



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 10-05497
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire

December 14, 2011

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued numerous unpaid debts and did not file his tax returns for tax years 2004 through 2006. His tax returns have been filed and he is current on all subsequent tax filings. Most of Applicant’s debts have been either resolved or successfully disputed because they were not his responsibility. He also resolved a tax debt in excess of \$27,000 and established that his current finances are sound. Applicant’s request for a security clearance is granted.

Statement of the Case

On or about June 12, 2009, Applicant submitted a security clearance application (SF-86) to obtain or renew a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to

Applicant interrogatories¹ to clarify or augment information obtained by investigators. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to grant Applicant's request for access to classified information. On November 24, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)³ for finances (Guideline F).

Applicant timely answered the SOR and requested a hearing. The case was assigned to an administrative judge on April 7, 2011, but was transferred to me on June 21, 2011. Pursuant to a Notice of Hearing issued on August 15, 2011, I convened a hearing in this matter on September 20, 2011. DOHA received a transcript (Tr.) of the hearing on September 28, 2011. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 13. All were admitted except for Gx. 12, which was excluded in response to an objection by Applicant.⁴ Applicant testified and presented five exhibits, identified as Applicant's Exhibits (Ax.) A⁵ - E, were admitted at the hearing.⁶ I left the record open to receive additional relevant information from the Applicant, whose timely post-hearing submission I have admitted over objection by Department Counsel as Ax. F.

Findings of Fact

Through the SOR, the Government alleged under Guideline F that Applicant did not file as required his federal income tax returns for tax years 2004 through 2006 (SOR 1.a - 1.c). The Government further alleged that Applicant accrued approximately 17 delinquent debts totaling \$38,614 (SOR 1.d - 1.t). Of those debts, Applicant allegedly owed a single debt of \$27,762 (SOR 1.o) to the Internal Revenue Service (IRS).

In response to the SOR, Applicant admitted the SOR 1.n and 1.r allegations, and denied the rest. In support of his denials, Applicant averred that he had filed his past-due tax returns. He further claimed that the debts alleged at SOR 1.d, 1.i, and 1.j belong to his son, whose name is nearly identical to Applicant's; that the debts alleged at SOR 1.e, 1.g, 1.k, 1.l, 1.m, 1.n, 1.o, and 1.r have been paid or otherwise resolved. Finally, as to the remaining debts, Applicant claimed that his financial advisor was either trying to

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ Tr. 27 - 28.

⁵ Ax. A contains 11 sub-parts, further identified as Ax. A1, Ax. A2, etc..

⁶ Ax. C and D were admitted over Department Counsel's objections. (Tr. 29 - 32)

verify that the debts were properly attributed to Applicant or that his advisor had successfully disputed the debts. Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 60 years old and is employed by a company doing business with the State Department in a position that requires a security clearance. Since 2006, Applicant has worked exclusively on overseas projects. Except for three brief periods in 2006, 2007 and 2008, Applicant has not resided in the United States. Except for a brief visit in August 2010, from July 2008 until he returned to appear for this hearing, Applicant has worked abroad and lived in quarters supplied as part of his employment contracts. (Gx. 1; Gx. 2; Tr. 55 - 56)

Applicant previously was investigated for a security clearance in 1994. The record does not show that he was actually granted a security clearance; however, Applicant testified that he previously worked for his brother's company doing work similar to that for which he currently needs a security clearance. (Gx. 9; Tr. 56 - 57)

Applicant has been married and divorced twice. His first marriage began in January 1969 and ended in May 1978. He and his first wife had two children together. Applicant married his second wife in November 1982. They were divorced in September 2007. In addition to her two children from before the marriage, they had four children together. All of Applicant's children are now adults. (Gx. 1; Tr. 50) His second ex-wife and two of his sons live in the house Applicant and his ex-wife bought in 1992. Applicant has not lived there since 2006, but pays the mortgage, insurance, and taxes on the house. His ex-wife pays the insurance, utilities and all other expenses connected with the house. Applicant still owes about \$126,000 on the mortgage for the house, which he estimates is worth about \$170,000. (Tr. 54, 90 - 92)

In the mid-1980s, Applicant worked selling and installing garage doors. Between 1984 and 1986, he and another person had their own garage door business. The business failed in about 1987, when, according to Applicant, his partner stole about \$30,000 from the business bank account. Available information does not corroborate Applicant's claim that he was a victim in the business failure; however, the record does show that there was a falling out with his partner and that significant amounts of company funds were lost, possibly through his partner's malfeasance. As a result of that business failure, Applicant became delinquent on numerous business and personal debts. In 1987, he was discharged of 31 debts totaling in excess of \$64,000 (Gx. 10; Gx. 13 - 15; Tr. 61 - 62)

After his small business failed, Applicant returned to installing garage doors as an employee of other companies. In 1990, he suffered a severe neck injury on the job and was unable to work for most of the next two years. He supported himself through workmen's compensation, unemployment benefits and limited sales work. In about 1992, his brother hired him in a sales position, which he held until he and his second wife started their own garage door business in 1996. (Gx. 1; Gx. 2; Tr. 58 - 59, 62 - 64, 94 - 95)

Applicant and his wife stayed in business until about 2006. Applicant worked in the field selling garage doors and overseeing their installation. His ex-wife was their business manager who was responsible for paying their business expenses as well as managing their personal finances. He averred that the business then failed due to the cumulative effects of business downturns after the September 11, 2001, attacks and the deterioration of their marriage. Between 2003 and 2006, Applicant and his wife did not file their federal tax returns as required. Applicant blamed his wife for not filing because she generally handled their finances. However, he also acknowledged that he should have been more attentive to his financial responsibilities. Applicant has since filed all of his past-due tax returns and satisfied a debt for unpaid taxes totaling \$32,073.77, with interest and penalties. (Gx. 2; Ax. A3; Ax. A4; Ax. D; Ax. F; Tr. 76 - 82)

Credit reports obtained during Applicant's background investigation attributed to him additional debts totaling about \$10,852. Applicant averred that some of those debts actually belonged to his son. Only the son's middle name is different, but the middle initial is the same. This issue was also present during Applicant's previous background investigation. (Gx. 14) In about January 2011, Applicant asked a financial advisor, whom he had used for his most recent business venture, to help him verify the debts in his credit history and to negotiate account settlements with his creditors. The advisor determined that the debts at SOR 1.d, 1.f, 1.h - 1.j, 1.q and 1.s, totaling \$2,779, are actually the responsibility of Applicant's son. They likely stem from his son's own business problems. (Gx. 2; Ax. A2; Ax. E; Tr. 71 - 72)

Applicant has paid or resolved, through successful dispute with credit reporting services, all of the remaining \$8,073 of unpaid debt alleged at SOR 1.e, 1.g, 1.k - 1.n, 1.p, 1.r, and 1.t. (Ax. A2; Ax. A5 - 9) Applicant began paying off debts on his own during a one-year work assignment abroad. (Tr. 57, 64 - 65) His current finances appear to be sound. He has a significant positive cash flow each month, and he carries little personal debt aside from his mortgage obligations for the house in which his ex-wife still lives. (Ax. B)

Applicant continues to earn employment opportunities abroad through his reputation for reliability and professionalism. Several supervisors and co-workers from current and past projects recommend him for a position of trust because they have found him to be diligent, trustworthy, and honest. They also cite the absence of any breaches of security procedures as a basis for their recommendations. (Ax. B; Ax. C)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

material information,⁸ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent 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 security concerns and adjudicative factors addressed under AG ¶ 18 (Financial Considerations).

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.⁹ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, 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.¹⁰

Analysis

Financial Considerations

The Government presented information that showed Applicant has had significant financial problems for several years. In the mid-1980s, his debts forced him to file for Chapter 7 bankruptcy protection. More recently, he did not file his federal tax

⁸ Directive. 6.3.

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

returns as required for 2004 through 2006, in part, because he could not afford to pay his taxes. His most recent background investigation showed that he owed \$38,614 in delinquent debt for 17 accounts, of which \$27,762 was owed to the IRS. This information raises a security concern about Applicant's finances addressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, the Government's information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); AG ¶ 19 (c) (*a history of not meeting financial obligations*); and AG ¶ (g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

In response, Applicant presented information that showed his current finances are sound, he has no new delinquent or excessive personal debt, and he has a positive cash flow. His financial problems in the 1980s arose through a business failure. In the 1990s he suffered lost income after he was injured at work. In about 2006, he and his second wife, who was also his business partner, separated and divorced. Their business failed and he incurred expenses and debts from both the marriage and his business. Further, several debts were improperly attributed to him rather than his son, who was experiencing financial problems of his own. Finally, Applicant showed that he started paying his debts in 2009, that he has satisfied his tax debt, and that, with the help of a financial advisor, he has paid or successfully disputed the remaining debts alleged in the SOR.

All of the foregoing supports application of the mitigating conditions at AG ¶ 20(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*); AG ¶ 20(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*); AG ¶ 20(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*); AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*); and AG ¶ 20(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*). On balance, Applicant has mitigated the security concerns about his finances.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 60 years old and has experienced significant financial problems over the past 25 years. However, the record shows that he has acted prudently to resolve his debts and the circumstances from which they arose. He has acknowledged his responsibilities regarding his previously unfiled tax returns, and he has demonstrated that he is now complying with his obligations. Available information shows that Applicant is not likely to act in a manner inconsistent with the national interest should he be granted a security clearance. A fair and commonsense assessment of all available information bearing on Applicant's past and current circumstances shows that he has satisfactorily addressed the doubts, raised by his finances, about his ability to protect the Government's interests as his own.

Formal Findings

Formal findings 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.t: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge