



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



In the matter of:)
)
) ISCR Case No. 10-09039
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

February 6, 2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the Financial Considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOHA acted under Executive Order (EO) 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 on September 1, 2006.

Applicant answered the SOR on August 12, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 4, 2011. DOHA issued a notice of hearing on October 31, 2011, and the hearing was convened

as scheduled on November 17, 2011. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified and submitted exhibits (AE) A through C at the hearing, which were admitted into evidence without objection. The record was held open for Applicant to submit additional information. Applicant timely submitted AE D through S, which were admitted into evidence without objection. Department Counsel's post-hearing memorandum was marked HE II. DOHA received the hearing transcript (Tr.) on November 29, 2011.

Findings of Fact

Applicant admitted all of the SOR allegations. Those admissions are incorporated as findings of fact. After a review of the pleadings, testimony, and admitted exhibits, I make the following findings of fact.

Applicant is a 55-year-old employee of a defense contractor. He has worked for his current employer for 30 years. He is a quality engineer. He has a master's degree. He is divorced. He has two adult daughters and a step-daughter. One daughter and a grandchild reside with him. As of six months ago, his ex-wife also moved in with him. His annual salary is about \$81,000. He has not served in the military. He has held a security clearance for 29 or 30 years.¹

The SOR alleges five delinquent debts and a garnishment action for the delinquent payments on two vehicles. The largest debt is a federal tax lien in the amount of over \$56,000. The remaining debts—three credit card debts and a telephone-related debt—total about \$42,186. The garnishments were for two vehicles Applicant financed through a credit union. Those garnishment-related debts have been paid. The debts were listed on credit reports obtained on May 7, 2010; February 23, 2011; and June 8, 2011.²

Regarding the debt alleged in SOR ¶ 1.a., Applicant worked for his company in an overseas location from 1992 until 2007. During his last year at this location, he earned approximately \$140,000 annually. Additionally, he took advantage of federal tax benefits allowing the exclusion of part of his foreign income. In 2007, he accepted a stateside position with his company. He was given very short notice to move and relocate his family to the new location. He decided to purchase a house in the new location. To finance the purchase, he used funds from his 401k retirement plan. At that time, the fund contained approximately \$500,000. He took out \$128,000 directly and took a loan out for \$40,000. Installment payments from his paycheck were used to start paying back the loan. The \$168,000 was used as a down payment for the purchase of his \$323,000 home. Because he took out \$128,000 directly from the fund, he was required to pay income taxes and a 10% early withdrawal penalty on this amount for tax year 2007. Applicant claims no taxes were deducted at the time he received the money.

¹ Tr. at 5, 29-31, 95; GE 1.

² GE 4-6.

Subsequently, when his accountant prepared his 2007 tax return, Applicant was deemed to owe over \$68,000. He did not have the funds to pay that amount and the IRS filed a tax lien on his property. He set up a payroll deduction payment plan with the IRS beginning in January 2010. Under the initial plan, he paid \$1,000 per month (\$250 per week) toward the tax debt. In September 2010, he had that amount reduced to \$700 per month. Additionally, his 2010 federal tax refund in the amount of \$8,000 was seized by the IRS.³

The debts alleged in SOR ¶¶ 1.b through 1.d are credit card-related debts. They were used for the purchase of general items when he came back to the United States in 2007. Since he was making much less money than when he has overseas, the credit cards were used to make ends meet. The accounts became delinquent and were sold to collection agencies. For a short time, from May 2011 to August 2011, small payments of \$10 or \$20 per month were made toward these debts. However, in August 2011, the creditor for SOR debt ¶ 1.b demanded a higher monthly payment in the amount of \$150. There is no evidence to show Applicant paid the higher amount. Despite Applicant's hearing testimony where he stated he did not want to file for bankruptcy, his post-hearing submission included a Chapter 7 bankruptcy filing on December 27, 2011. No Schedule F (showing unsecured debts) was included in the exhibit, but Applicant's latest budget, also submitted post-hearing, indicated all his debts were included in the bankruptcy.⁴

