



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



In the matter of:)
)
) ISCR Case No. 10-03939
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

December 30, 2011

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Because of three extended periods of unemployment, Applicant experienced financial problems beyond his control. He has demonstrated a willingness to fulfill his legal obligations to his creditors and has established a track record of repayment. He has also demonstrated concomitant conduct in support of his plan to file for bankruptcy protection. Clearance is granted.

Statement of the Case

Acting under the relevant Executive Order (EO) and DoD Directive,¹ on April 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

Reasons (SOR) explaining that it was not clearly consistent with the national interest to continue Applicant's access to classified information. The SOR detailed the factual basis for the action under the security guideline known as Guideline F (financial considerations).

Applicant answered the SOR and requested a hearing. This case was initially assigned to another administrative judge. After Applicant requested and received two continuances in June and July 2011, the case was assigned to me on August 9, 2011. The hearing proceeded as scheduled on August 12, 2011. Department Counsel offered Government's Exhibits (GE) 1 through 10, which were admitted without objection. Applicant's Exhibits (AE) A through C were also admitted without objection. I admitted as Hearing Exhibit (HE 1) a demonstrative exhibit prepared by Department Counsel.

After the hearing, I held the record open to allow Applicant to submit additional documentation about his finances. He submitted one document, which I admitted as AE D without objection from Department Counsel. I received the transcript (Tr.) on August 22, 2011.

Findings of Fact

Applicant is a 63-year-old employee of a government contractor. Married 22 years, he is the father of two college-age children, who live at home. The SOR alleges Applicant's history of financial problems; specifically, that Applicant is indebted to eight creditors for \$76,744 and that he filed for Chapter 13 bankruptcy protection in 2004 and 2007.²

Applicant's financial problems began in the late 1990s. Between 1998 and 2009, Applicant experienced three lengthy periods of unemployment due to lay offs: 6 months between 1998 and 1999; 14 months between 2007 and 2008; and 14 months between 2008 and 2009. His financial problems were exacerbated by his wife's unemployment. With the exception of working part time for a few months in 2008, she has not worked full time since being laid off in 2006. Medical issues have prevented Applicant's wife from re-entering the workforce. In July 2011, she was diagnosed with cancer.³

During these periods of unemployment, Applicant depleted his savings to make ends meet. Between 2007 and 2009, he also worked as a consultant to generate additional income, but he did not earn enough to support his family. He attempted to resolve his delinquent debt through Chapter 13 bankruptcy protection. Between 2000 and 2007, Applicant filed for bankruptcy four times. In total, Applicant paid \$243,558 to the bankruptcy trustee. His payments were distributed as indicated in the table below:

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

² Tr. 30; GE 1.

³ Tr. 24, 35, 64-69, 74-79; GE 1.

Date Petition Filed	Date Petition Dismissed	Total Claims Allowed	Total Receipts	Disbursements				
				Secured	Unsecured	Trustee	Attorney	Refund to Debtor
10/3/2000	10/30/2001	\$ 116,868.96	\$ 9,000.00	\$ 6,795.00	\$ -	\$ 855.00	\$1,350.00	\$ -
12/19/2001	11/6/2003	\$ 321,725.77	\$ 12,250.00	\$ 7,309.02	\$ -	\$ 945.49	\$1,995.49	\$ 2,000.00
2/3/2004	4/23/2007	\$ 258,334.13	\$ 81,458.26	\$ 73,993.92	\$ -	\$ 5,270.34	\$2,194.00	\$ -
7/2/2007	10/25/2010	\$ 260,104.09	\$140,850.00	\$128,596.72	\$ -	\$ 9,168.28	\$3,085.00	\$ -
Total		\$ 957,032.95	\$243,558.26	\$216,694.66	\$ -	\$16,239.11	\$8,624.49	\$ 2,000.00

In the 2001, 2004, and 2007 petitions, Applicant's delinquent mortgage constituted 75% or more of the total claims allowed. Although Applicant made a significant number of payments under each bankruptcy plan, each petition was dismissed for cause — the last being dismissed with prejudice.⁴

Applicant faults his attorney for the dismissal of his 2000, 2001, and 2004 Chapter 13 petitions. He believes that the attorney failed to timely file documents requested by the trustee. He also believes that the attorney failed to remit Applicant's payments to the trustee. Although Applicant suspected his attorney of malfeasance, he continued the representation reasoning that the lawyer was already familiar with his case and that retaining a different lawyer would be more expensive. Applicant admits that he allowed the 2007 petition to be dismissed so that he could obtain a mortgage modification. The lender refused to renegotiate the terms of Applicant's mortgage as long as it was included in the bankruptcy petition. Once the bankruptcy was dismissed, Applicant obtained a mortgage modification and rehabilitated his delinquent mortgage, which is now current.⁵

Applicant's job as a program manager has caused him to become a geographical bachelor, living thousands of miles away from his family. For the last two years, he has paid the expenses of two households and his children's college tuition on one income. He travels to his home state to visit his family only when his finances permit him to do so. A review of Applicant's current credit reports indicates that he has not opened any new credit accounts nor has he accumulated any additional debt since he began his current employment. Even supporting two households, he is living within his means.⁶

Specifically, the SOR alleges that Applicant is indebted to eight creditors for approximately \$76,000; of that amount \$59,000 is his now-rehabilitated mortgage. Medical expenses incurred while Applicant and his wife were unemployed in 2007 constitute approximately \$1,800 of the alleged delinquent debt. Two of the debts, Castle Credit (\$1,765) and Calvary Portfolio/ Chrysler Financial (\$13,562) are older debts that

⁴ Tr. 34-35, 67-69; GE 4-7.

⁵ Tr. 25-26, 36-42, 45; AE D.

⁶ Tr. 73-74, 82-82; GE 8-10.

were included in all four of Applicant's Chapter 13 petitions. These creditors received distributions totaling \$7,700 from the trustee.⁷

Applicant has retained a different attorney to help him through the bankruptcy process. At the time of the hearing, Applicant had an appointment scheduled with his attorney to determine whether his bankruptcy would proceed under Chapter 7 or 13. He has filed a bar complaint against the attorney who represented him in his four previous bankruptcy filings. He also plans to file a complaint with federal officials against the bankruptcy trustee that handled his Chapter 13 petitions.⁸

Although Applicant does not currently hold a security clearance, he has done so in the past without incident. Initially, Applicant received access to classified information while serving in the Marine Corps from 1968 to 1977. He continued to hold a security clearance during his 20-year tenure with another government contractor. He believes that his security clearance lapsed between 2007 and 2008 when he was unemployed.⁹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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,

⁷ Tr. 43, GE 4-7.

⁸ Tr. 29, 57-58, 87; AE A-B.

⁹ Tr. 30, 71-72; GE 1.

or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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 under AG ¶ 19. Two are potentially applicable in this case:

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

Applicant has experienced financial problems that caused him to seek Chapter 13 bankruptcy protection four times in less than 10 years. These facts are sufficient to warrant the application of the disqualifying conditions cited above.

Of the mitigating conditions available under AG ¶ 20, two are applicable to this case:

(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; and

(d) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's financial problems were caused by events beyond his control, his and his wife's 4.5 years of combined unemployment between 1999 and 2009. He chose to use Chapter 13 bankruptcy protection to resolve his delinquent debts. Over the course of approximately eight years, Applicant paid over \$240,000 to the trustee, 80% of which was distributed to his secured creditors. Department Counsel argues that because all four of Applicant's Chapter 13 petitions were dismissed, AG ¶ 20(b) cannot apply to this case. This argument is not persuasive.

Applicant used a legally legitimate method to manage his debt while coping with extended unemployment. The \$240,000 in payments under his multiple Chapter 13 bankruptcy petitions are too significant to be summarily dismissed. Applicant continued to make payments during his lengthy periods of unemployment between 2007 and 2009. He also made payments as he financially supported two households on one income after he began working with his current employer in 2009. His actions demonstrate a willingness to fulfill his financial obligations and a positive track record of debt repayment. Applicant's decision to pay his delinquent debts through Chapter 13 was a reasonable method of engaging his multiple creditors, causing them to work toward the resolution of his delinquent debt in a way they may not have, if Applicant approached them individually.

Furthermore, the debts alleged in the SOR, as well as those declared in the four bankruptcy petitions, are not indicative of careless spending or irresponsible financial management. They are reasonable expenses associated with family life. Under the circumstances, Applicant handled his delinquent debts responsibly. Finding mitigation under AG ¶ 20(b) is not an endorsement of Applicant's decision to file multiple Chapter 13 bankruptcy petitions, but recognition that Applicant's motivation was toward the resolution of his debt and his decisions to that end were well-founded given his precarious financial situation.

The evidence also supports a finding that Applicant has acted in good faith to repay his delinquent debts. Through his bankruptcy petitions, Applicant's secured creditors received over \$216,000 in payments. Three of the eight creditors alleged in the SOR, Bank of America, Castle Credit, and Calvary Portfolio (Chrysler), received distributions from the trustee. Applicant has rehabilitated and is current on the largest delinquent debt alleged in the SOR – his Bank of America mortgage. Finally, he has retained a different bankruptcy attorney to advise him and ultimately guide him through the bankruptcy process most suited to his current circumstances. Given Applicant's current situation, this decision is reasonable. Although the petition has not yet been

filed, Applicant has paid his attorney's retainer fee, has his first meeting with the attorney scheduled, and has notified his creditors of the impending bankruptcy filing.

The Appeal Board has held that, "an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan.¹⁰ Applicant's actions are more than a promise of remediation, but are concrete steps toward the resolution of his delinquent debt. As such, the unresolved nature of his finances is of limited security concern.

Whole- Person Concept

Given the evidence in this case, I have no doubts or reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). For the past ten years, Applicant has leveraged his resources to the maximum. His efforts to financially support his family and repay his delinquent debt have come at a significant personal cost. For the past two years he has juggled these responsibilities while living thousands of miles away from his wife and his children. He continues to do so even though his wife is facing significant medical issues. Given Applicant's history of debt repayment and evidence of his concomitant conduct towards the resolution of his debt through bankruptcy, I find that he has mitigated the security concerns raised in this case.

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 - 1.j	For Applicant

¹⁰ See, e.g., ISCR Case No. 08-06567 at 3 (App. Bd. Oct 29, 2009).

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. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge