



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



In the matter of:)
)
) ISCR Case No. 11-03073
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

01/21/2016

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On October 28, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on November 14, 2014, and requested a hearing before an administrative judge. The case was originally assigned to me on February 27, 2015. Scheduling of the case was delayed because Applicant was working overseas. The case was reassigned to me on May 4, 2015. After coordinating with the parties, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing

on July 16, 2015, scheduling the hearing for August 18, 2015. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on August 26, 2015.

Evidentiary Rulings

Government Exhibits (GE) 1, 2, 4, 5, and 6 were admitted in evidence without objection. GE 3 was admitted over Applicant's objection. Applicant testified, called five witnesses, and submitted Applicant's Exhibits (AE) A through Z, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted documents that I have marked AE AA and BB¹ and admitted without objection.

Findings of Fact

Applicant is a 57-year-old self-employed contractor for a defense contractor. He served in the U.S. military from 1979 until he retired in 2000. He seeks to retain a security clearance, which he has held since he was in the military. He attended college for a period, but he is a few credits shy of a degree. His first marriage ended in divorce. He has been married to his current spouse for more than 25 years. He has two adult children.²

Applicant spent the majority of his military career in special operations. He went on numerous combat missions, conducted clandestine insertions, and operated undercover. When he retired he became an entrepreneur and started his own companies. His primary company was incorporated, but Applicant had to personally guarantee many of the company's liabilities. He also invested in real estate. His primary company suffered significant setbacks during the recession and housing crisis of the later part of the 2000s. His real estate properties lost much of their value. He closed his primary company in 2009 and has been working since then as a self-employed contractor and subcontractor for other companies. He has spent much of the last five years working overseas in dangerous assignments.³

The SOR alleges nine delinquent debts, which include a \$58,161 judgment (SOR ¶ 1.a), mortgage loans (SOR ¶ 1.c - \$30,994; SOR ¶ 1.d - \$351,562; SOR ¶ 1.e - \$271,900; and SOR ¶ 1.f - \$50,688), two business-related debts (SOR ¶ 1.b - \$18,028 and SOR ¶ 1.h - \$77,115) and federal taxes (SOR ¶ 1.g - \$33,882 for tax year 2008, and SOR ¶ 1.i – no amount alleged for tax years 2012 and 2013). Applicant admitted owing most of the debts at some point, but several of the debts were paid, settled, or otherwise resolved.

¹ Counsel marked the post-hearing submissions as Z and AA, but AE Z was already admitted at the hearing.

² Tr. at 118, 123-127, 184; GE 1, 3 AE A.

³ Tr. at 28-31, 120, 127-131; GE 1, 3; AE A, T.

Applicant's primary company was growing, and it leased a larger warehouse in about 2008. The business ultimately failed, and the company broke the lease. The owner of the warehouse sued Applicant personally and obtained a \$58,161 judgment against him (SOR ¶ 1.a). Applicant's attorney is negotiating a settlement on this judgment.⁴

Applicant and a partner had a falling out over the business. The ex-partner sued Applicant for \$160,000. They reached a settlement through arbitration in which Applicant agreed to pay the ex-partner \$163,000 by 2010. He paid about \$86,000, but he was unable to pay the remainder when the company closed. The partner either obtained a judgment for \$77,000 or sought to enforce the arbitrated settlement. Applicant's attorney is negotiating a settlement for the remainder owed to the ex-partner.⁵

In February 2013, Applicant settled the \$20,302 business credit card debt alleged in SOR ¶ 1.b (alleged as \$18,028 in SOR) for \$10,151, which was paid in February 2013. Applicant submitted proof in his response to DOHA interrogatories in May 2014 that the debt had been settled. The February 2014 credit report lists the account with a zero balance, with the annotation that it was transferred, sold, and paid.⁶

Applicant was due a refund from his 2007 federal income taxes, but he owed the IRS for tax year 2008. The IRS filed a \$33,882 tax lien against Applicant in June 2010 (SOR ¶ 1.g). In January 2011, the IRS applied his \$15,892 refund from his 2007 taxes to his 2008 taxes. Applicant paid the remaining \$5,689 owed for 2008 in January 2013. The 2014 credit reports obtained by the Government report the lien as released in January 2013.⁷

Applicant owed the IRS \$65,863 for his 2012 and 2013 federal income taxes. In April 2015, he submitted a proposed installment agreement to the IRS whereby he would pay an initial \$915 and then \$500 per month until paid. In July 2015, the IRS accepted Applicant's installment agreement and added his 2014 taxes. On June 5, 2015, Applicant paid the IRS \$56,415 for his 2014 taxes. On July 9, 2015, he paid \$10,000 toward his estimated taxes for 2015.⁸

Applicant used to own five properties consisting of his residence and four rental properties. Some of his tenants did not pay their rent, and he also had a property vacant for an extended period. Applicant bought his home and another property when he was in the military. He still has those properties, plus another, but he lost two properties to foreclosure. SOR ¶¶ 1.d and 1.f allege the first (\$351,562) and second (\$50,688)

⁴ Tr. at 132-133, 173-175, 185-186; Applicant's response to SOR; GE 3; AE X, BB.

⁵ Tr. at 176-177, 188-190; Applicant's response to SOR; GE 1, 3; AE BB.

⁶ Tr. at 151, 177-178; Applicant's response to SOR; GE 3-6; AE M, O.

