



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 10-03435
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)
Applicant for Security Clearance)

Appearances

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

June 14, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On November 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 December 22, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on February 4, 2011. DOHA issued a notice of hearing on March 7, 2011, and I convened the hearing as scheduled on April 1, 2011. The Government offered Exhibits 1 through 11, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through D, at the time of hearing, which were also admitted without objection. Two additional witnesses also testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on April 21, 2011. I granted Applicant's request to keep

the record open until May 6, 2011, to submit additional documents, and additional documents that were received have been identified and entered into evidence without objection as Exhibits E through K. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and the additional witnesses, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR, Applicant admitted all of the SOR allegations 1.a. through 1.c. 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 39 years old. He is currently in the process of divorce, he was married from 1997 to 2010, and he has no children. Applicant actively served in the United States Navy from 1991 to 2001, and he has been in the Naval reserves from 2001 until the present. 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 three allegations (1.a. through c.) regarding financial concerns under Adjudicative Guideline F. As reviewed above, Applicant admitted all of the allegations in his RSOR. The allegations will be discussed below in the same order as they were listed on the SOR:

1.a. Applicant failed to file Federal Income Tax returns for tax years 2007, 2008, and 2009.

1.b. Applicant failed to file State Income Tax returns for tax years 2007, 2008, and 2009.

Applicant explained in his RSOR and by way of testimony that he is currently in the process of divorcing his wife; he filed for divorce in April 2010. They first separated in 2007 for a short time and then in June 2008, and they have lived apart since then. Applicant testified that he had never failed to file a required tax return until tax year 2007. He had a problem filing the return in 2008 for tax year 2007, because a lot of the documentation that he needed to file the return was in the house where he had lived with his wife, and where his wife continued to live, and he had limited access to the house. The other issue was that he was trying to convince his wife to sign the returns jointly, rather than he filing it separately. Applicant testified that he believed his liability for the three tax years would be approximately \$17,000 if he filed jointly with his wife, but between \$30,000 and \$40,000 if he filed separately. (Tr at 31-35.)

Applicant also submitted a Stipulation and Order prepared by his attorney, in which he proposed that Applicant's wife file a joint return with Applicant and sign the Federal and State tax returns for tax years 2007, 2008, and 2009 (Exhibit B.) The Stipulation and Order proposed that if there is any net liability owed, Applicant will be solely responsible for that net liability, and if there is any refund, Applicant will share it equally with his wife. At this point, she has not been willing to sign the stipulation.

Applicant testified that it is his plan to file his Federal and State tax returns for tax years 2007, 2008 and 2009, whether or not he can convince his wife to sign jointly with him, even if it does cost him significantly more to file separately. He also noted in his RSOR that he has been in contact with the IRS and the State Tax Board, throughout the time that the taxes have not been filed regarding his situation and plan for resolution. (Tr at 40.) In his post hearing documents, Applicant wrote that he intends to file the tax returns within the next month, assuming he can receive timely responses from his wife's attorney. (Exhibit E.)

Attached to the RSOR was a letter from Applicant's accountant. He wrote that Applicant has been his tax client since 2003, and that he always conducted himself professionally and has been diligent in fulfilling his obligations. This tax preparer filed tax extensions for tax years 2007, 2008, and 2009, because Applicant did not have all of the necessary information due to a lack of cooperation from his wife. The missing information included his wife's business profit and loss statement. He further wrote that Applicant has been working with his attorney to try to get his wife's cooperation, but so far unsuccessfully. They have now prepared the tax returns for the years in question, and they are ready to file the returns.

Applicant indicated that his wife has not contributed to paying their joint debt, even though she committed to do so during their marriage and since they have been separated. He has been paying the debts that were assigned to his wife, because she was not paying them. He averred that his finances have been gradually improving since he separated from his wife, and he has not taken on any new debt. (Tr at 43-49, 56.) Exhibit F is Applicant's Personal Monthly Budget, which shows that his total monthly income is \$9,950 and his expenses are \$8,912, leaving him with a net monthly remainder of \$1,038.

1.c. Applicant's employer garnished his wages in 2010 in the approximate amount of \$8,592, in favor of the State Tax Board. It is alleged in the SOR that the garnishment has not been completed. In his RSOR, Applicant wrote that the garnishment was satisfied as he paid approximately \$5,500 through wage garnishment and then paid the additional amount to the State Tax Board. He averred that the garnishment order was released in June 2010. Exhibit G includes emails showing that his former employer received a notice of the release of the garnishment from the State Tax Board.

Mitigation

Two witnesses appeared at the hearing and testified on behalf of Applicant. The first witness was Applicant's former manager for approximately two years. He testified that Applicant "always operated with integrity and was well-liked by all of his coworkers and did a great job on a very difficult program." He also averred that he believed Applicant was planning to resolve his financial issues as quickly as possible. (Tr at 68-71, 74.) This witness also submitted a letter on Applicant's behalf in which he wrote, "I would not hesitate to have [Applicant] in a position of trust . . ." (Exhibit A.)

The second witness has known Applicant since 2000, when he first hired him, and Applicant worked for him until 2008, when Applicant left for better opportunities. The witness testified that he had relied very heavily on Applicant for making very important decisions. He stated that over his career he has worked with several hundred people, and Applicant is "probably one of the most upstanding young men I've had the opportunity to work with in my business career." He characterized Applicant as a man of honor and integrity. (Tr at 76-81.) In a letter that this witness wrote he called Applicant "one of the most honest, ethical, and hard working people I know." (Exhibit D.) Applicant also submitted one additional positive character letter from a former supervisor. He wrote that Applicant "upholds the highest level of integrity in all of his professional interactions." (Exhibit H.)

Applicant submitted documents showing that he received the Navy and Marine Corps Commendation Medal, five Navy and Marine Corps Achievement Medals, and three Navy Achievement Medals. He also submitted his Fitness Report and Counseling Records for his years in the Navy. He was described as "a tremendous Naval Officer and asset to my unit. He consistently performs beyond expectations, demonstrating excellent leadership and managerial skills." (Exhibit J.)

Finally, Applicant also forwarded his Performance Evaluation from his employer for 2010. His overall performance was rated "Exceeds Requirements." (Exhibit I.)

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 by not filing his Federal and State taxes for tax years 2007, 2008, and 2009. Finally, AG ¶ 19 (g) failure to file required tax returns is applicable.

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 from his divorce, and his soon to be ex-spouse’s failure to cooperate with him in filing joint tax returns, and allowing Applicant access to information that he needs to file the taxes. Prior to the divorce, Applicant has always filed his tax returns and paid his taxes in a timely manner. I find that he has acted responsibly, since he has been in contact with the IRS and the State Tax Board, and he is in the process of filing his returns. He has also attempted to work with his wife, through his attorney, by proposing a stipulation in which he would be responsible for any liability, and if there is any surplus, they would split it. His wife does not appear to want to help Applicant resolve this issue. Therefore, I find that this mitigating condition is a factor for consideration in this case.

Finally, AG ¶ 20(d) is applicable since Applicant has “initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” I find that this mitigating condition is also a factor for consideration in this case as Applicant is working with his attorney and accountant to help him to resolve these tax debts.

I conclude that Applicant is in the process of resolving his overdue debt, and he has shown that he is maintaining financial stability. Therefore, he has 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