The debt alleged at SOR ¶ 1.e is a delinquent telephone debt. Applicant stated that the large bill was incurred when his daughters used the cell phone to call their overseas mother on numerous occasions. This debt is still outstanding and was included in the bankruptcy filing.⁵

Prior to returning to the United States in 2007, Applicant sold one car and gave his ex-wife a second car. These cars were financed through a credit union. Balances remained after the sale and gift. The credit union obtained a judgment and ultimately garnished Applicant's wages. Applicant received a payment-in-full letter from the credit union in April 2011.⁶

Although not alleged in the SOR, Applicant's testimony revealed that he was two months behind on his mortgage payments. He submitted a post-hearing mortgage statement showing a past-due amount of \$4,421. His monthly mortgage payment is approximately \$1,475. In a statement to an investigator, Applicant admitted he had poor money management skills. He has approximately \$245,000 in his 401k account, but because of his previous withdrawal and current loan, he cannot access this account until he is 59½ years old. He received financial counseling through the bankruptcy

³ Tr. at 35-36, 38, 48, 53-54, 58; GE 2.

⁴ Tr. at 62-63, 66, 70, 73, 75; GE 2; AE E, G.

⁵ Tr. at 77-79; AE E, G.

⁶ Tr. at 80-83; GE 2; Applicant's Answer to SOR (Answer).

process and by contacting online financial consultants. He submitted job performance evaluations from 2009 through 2011. He was rated as a “Basic Contributor” on his most recent evaluation and as a “Successful Contributor” on his two earlier evaluations. The evaluation range is from unsatisfactory to basic contributor to successful contributor to high contributor to exceptional contributor.⁷

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 that 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, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable 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 about potential, rather than actual, risk of compromise of classified information.

⁷ Tr. at 33, 99, 101-102, 113; GE 2; AE F, H-J.

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* Executive Order 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 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.

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 currently is indebted to the IRS and is making monthly payments towards satisfaction of the debt. He is also delinquent on four credit card debts and a telephone debt. He recently filed a Chapter 7 bankruptcy in an attempt to have those debts discharged. He had his wages garnished to satisfy two delinquent car loans. The evidence is sufficient to raise the above disqualifying conditions.

Several 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; and

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

Applicant's delinquent debts are recent and numerous. Additionally, his failure to properly pay the taxes associated with his early 401k withdrawals and the garnishment of his wages to satisfy car loans cast doubt on his trustworthiness, reliability, and good judgment. AG ¶ 20(a) is not applicable.

Applicant made a conscious decision to withdraw funds from his retirement account in order to make a down payment on his new home. He should have understood the tax consequences of that transaction. The resulting tax debt was not beyond his control. Using his credit cards and taking out the car loans were also within his control. AG ¶ 20(b) is not applicable.

The only evidence of financial counseling is Applicant's seeking bankruptcy relief and seeking online financial assistance. Applicant initially paid nominal amounts towards the debts. More recently he chose to pursue protection under Chapter 7 bankruptcy. However, seeking bankruptcy relief is not a good-faith effort to repay his debts.⁸ Although AG ¶ 20(c) partially applies, ¶ 20(d) does not. At this point, Applicant's finances remain a concern despite the presence of some mitigation.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

⁸ The 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 Financial Considerations Mitigating Condition 6, 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 Financial Considerations Mitigating Condition 6.

(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. Jun. 4, 2001)).

(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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's years of service to his employer and his recent job evaluations. I also considered the fact that he is paying a heavy financial price for making an early withdrawal from his 401k plan. However, by his own admission, Applicant is a poor money manager. His past financial track record reflects a troublesome financial history that causes me to question his ability to resolve his debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations 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 – 1.f:	Against 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.

Robert E. Coacher
Administrative Judge