⁷ Tr. at 134-140; Applicant's response to SOR; GE 1, 3; AE Q.

⁸ Tr. at 127, 140-148; Applicant's response to SOR; GE ; AE R, S, V.

mortgage loans on one of the foreclosed properties. The \$351,562 figure is listed on the credit reports as the high credit on the first mortgage loan, not a balance. The 2010 credit report lists the account before foreclosure as \$8,609 past due, with a \$274,274 balance. The more recent credit reports list the first mortgage loan as foreclosed with a zero balance. TransUnion reported in August 2015: "Credit grantor reclaimed collateral to settle defaulted mortgage[.] Foreclosure proceedings started[.]"⁹

The second mortgage loan is listed on the three oldest credit reports with a \$50,688 balance. Equifax reported a \$50,688 balance in the combined credit report from August 2015. TransUnion reported the loan as closed with a zero balance. Applicant's online account snapshot of the second mortgage loan shows a zero balance. Applicant stated that he thought the first and second mortgage loans were resolved by the foreclosure. He has never been contacted by the holders of the first and second mortgage loans seeking a deficiency owed on the loans.¹⁰

SOR ¶ 1.e alleges the mortgage loan (\$271,900) on the second foreclosed property. The \$271,900 figure is listed on the credit reports as the high credit on the mortgage loan, not a balance. The reports list a zero balance for the loan. The 2010 and 2015 credit reports list the account as "Foreclosure redeemed," and "Credit grantor reclaimed collateral to settle defaulted mortgage[.]" Applicant has never been contacted about a deficiency owed on the loan.¹¹

SOR ¶ 1.c alleges the \$30,994 charged-off second mortgage loan on Applicant's home. He settled the debt for \$7,517, which he paid in August 2015. Applicant is current on the first mortgage loan on his residence and the mortgage loans on his two remaining investment properties.¹²

Applicant paid other debts that were not alleged in the SOR. He repaid a \$10,000 loan from his former commanding officer. He borrowed \$50,000 from a friend who he served with in the military in an effort to maintain his business. He paid the friend and then his friend's widow after his friend passed away. Applicant made the last payment of \$14,000 in August 2015.¹³

Applicant's accountant, friends, and business associates recommended that he file bankruptcy to discharge the debts accrued from his failed business and the real estate collapse. He chose not to file bankruptcy because he wanted to pay his debts, and he was afraid that a bankruptcy would adversely affect his security clearance. He has been working overseas under dangerous conditions during the last five years to

⁹ Tr. at 151, 186-187; Applicant's response to SOR; GE 3-6; AE O.

¹⁰ Tr. at 151-156, 188; Applicant's response to SOR; GE 4-6; AE O, P.

¹¹ Tr. at 151, 187-188; Applicant's response to SOR; GE 4-6; AE O.

¹² Tr. at 156-163, 179; Applicant's response to SOR; GE ; AE AA, BB.

¹³ Tr. at 65, 170-173, 192-193; Applicant's response to SOR; GE 3-6; AE O, Z.

earn the money that has enabled him to pay his debts. He credibly testified that it will take time, but he is committed to resolving all his debts.¹⁴

Applicant's character evidence was extraordinary. He submitted numerous letters and several witnesses testified. Many of the authors and witnesses served with Applicant in special operations. His former commanding officer testified that he served with Applicant under conditions that the commanding officer modestly described as "quite stressful." The endorsements of the witnesses and authors were unequivocal and exceptional.¹⁵

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."

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 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

¹⁴ Tr. at 50, 180-181, 190-193, 197; Applicant's response to SOR; GE 3 ; AE A, U, W, Y.

¹⁵ Tr. at 25-28, 50-51, 62-74; AE B-L, T.

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. The following are potentially applicable in this case:

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

Applicant had delinquent debts that he was unable or unwilling to pay. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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 owed and still owes a lot of money, but the SOR overstated his debts. The evidence available to the Government (credit reports and documents submitted by Applicant in response to interrogatories) established that before the SOR was issued, Applicant settled the \$18,028 debt alleged in SOR ¶ 1.b, and he paid the IRS the \$33,882 alleged in SOR ¶ 1.g. Additionally, the SOR alleged the high credit on the two mortgage loans (SOR ¶¶ 1.d - \$351,562 and 1.e - \$271,900), when the balances on those loans were reported as zero.

Applicant paid his 2008 federal income taxes. He has a payment plan in place for his 2012 and 2013 tax years. He settled and paid the second mortgage loan on his home, and he paid other debts that were not alleged in the SOR. His attorney is negotiating settlements for the two judgments against him. Applicant credibly testified that it will take time, but he is committed to resolving all his debts.

I find that Applicant established a plan to resolve his financial problems, and he took significant action to implement that plan. He acted responsibly and made a good-faith effort to pay his debts. There are clear indications that his financial problems are being resolved and are under control. They occurred under circumstances that are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(c) and 20(d) are applicable. AG ¶ 20(b) is partially applicable. AG ¶ 20(a) is not yet completely applicable because Applicant is still in the process of paying his debts.

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):

(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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis.

Applicant's character evidence was extraordinary. His financial problems are large, but not insurmountable. Applicant credibly testified that he will eventually resolve all his debts. His sacrifices in service to this country have earned him the time to do so.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant 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:	For Applicant
Subparagraphs 1.a-1.i:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge