



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



In the matter of:)
)
) ISCR Case No. 10-10859
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

January 19, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to pay federal payroll taxes and acquired significant debt. His wife’s illness, divorce, and small earnings contributed to his inability to pay his debts. Since 2008, he has taken action to resolve his debts, established a record of financial responsibility, and demonstrated that his financial problems are being resolved. He now understands what is required of him to be eligible for a security clearance. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 5, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

Applicant's request for a security clearance. On August 2, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (Financial Considerations) of the adjudicative guidelines (AG).²

Applicant answered the SOR on September 8, 2011. He requested a hearing before an administrative judge. The case was assigned to me on October 13, 2011. DOHA issued a notice of hearing on October 25, 2011, convening a hearing on November 15, 2011. At the hearing, the Government offered exhibits (GE) 1 through 10. Applicant testified, and offered exhibits (AE) 1 through 11. AE 11 was received post-hearing. It includes the Government's cover letter indicating it did not have any objection to me considering Applicant's post-hearing submission, an extract of Chapter 7 of the Bankruptcy Code, and an extract of the Internal Revenue Manual. All exhibits were received without objection. DOHA received the transcript of the hearing (Tr.) on November 23, 2011.

Findings of Fact

Applicant denied all SOR allegations. After a thorough review of the evidence of record, and having observed his demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 51-year-old program manager employed by a defense contractor. He attended high school, but his not graduate because his father died and he had to start working. Applicant married his fist wife in 1979 and they divorced in 1982. He married his second wife in 1984, and they divorced in 2008. He has four adult children of this marriage. He married his current wife in December 2008. He has three step-children of this marriage, ages 22, 17, and 15. The two younger children reside with Applicant, and he provides financial assistance to them. Applicant's spouse is a nurse. She earns approximately \$42,000 a year, and she contributes to the household finances.

Between 1989 and 2000, Applicant established two companies. The first company failed in 1998, and the second company failed in 2000. He has worked for his employer, a government contractor, since December 2001.

In his answers to the financial questions in his May 2010 SCA, Applicant disclosed that during the last seven years he had property repossessed, federal and state liens filed against him, defaulted on loans, and debts charged off and turned over to collection agencies. Applicant's background investigation addressed his financial and tax problems. The investigation revealed the nine delinquent debts alleged in the SOR, which are established by the record evidence and Applicant's testimony.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

The \$4,074 debt alleged in SOR ¶ 1.a resulted from a civil penalty, plus interest, imposed by the IRS against Applicant for deficiencies during tax year 2000. It is not clear from the evidence when the IRS notified Applicant of the assessment against him. However, the IRS filed a lien against Applicant in April 2011. Applicant's IRS documents establish that he started making payments on this debt in July 2010. Applicant paid the debt and the lien was released in September 2011. (AE 11)

Applicant and his wife acquired the \$15,733 debt to the IRS alleged in SOR ¶ 1.b when she accepted an inheritance in 2009. Apparently, she miscalculated the federal and state estate tax owed. Applicant established a payment plan in December 2010. He has been paying \$297 a month since then. Additionally, the IRS is retaining Applicant's income tax returns and applying it to the debt.

The debts alleged in SOR ¶¶ 1.c through 1.e are the result of Applicant's failure to pay payroll taxes for his two companies' employees during tax years 1995, 1999, and 2000. He acquired approximately \$120,000 in debt to the Internal Revenue Service (IRS) (SOR ¶¶ 1.a and 1.c through 1.e). Applicant explained that when his first company began to fail (between 1995 and 1998), he used the payroll tax money to keep the business going. He established the second company from 1998 until 2000. He averred that during this period, unbeknown to him, his business manager embezzled the money and did not pay the payroll taxes. (See AE 9)

The IRS started its collection efforts in 2000, applying Applicant's yearly income tax returns to the debt. Additionally, the IRS filed liens against Applicant's properties. One of Applicant's real estate properties was foreclosed and sold in auction by the IRS in 2007-2008. The proceeds of the sale, approximately \$30,000, were applied to Applicant's debt. In 2008, Applicant started paying \$125 a month to the IRS. He increased his monthly payment to \$300 a month in 2011. As a result of the above IRS's collection efforts and Applicant's payment plan, he paid in full the debts alleged in SOR ¶¶ 1.a and 1.c through 1.e. All the IRS liens filed against Applicant concerning his failure to pay the payroll taxes were released in September 2011. (AE 9)

Concerning the debt alleged in SOR ¶ 1.f, Applicant explained that he purchased a house in 1998. He was renting the home, but the tenants vacated the property in 2005-2006. Because of his financial problems, Applicant was unable to pay the mortgage and the home owners' association (HOA) dues. The HOA obtained multiple judgments against Applicant for the HOA assessments, which are alleged in SOR ¶ 1.f. The bank foreclosed the property for lack of payment, and sold it in auction. Because the IRS had filed liens against the property, the IRS invalidated the bank's foreclosure and the sale of the property. The IRS then foreclosed on the property and sold it. Part of the proceeds of the sale of the home was applied to Applicant's IRS debts.

Applicant and the HOA believe that Applicant's responsibility for the past due HOA assessments terminated when the property was foreclosed and sold. Applicant is disputing this debt. The HOA believes that the judgments were "wiped out" through the foreclosure and that payment is not necessary. (GE 7) Notwithstanding, since April

2009, Applicant has been making good-faith payments of \$10 a month to the HOA, just in case the foreclosure did not release him of financial responsibility.

SOR ¶ 1.g alleges a judgment filed against Applicant for a delinquent credit card debt of \$2,981. Applicant admitted this is his debt. In February 2009, he established a payment plan of \$105 a month. He has been consistently making his payments. As of October 2011, his balance was \$991.

SOR ¶ 1.h alleges a \$22,000 judgment filed against Applicant in 2001 for legal services provided to one of his failed companies. Applicant testified that he believes he was discharged of the judgment when he and his company filed for Chapter 7 bankruptcy protection in 1997. He presented no documentary evidence to corroborate his claims. He averred that he received no collection notices after he filed for bankruptcy protection. He became aware of the judgment as a result of the security clearance process. Applicant promised to pay this debt if it was not discharged through the bankruptcy process.

SOR ¶ 1.i alleges an \$8,600 tax debt owed to Applicant's state of residency. Applicant explained that he and his wife acquired this debt in 2009, when she accepted his father's inheritance. Applicant started a \$300 a month payment plan in January 2011. As of his hearing date, he owed \$4,483. (AE 7)

Applicant was candid and forthcoming during his hearing. He readily accepted responsibility for his failure to pay his payroll taxes. He acknowledged that he was negligent in the handling of his payroll taxes. Applicant explained, not as an excuse for his questionable behavior, but to place his behavior in the context of his personal and financial circumstances, that at time he failed to pay the payroll taxes, his company was in financial trouble. He used the payroll taxes to keep the business going. He was planning to repay the payroll taxes when his financial situation improved.

Applicant's financial problems were exacerbated by his second wife's prolong illness and the resulting medical expenses. Because of her illness, she was unable to work. Applicant was the sole household provider. Additionally, around 2008, Applicant went through a contentious divorce with his second wife, prompted in part, because of his poor economic situation. After the divorce, Applicant was required to pay alimony and part of his ex-wife's medical expenses.

Applicant testified that he was not able to address all his delinquent debts sooner because of his limited earnings. Applicant's current yearly salary is \$122,000. His current wife is employed and she is contributes to the household finances. With her help, he was able to establish payment plans in 2008 with the IRS and other creditors. He intends to pay all his debts one at a time.

Applicant has not acquired any large debts since 2008. He carries one consumer credit card because he needs to re-establish his credit rating. He has no personal loans or any other delinquent accounts, except for those listed in the SOR. His wife owns the

home where they live, and he drives a 2003 car. Applicant and his wife follow a budget and they limit their discretionary expenses to pay their delinquent debts. He has a monthly net remaining income of \$1,200 after paying all his delinquent debts. He uses his remaining income to provide financial assistance to his stepchildren as they are attending college. He has approximately \$8,000 in a savings account.

Applicant credibly expressed remorse for his negligence in handling his payroll taxes. He understands his legal responsibilities. He also is aware of the security clearance consequences of his actions, and what is expected of him to be eligible for a security clearance. Applicant's direct supervisor considers Applicant to be a valuable asset with excellent skills and experience. He has been instrumental in achieving customer satisfaction from the government agency they serve. Overall, Applicant is considered to be dedicated to accomplishing the company's mission and demonstrates excellent work ethic, loyalty, and integrity.

Policies

The Secretary of Defense may grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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. AG ¶ 18.

Applicant failed to pay federal payroll taxes during tax years 1995, 1999, and 2000. He acquired approximately \$120,000 in debt to the IRS. Additionally, he and his wife owe the IRS and his state approximately \$24,000 for unpaid estate taxes. He also acquired three debts that were delinquent for several years. He has established payment plans with the IRS, his state, and all of his creditors, except one. AG ¶ 19(a): “inability or unwillingness to satisfy debts”; AG ¶ 19(c): “a history of not meeting financial obligations”; and AG ¶ 19(d): “deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust” apply.

AG ¶ 20 provides five conditions that could mitigate the financial considerations security concerns:

- (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;

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

(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 his dispute or provides evidence of actions to resolve the issue.

Applicant's good-faith efforts to resolve his delinquent obligations started in 2008. He paid the four alleged IRS debts resulting from his failure to pay the payroll taxes. (SOR ¶¶ 1.a and 1.c through 1.e) He has been making consecutive payments to the IRS and his state for the estate taxes owed. (SOR ¶¶ 1.b and 1.i) And, he has been making consecutive payments to two other creditors. (SOR ¶¶ 1.f and 1.g) Of the alleged debts, only SOR ¶ 1.h is unresolved. Applicant disputed that debt because he believes it was discharged through one of his bankruptcy filings. However, he failed to present documentary evidence to support his claim.

AG ¶ 20(a) does not apply. Applicant's financial problems are recent. Considering the number of debts, how he acquired his delinquent debts, and the period they were delinquent, his financial problems cannot be considered infrequent. His payroll tax debts were not acquired under extraordinary circumstances.

AG ¶ 20(b) applies, but does not fully mitigate the financial considerations concerns. Applicant's second wife's prolonged illness, his divorce, his two businesses' failure, his low earnings, and the two tax debts acquired as a result of his wife's inheritance are circumstances beyond his control that contributed to his inability to resolve his financial problems. It does not fully mitigate the financial concerns because Applicant was negligent and financially irresponsible when he failed to pay the payroll taxes. He also should have been more diligent in addressing his other financial obligations.

AG ¶¶ 20(c) and (d) apply. Since 2008, Applicant has been making good-faith efforts to pay all of his delinquent financial obligations, except one. He established payment plans and has been making his payments as agreed. Although he did not

present evidence of financial counseling, he and his wife have been following a budget and implementing financial lifestyle changes to reduce their expenses. He has not acquired additional debts or loans. His monthly net remainder and savings account demonstrate he is not financially overextended. He established a realistic plan to pay his debts and he has been paying his debts since 2008. Applicant intends to pay all of his legal obligations.

AG ¶ 20(e) applies to the debt alleged in SOR ¶ 1.f. Applicant is disputing that debt, and the creditor agrees with his position. Furthermore, he is making small payments on that debt just in the event he loses his dispute. Applicant claimed that the debt alleged in SOR ¶ 1.h was discharged either through his company's or his personal Chapter 7 bankruptcy filing. He failed to present documentary evidence to support his claim. The record evidence shows the judgment is outstanding. Applicant promised to pay this debt, if he is legally liable, after he pays his other delinquent obligations. Considering his efforts to pay his delinquent debts since 2008, Applicant's promise to pay this debt is credible. AG ¶ 20(f) is not pertinent to the facts in this case.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated in my whole-person analysis my comments on the analysis of Guideline F.

Applicant demonstrated financial irresponsibility, lack of judgment, and an unwillingness to abide by rules and regulations when he failed to pay his payroll taxes. He also should have been more diligent in his efforts to resolve his delinquent financial obligations. Notwithstanding, Applicant's failure to promptly address his financial problems could be attributed, in part, to circumstances beyond his control. After Applicant remarried in 2008, his financial situation improved. With his wife's financial assistance, Applicant started to resolve his financial problems and he is making significant progress. He resolved (he paid or is current on his payment plans) all of his delinquent debts, except one.

Considering the record as a whole, I find that his actions since 2008 mitigate the financial considerations security concerns. He initiated good-faith payments on his debt and established payment plans. He has been consistently complying with his payment plans. He has established a track record of financial responsibility, demonstrated that his financial problems will be resolved in the foreseeable future, and that they are unlikely to recur.

Applicant has matured as a result of his previous financial mistakes and business failures. He now has a stable, important position that provides him and his family with a substantial income. He is remorseful about his past questionable behavior. Moreover, through his remediation actions since 200, he has demonstrated that he has learned his

lesson. He now understands what is required of him to be eligible for a security clearance. He mitigated the security concerns raised under financial considerations.

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.i: | For Applicant |

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge