



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



In the matter of:)
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 -----) ISCR Case No. 10-02422
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)
 Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

June 08, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On December 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F for Applicant. 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.

On January 21, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested that his case be decided on the written record in lieu of a hearing. Thereafter, Department Counsel requested that this case be converted to be decided by a hearing before an Administrative Judge. I received the case assignment on February 22, 2011. DOHA issued a notice of hearing on March 10, 2011, and I convened the hearing as scheduled on March 28, 2011. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through M at the time of hearing, which were also admitted without objection.

DOHA received the transcript of the hearing (Tr) on April 4, 2011. I granted Applicant's request to keep the record open until April 11, 2011, to submit additional documents, and four additional documents were received, and have been identified and entered into evidence without objection as Exhibits N through Q. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted SOR allegations 1.a. through 1.m., and he denied 1.n. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 57 years old. He is currently divorced after a 22 year marriage, and he has one 16 year old son. He has three Master's degrees, in Business Administration, Education, and Divinity. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline F, Financial Considerations

The SOR lists 14 allegations (1.a. through n.) regarding overdue debts under Adjudicative Guideline F. As reviewed above, Applicant admitted all of the allegations in his RSOR, except 1.n. At the hearing, Applicant also admitted that all of the debts, listed in the SOR as 1.a. through 1.l., have not been paid or resolved. He gave a qualified response as to 1.m. (Tr at 33.) The allegations will be reviewed below in the same order as they were listed on the SOR:

1.a. This overdue debt is cited in the SOR for a tax lien to the Internal Revenue Service (IRS) in the amount of \$22,131. Applicant testified that his tax problems, were as a result of the penalties for withdrawing from his retirement account, and also because his income has been higher, and so he owed more in taxes during that period. (Tr at 47-48, 67-68.)

Exhibit Q is a letter from the IRS, dated April 11, 2011, indicating that Applicant still owes \$31,667.24 for tax years 2008 and 2009, but since they have made a determination that he is unable to pay the money he owes, they filed a federal tax lien against him. Based on Applicant's RSOR and testimony, I find that Applicant owes \$31,667.24 to the IRS, rather than the \$22,131 listed on the SOR.

1.b. This overdue debt is cited in the SOR in the amount of \$1,141. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.c. This overdue debt is cited in the SOR in the amount of \$11,613. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.d. This overdue debt is cited in the SOR in the amount of \$11,006. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.e. This overdue debt is cited in the SOR in the amount of \$41,734. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.f. This overdue debt is cited in the SOR in the amount of \$9,725. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.g. This overdue debt is cited in the SOR in the amount of \$17,201. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.h. This overdue debt is cited in the SOR in the amount of \$11,438. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.i. This overdue debt is cited in the SOR in the amount of \$4,693. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.j. This overdue debt is cited in the SOR in the amount of \$30,902. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.k. This overdue debt is cited in the SOR in the amount of \$20,573. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.l. This overdue debt is cited in the SOR in the amount of \$1,705. Based on Applicant's RSOR and testimony, I find that this debt is still due and owing.

1.m. This overdue debt is cited in the SOR in the amount of \$7,928, for a real estate mortgage account with a total balance of \$811,000. Applicant testified that this debt was for his primary residence. He stated that he had one more payment to make, and then the house would no longer be in foreclosure, but rather it will be current. (Tr at 51-52.) Exhibit N is a Domestic Wire Transfer, dated April 4, 2011, establishing that Applicant wired \$4,448.23 to Watchovia Bank for this real estate mortgage. While it is clear that Applicant has made a payment on this mortgage, no independent evidence has established that Applicant is now current on this debt.

Applicant submitted Exhibit L, a foreclosure profile report, indicting that the value of this property is \$1,614,058, and that Applicant's equity in this home is \$798,058. Applicant testified that he believes if he sold this home, he would have sufficient assets to resolve all of his debts, but he is waiting for 24 months, until his son reaches the age of 18, before he sells his home. He stated that with his divorce, he is concerned that his son will have some stability in his life.

1.n. This overdue debt is cited in the SOR in the amount of \$6,193, for a real estate mortgage account with a total balance of \$265,000. This debt arose from a vacation home owned by Applicant and his wife. Applicant testified that he no longer

owns this property as he sold it to his ex-wife, and the debt has been resolved and is no longer owing. (Tr at 58.)

Applicant testified that as a result of his divorce, he paid his wife \$524,000. (Tr at 35-36.) A few months after the divorce, his consulting business that he started in 1989 started taking in less income. He testified that currently the business does not make any profit, although Applicant still manages the company approximately 10 hours a week, and there are no other employees.

Applicant testified that in 2009 his income totaled \$99,000, of which \$49,000 was actual income from his employment and \$50,000 was from money he withdrew from his retirement account. He stated that in 2008 he withdrew \$30,000 from his retirement account. He explained that this testimony was to explain how his limited income contributed to his financial difficulties, when previously he had earned significantly more income and had good credit. (Tr at 41-43.) (Exhibit C.) He also testified that he had engaged the services of an attorney and paid him \$15,000 to help him resolve his financial issues, but the attorney was disbarred without helping Applicant. (Tr at 44-46.) He now has another attorney, but he has yet to pay him a fee. He is hoping to receive a refund from the state bar for this first attorney, but there has been no indication if or when he will receive this refund. (Tr at 71-73.)

Applicant testified that he believed it was the moral thing to do to pay off all of his debts, yet when he was asked why he believed it was alright to pay the creditors 20% of what he owed, as he had previously testified he was told by his first attorney, he did not have a reasonable response. (Tr at 84-87.)

As discussed above, Applicant has approximately \$800,000 in home equity, which could be used to resolve most of his debts. Although he was not planning to sell his home for 24 months, so his son would have a stable place to live, Applicant conceded that his son had spent the present school year at a boarding school to learn to ski, and he was planning to do the same thing next year, so the time that he was actually living at this house was extremely limited. (Tr at 87-89.)

Mitigation

Among the post-hearing documents submitted by Applicant, was a positive character letter from an attorney and friend of Applicant. He wrote about Applicant's character, his commitment to God and his country, his desire to do right, willingness to voluntarily serve others, and his overall approach, which makes him someone who can be trusted, even in light of his financial struggles. (Exhibit P.)

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 over-arching adjudicative goal is a fair, impartial and common sense 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. 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. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 and could potentially apply in this case. 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. I find that both of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant has accumulated significant delinquent debt.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties: Under AG ¶ 20 (b), it may be mitigating where "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." As noted above, Applicant testified that his financial problems resulted in part from his divorce and from his business turndown. However, I cannot find that Applicant has acted responsibly, since Applicant still owes \$193,398, and with the exception of the IRS lien, no arrangement or payment plans have been made with any of the other creditors. Therefore, I do not find that this mitigating condition is a factor for consideration in this case.

AG ¶ 20(d) is also not applicable since Applicant has not "initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." I also find that this mitigating condition is not applicable in this case.

I cannot conclude that Applicant has significantly reduced or resolved his overdue debt, or shown that he can maintain more financial stability. Therefore, he has not mitigated the financial concerns of the Government.

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.

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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and the Mitigating Conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.l.:	Against Applicant
Subparagraphs 1.m and 1.n.:	For 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.

Martin H. Mogul
Administrative Judge