



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 10-00228
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel

For Applicant: *Pro se*

December 14, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for Financial Considerations. Accordingly, his request for a security clearance is denied.

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (SF 86) dated August 19, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On June 15, 2010, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guideline F (Financial Considerations) of the Adjudicative Guidelines (AG).²

In his Answer to the SOR, dated July 1, 2010, Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 29, 2010, and I received the case on August 4, 2010. DOHA issued a Notice of Hearing on August 10, 2010. I convened the hearing as scheduled on August 24, 2010.

During the hearing, the Government offered seven exhibits, which I admitted as Government Exhibit (GE) 1 through 7. Applicant testified, and did not present witnesses. He offered six exhibits, which I admitted as Applicant's Exhibit (AE) A through F. I held the record open to allow him to submit additional documentation. He timely submitted five documents, which I admitted as AE G through K. DOHA received the transcript (Tr.) on August 30, 2010.

Procedural Matters

DOHA issued Notice of Hearing on August 10, 2010, and Applicant received it on August 19, 2010. The hearing was convened on August 24, 2010. Applicant is entitled to 15 days notice under the Directive. However, Department Counsel contacted Applicant on or before October 21, 2010, at least 27 days before the hearing, and therefore, Applicant's notice of the hearing date was sufficient under the Directive. (Tr. 8-9)

Findings of Fact

In his Answer, Applicant denied SOR allegation 1.a. and admitted the remaining ten allegations. His admissions are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is a 39-year-old single man. He married in 1995, and his divorce was final in 2006. He pays child support for his two daughters, who are 10 and 15 years of

¹ Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

²Adjudication of this case is controlled by the adjudicative guidelines that were implemented by the Department of Defense on September 1, 2006. The adjudicative guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

age. He has worked full-time as a software developer for a defense contractor (company A) since 2002. In 2010, he went to a part-time status with company A, and began a full-time job at company B in July 2010. (GE 1; Tr. 29-32, 68-71)

In 2003, Applicant met his future fiancée. She held an administrative position and earned between \$40,000 and \$50,000 annually. In 2005, Applicant purchased a condominium and they moved in together. They were both employed, and they did not have financial problems. They became engaged in April 2007. Applicant applied for a \$53,000 second mortgage, with the understanding that they would each pay half of the debts. They used the funds from the second mortgage for home improvements, and to pay off a car loan and several credit card balances. They planned to use some of the funds for their honeymoon. They also purchased a BMW in November 2007. The following month, in December 2007, Applicant's fiancée lost her job. After a few months, Applicant's mortgage loan and debts started to become delinquent. Applicant's fiancée found a job in August 2008. However, she refused to share responsibility for the debts, and she left in late 2008. (GE 2, 5, 6; Tr. 24-26, 40-49)

In January 2009, Applicant began a plan with his lender to rehabilitate his mortgage loan. He made his monthly payment of \$1,392, plus an additional \$1,100. After two or three months paying \$2,500, the lender suggested he apply for the Making Home Affordable (MHA) plan. He agreed, and began paying at a reduced rate of \$1,365. In November, 2009, however, he was informed that his income was over the limit to qualify for the plan. In December, 2009, the mortgage lender stopped accepting his payments, and will not accept any until an alternate plan is in place. At the time of the hearing, Applicant was approximately \$15,000 behind. The lender informed him that it will not foreclose while Applicant is under consideration for the Making Home Affordable Plan. He has been saving the payments he would have been making. (AE D, E, F; Tr. 51-59)

In January 2010, the lender informed Applicant that he made an error in his application for the Making Home Affordable plan because he failed to include his child support payments. He was told to re-submit his application. As of the date of the hearing, he was still under consideration for the MHA plan. (AE C; Tr. 58-62)

Since 2008, Applicant has focused primarily on resolving his home mortgage delinquencies. He did not enlist the help of a credit counseling or debt consolidation firm. He decided that once he made arrangements with the mortgage lenders, he would work on payment plans for his other debts. However, after working on his mortgage for almost two years without a resolution, and with his other debts becoming more delinquent, Applicant considered bankruptcy. In March 2010, he consulted an attorney about filing a Chapter 13 bankruptcy petition, and paid a \$500 deposit. His attorney advised him not to make payments on any debts because, in light of his upcoming bankruptcy petition, he could not pay some and not others. In addition, they would be included in the petition. In May and June 2010, he received two offers to settle his second mortgage for \$5,000 instead of \$52,000, but he did not respond to the offers

and did not seek his attorney's advice about accepting the settlement offer. Applicant completed the bankruptcy paperwork, but did not go forward with filing the petition. He thought that he might be able to work out payment plans for the other debts if the MHA modification came through. After the hearing, Applicant submitted evidence that on September 1, 2010, he paid \$700 to his attorney to proceed with the bankruptcy petition. (GE 2; AE A, B, K; Tr. 27-28, 36, 39-40, 63)

In March 2010, Applicant worked full-time for company A and had a monthly net income of \$4,904. His monthly expenses and debt payments totaled \$4,669, leaving a monthly net remainder of \$235. In mid-2010, he went to part-time status at company A and now works about 20 hours per week. He earns a net monthly income of approximately \$4,600. In July 2010, Applicant started working full-time in information technology for company B, in addition to his part-time job. His net monthly income is \$5,000. He also earns about \$700 per month doing freelance website work. He pays \$1,240 monthly toward child support, and provides intermittent funds for his children's books and other expenses. (GE 2; AE I, J; Tr. 62, 68-71)

Applicant has about \$3,000 in checking and savings accounts, as well as about \$5,000 that his parents are holding to make his mortgage payments. He has about \$1,500 in a 401k account. He has not taken a vacation in ten years. He has a 2007 BMW. He tried to trade it in when his fiancée lost her job, but was unsuccessful. His car payments are up-to-date. (Tr. 63-68)

Applicant's SOR debts appear in credit reports dated September 2009 and April 2010 (GE 6, 7) The largest debts are Applicant's mortgage loans totaling \$250,800, with about \$15,000 past due. The non-mortgage debts in the SOR total \$27,817, and are mainly credit card accounts. The SOR also includes a tax debt at allegation 1.a. It resulted when Applicant began his own business in the 1990s and did not know how to handle the business taxes. His tax refunds were applied to the debt and Applicant provided evidence that it was paid in 1999. (GE 3, 4; AE H; Tr. 33-35)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.³ Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the guidelines.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them as they represent

³ Directive. 6.3.

policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the adjudicative factors addressed under Guideline F (Financial Considerations).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁶

Analysis

Guideline F (Financial Considerations)

AG ¶18 expresses the security concern pertaining to financial considerations:

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 over-extended 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.

Applicant's delinquent debts began in 2008, and remain unpaid. He is about \$15,000 behind in his mortgage payments, and owes almost \$28,000 in non-mortgage

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

debt. The following disqualifying conditions under AG ¶19 apply:

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

The Financial Considerations guideline also contains factors that can mitigate security concerns. I have considered the mitigating factors under AG ¶ 20, especially the following:

- (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.

Applicant's debts are both numerous and recent, as they have continued from 2008 to the present. His lack of diligence in relation to the non-mortgage debts casts doubt on his good judgment. AG ¶ 20(a) does not apply.

Applicant's financial delinquencies resulted from unexpected events in 2007-2008 – the loss of his fiancée's job, eight months without her contribution of \$40,000 to \$50,000 to the household income, and her subsequent refusal to share expenses when she did obtain a job, and her departure. Applicant could not predict his fiancée's actions, and they had a serious negative impact on his finances. However, Applicant did not act reasonably when he decided to concentrate his efforts on his mortgage, to the exclusion of all of his other debts. He had two years in which to work with the other creditors, and he did not. He can claim only partial credit under AG ¶ 20(b). In addition, he did not seek financial counseling during the two years that his debts mounted. His financial situation is not under control, and AG ¶ 20(c) does not apply.

Since 2008, Applicant worked with his lender to ensure that he was able to keep his house. He made significant efforts to resolve the mortgage debts. He has been in

contact with the lender, paid additional monthly payments, and applied for a loan modification. His past-due balance stems in part from the lender's refusal to accept his payments while the modification is being considered. He did make a good-faith effort in regard to his mortgage debt. However, he made no effort to work with creditors for the remaining significant non-mortgage debt. He accrued almost \$28,000 in these other delinquencies, and made no effort to contact creditors, establish payment plans, or otherwise resolve them. His efforts in regard to bankruptcy have been intermittent and unconvincing. Though the record remained open after the hearing, he submitted only a cancelled check, with no further confirmation that the process had been underway. Applicant's lack of effort in relation to substantial non-mortgage debt precludes full mitigation under AG 20(d).

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant had a good financial record in 2007 and earlier, as shown by his ability to qualify for a home loan, and for a second mortgage. His fortunes unexpectedly changed when his fiancée lost her job and he had to pay for numerous expenses that he had taken on when he had a significantly larger income. To his credit, he worked consistently with the mortgage lender to keep his house. But his failure to make any effort in regard to his other debts demonstrates a lack of willingness to pay his legitimate financial obligations. He earns a substantial income and could have made some effort to contact creditors, arrange payment plans, or otherwise deal with his delinquencies. He did not consult with his attorney after receiving a settlement offer that would have allowed him to resolve a \$52,000 debt for \$5,000. Finally, Applicant

does not appear committed to filing the bankruptcy petition, and I am not convinced that he will follow through with the Chapter 13 petition. Under the Appeal Board jurisprudence, an Applicant does not have to show that he paid every debt, or paid every debt in full; but he does have to show that he has a viable plan in place and has taken steps to implement that plan. With the unknown result on his MHA application, a lack of commitment to filing bankruptcy, and no plan to resolve the other \$28,000 in delinquent debt, Applicant does not meet this standard.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns raised by the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline F	AGAINST APPLICANT
Subparagraphs 1.a. – 1.k.	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge