



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 10-00793
)
Applicant for Security Clearance)

Appearances

For Government: William O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

January 27, 2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On September 30, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On May 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued 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 on June 6, 2011, and DOHA received his answer on June 8, 2011. Department Counsel was prepared to proceed on August 4, 2011. The case was assigned to me on August 23, 2011. DOHA issued a notice of hearing

on August 23, 2011, scheduling the hearing for September 14, 2011. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through E, which were received into evidence without objection.

I held the record open until September 30, 2011, to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted AE K through X, which were received into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on September 21, 2011. The record closed on September 30, 2011.

Findings of Fact

Applicant denied all of the SOR allegations with explanations. His answers and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact. I found Applicant's testimony to be credible.

Background Information

Applicant is a 57-year-old senior program manager, who has worked for a defense contractor since February 2009. He seeks to reinstate his security clearance, which is a requirement of his continued employment. Applicant held an interim security clearance for approximately two years before it was revoked as a result of these proceedings. He also held a security clearance for approximately four years in the "80s" while employed by a U.S. Government agency. Applicant estimates that he has successfully held a security clearance for a total of six years. (Tr. 13-15, 38-40, GE 1, AE B – C, L.)

Applicant graduated from high school in June 1972. He has accumulated approximately "60 or 70" college credit hours, but did not graduate. Applicant married in June 1981 and has four adult children. Applicant's wife works in the office of development at a nearby college. He did not serve in the armed forces. (Tr. 15-19, GE 1.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his September 2009 e-QIP, one set of January 2011 DOHA Interrogatories; as well as his October 2009, November 2010, and April 2011 credit reports. (GE 1 – 5.) Applicant's SOR alleges three separate debts consisting of a state tax lien filed in 2001 for \$45,038, a cell phone bill in the amount of \$1,550, and a

¹ AE F – J were inadvertently omitted when marking Applicant's post-hearing exhibits.

former home owner's insurance company bill in the amount of \$174. (SOR ¶¶ 1a – 1c.)

The largest and most significant debt alleged is a 2001 \$45,038 state tax lien filed by a state (State A). Applicant previously lived in State A before moving to his current state of residence (State B). Applicant contested this lien from the onset. It is purportedly for tax years 1993, 1994, and 1995 when Applicant and his family lived in State A. In March 1997, Applicant and his family moved to State B. On March 9, 2001, Applicant received notice from State A that he owed state taxes in the amount of \$46,163.96 due by March 14, 2001. Applicant responded to State A's demand by letter on March 12, 2001 requesting supporting documentation. Applicant did not receive a response nor were his telephone calls returned. On March 11, 2002, State A sent Applicant a letter stating he now owed \$50,655.28. (Tr. 19-22, SOR response, GE 2.)

Applicant retained the services of a law firm in State A specializing in tax matters. His attorney notified him by letter dated April 9, 2002 that he had met with officials with State A's Department of Revenue (DOR) and was "unable to determine the amount owed, if any." His attorney added that, "it will take some time for me to resolve this issue." (SOR response.) On July 24, 2002, Applicant's attorney received a facsimile from State A's DOR advising that Applicant owed \$13,007.46 based on past-due taxes of \$6,002 plus penalties and interest. Applicant adamantly denied that he owed any taxes. Applicant's attorney advised him not to make any further attempts to rectify the error as the DOR had failed to provide Applicant with required due process, that Applicant had properly submitted and paid his taxes, and that the DOR had made an error by confusing Applicant's name with another taxpayer. (Tr. 22-26, SOR response, GE 2.)

On August 7, 2002, Applicant's attorney prepared an affidavit for him summarizing what had occurred requesting that the DOR remove its lien from his record. To date, the DOR has not responded to Applicant. Applicant's attorney "worked" his tax case with the DOR from March 2002 through August 2002 and exhausted all reasonable avenues to resolve Applicant's tax problems. Applicant has had no further contact with State A's DOR since August 2002. (SOR answer, GE 2.) Applicant contacted the pertinent credit reporting agencies as recently as December 2010 requesting that State A's lien be removed from his credit report. The lien had been removed from Applicant's credits report and he submitted documentation of same. (Tr. 36-37, 40-43, AE D, AE L, AE N - O.)

Applicant was unaware of the two remaining debts until they were brought to his attention during these proceedings. He was initially unable to locate the creditor for SOR ¶ 1b, however, he has located the successor creditor and settled the original debt of \$1,550 for the lesser amount of \$930.69. He paid that amount by direct debit on September 23, 2011. (Tr. 27-28, 37-38, AE M.) The debt alleged in SOR ¶ 1c has been paid in full by direct debit on January 5, 2011. (Tr. 28-29, 37-38, AE E.) In conclusion, Applicant successfully contested his tax lien with State A and the lien has

been removed from his credit reports, he has settled and paid his cell phone bill, and he has paid his bill with his former home owner's insurance company.

Applicant did not seek formal financial counseling. (Tr. 30.) Applicant's annual salary is \$105,000, his wife's annual income is \$65,000, for a total of \$170,000. Applicant's personal financial statement, taking into account his income and the income of his wife, reflects a net monthly remainder of "about \$7,500 to \$8,000." Applicant is current on all his debts and has about \$45,000 in non real property assets. He owns his own home and is current on his mortgage. (Tr. 31-35, 40-41, GE 2, AE D, AE R - T.) Applicant kept his employer fully apprised of his situation throughout the course of these proceedings. (Tr. 39, AE A.)

Character Evidence

Applicant submitted a reference letter from his general manager (GM). His GM has known him since January 2009. The GM described in detail the significant contribution that Applicant has made and continues to make, not only to their company, but to the national defense. The GM concluded, "[Applicant] has my highest levels of trust and confidence." (AE L, AE P- Q.) Applicant submitted his most recent employee performance evaluation and records of promotions. These documents reflect Applicant's sustained superior performance, as well as, his company's complete confidence in him and in his abilities. (AE U – X.)

Policies

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 useful 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 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

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.” Applicant’s history of delinquent debt is established by his admissions and the evidence presented. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

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

(e) 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.

Applicant's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Nevertheless, he receives partial credit under AG ¶ 20(a) because the debt occurred under circumstances that are unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Although I do not find circumstances beyond Applicant's control as contemplated by AG ¶ 20(b), I note that State A's DOR appears to have filed a lien against Applicant in error. Applicant acted responsibly by immediately contesting State A's lien and when he failed, he contacted an attorney specializing in tax matters. He remained in contact with State A's DOR and has taken reasonable steps to resolve his debts.²

AG ¶ 20(c) is partially applicable even though Applicant did not seek formal financial counseling. He has, however, produced evidence that reflects he is living within his means and has regained financial responsibility. There are clear indications

²"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

that his financial problems are resolved. Furthermore, there is sufficient information to establish partial if not full mitigation under AG ¶ 20(d).³ Applicant actively contested his tax lien with State A and ultimately located the successor creditor for his cell phone bill as well as the creditor for his former home owner's insurance company. Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is applicable for reasons discussed above.

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 the 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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's service as a defense contractor weighs heavily in his favor. He is a law-abiding citizen and a productive member of society. He is current on his day-to-

³The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

day expenses, lives within his means, and all of his SOR debts have been addressed. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

The record is replete with Applicant’s good-faith efforts to resolve his tax dispute with State A over his 2001 \$45,038 lien. Although it took him a number of years to resolve, his persistence paid off and State A is no longer pursuing him and the lien has been removed from his credit reports. His company fully supports him and recommends him for a security clearance. Through no fault of his, State A pursued him for a tax debt that he did not owe. Applicant was never in financial distress despite these alleged debts. His monthly bills are current, he has money in the bank, and he has an approximate \$7,500 net surplus after his monthly debts are paid off. Applicant is in a state of financial responsibility.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant’s service as a defense contractor, his years of successfully holding a security clearance, his years of financial responsibility, his substantial steps taken to resolve his financial situation, his potential for future service as a defense contractor, the mature and responsible manner in which he dealt with his adverse situation, his reference letter and work performance evaluation, and his testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and

supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has fully mitigated or overcome the government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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 1a to 1c: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

ROBERT J. TUIDER
Administrative Judge