. There is no evidence that Applicant's lifestyle is beyond his means, that he incurs and neglects non-business related debts, nor that he had any notable financial issues in the past. In light of Applicant's situation, his on-going work with the state, the plan Applicant and the state have chosen to adopt, Applicant's resources, and his commitment to pay once the final tabulation is made, I find that Applicant mitigated financial considerations security concerns. Clearance is granted.

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 F: FOR APPLICANT

Subparagraphs 1.a-r: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge