



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 11-08840
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

04/11/2013

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s financial problems arose from a combination of unforeseen circumstances that caused his business to fail in 2004, and his decision to not file tax returns for four tax years between 1999 and 2003. After initially taking reasonable steps to resolve his debts, Applicant has not followed through on his efforts since about 2008. Despite having extra time to do so, he did not document his claims that his debts are being resolved. Clearance is denied.

Statement of the Case

On March 24, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his work as an employee of a federal contractor. After reviewing the results of the ensuing background investigation, Department of Defense (DOD) adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant’s access

to classified information.¹ On August 29, 2012, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline² for financial considerations (Guideline F).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on December 19, 2012, and I convened a hearing on January 24, 2013. DOHA received the transcript of hearing (Tr.) on January 30, 2013.

Department Counsel presented Government Exhibits (Gx.) 1 - 6, which were admitted without objection. (Tr. 24 - 33) Applicant testified and proffered one exhibit, which was admitted without objection as Applicant's Exhibit (Ax.) A. (Tr. 33 - 35) Additionally, I left the record open after the hearing to receive additional information from Applicant. His timely post-hearing submissions were admitted without objection as Ax. B, and the record closed on February 11, 2013.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes approximately \$7,743 for unpaid taxes over two separate tax years (SOR 1.a and 1.b); and that he owes approximately \$43,062 for ten other debts (SOR 1.c - 1.i). Applicant admitted SOR 1.a and 1.b.

As to the remaining allegations, Applicant he stated "no longer active" in response to each. (Answer) At hearing, he stated that he does not contest any of those allegations, except for SOR 1.h. Applicant disputes that debt, a past-due county tax bill for \$2,679, and avers that it has been paid. I find that, with the exception of SOR 1.h, Applicant admitted all of the SOR debts, but has raised an affirmative defense as to SOR 1.c - 1.g and 1.i - 1.i. (Tr. 10 - 12) Applicant's admissions are incorporated herein as facts. Having reviewed the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 42 years old and employed by a defense contractor as a project manager. He was hired by his current employer in October 2010. He and his wife have been married since March 1995 and have four children between age 5 and 15. After high school, Applicant served in the Army National Guard until 1989. (Gx. 1; Gx. 2)

Most of Applicant's employment history consists of work in the construction industry. Applicant owned his own roofing company between 1994 and 2005. It was a successful venture in that Applicant had several employees and subcontractors working on about 300 homes each year. At its peak, Applicant's business grossed about \$500,000 annually. However, in June 2004, Applicant suffered a serious leg injury that

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² 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).

required surgery, hospitalization and rehabilitation. His surgery was complicated by infections and a pulmonary embolism. Applicant was unable to work for more than six months. He never regained his ability to climb ladders and participate in the daily work of his roofing business. He still has only limited use of one leg because of damage to his ankle. The debt alleged at SOR 1.l represents an unpaid medical bill referred for collection. (Gx. 1; Gx. 2; Gx. 5; Tr. 45 - 47, 69)

A foreman working for Applicant took over managing the business after Applicant was injured. Unfortunately, the foreman mismanaged the company's finances. The business lost work and bills to suppliers went unpaid. Eventually, due to unpaid bills and a downturn in the construction industry, the business failed. The debts alleged at SOR 1.c and 1.d represent about \$21,000 past-due to two of Applicant's materials suppliers. Applicant also used personal credit cards to pay smaller business expenses. He was unable to keep those accounts current. The debts alleged at SOR 1.e - 1.g represent his delinquent credit card accounts. Also, the debt alleged at SOR 1.i is a business-related debt that has been delinquent since Applicant's business failed. (Gx. 2; Gx. 5; Tr. 46 - 47, 58, 69, 73 - 74)

Two other debts, alleged at SOR 1.j and 1.k, may or may not be related to Applicant's roofing business. Applicant could not provide much insight into those accounts, but testified that the SOR 1.j may be for a leased vehicle. (Gx. 2; Gx. 5; Tr. 62 - 64)

Applicant did not file his tax returns on time for tax years 1999, 2001, 2002, or 2003. He did not have the money to pay his taxes for those years, and he did not realize he could have filed his returns and worked out an agreement with the Internal Revenue Service (IRS) to satisfy his obligations. In 2005, a tax lien was perfected against Applicant for \$19,257 owed for tax years 1999, 2001, and 2002. In 2009, a \$1,680 lien for 2003 unpaid taxes was levied against Applicant. There is no repayment plan in place involving an agreement between Applicant and the IRS, but the total debt owed has been reduced to the amounts alleged in SOR 1.a and 1.b through involuntary diversion of tax refunds each year. Applicant estimates his tax refund for 2012 will be about \$3,000, and that his tax debt will be paid off in this way in a few years. (Answer; Gx. 2; Gx. 3; Gx. 5; Tr. 37 - 39, 50 - 53, 75 - 76)

After Applicant's roofing business failed, Applicant sold his house and moved his family to their current place of residence for a fresh start. He made about \$60,000 from the sale of the house. Applicant testified that he used those funds to pay off loans on his company vehicles, which he claimed were then sold to satisfy other unspecified business obligations. Applicant avers the county tax debt alleged at SOR 1.h is for taxes he already paid on those vehicles. He cited the absence of this debt from his credit reports as proof of his claim. Applicant stated he also used about \$15,000 from the sale of his house to pay moving expenses and rent deposits. To pay off his debts, Applicant filed for Chapter 13 bankruptcy protection in 2006. He made the required \$800 monthly payments until December 2008, when he could no longer afford to do so. The plan was

dismissed after he had paid about \$15,000 on the \$40,000 in debts included in the petition. (Gx. 2; Gx. 3; Gx. 4; Gx. 6; Tr. 40 - 44, 54 - 57, 60 - 61, 79 - 80, 86)

Applicant's background investigation produced a credit report that substantiates all of the debts alleged in the SOR. In response to interrogatories about those debts, Applicant stated they had all been settled. He provided a July 8, 2012 credit report as support for his claims, but that report did not mention any of the debts addressed in the interrogatories. At hearing, Applicant presented a January 21, 2013 credit report in support of his testimony that his debts have been resolved. That report did not address the debts in the SOR. (Gx. 2; Gx. 6; Ax. A)

From 2006 until 2010, he worked in construction jobs making between \$50,000 and \$65,000 annually before being laid off in April 2010. He was unemployed for four months before his current employer hired him. His starting annual salary in his current job was about \$72,000 in 2010. He now makes about \$82,000 annually. His wife had not worked outside the home for most of their marriage, as she stayed home to care for their children. However, in September 2012, she started working as a part-time substitute teacher, which produces a net monthly income of about \$1,000. (Gx. 1; Tr. 64 - 67, 81 - 84)

In July 2012, Applicant provided a personal financial statement (PFS) which showed a negative cash flow each month. However, with his increased annual salary and his wife's part-time income, Applicant now estimates he has between \$200 and \$500 remaining each month after expenses. Applicant and his wife use three credit cards, each current with modest balances of about \$250. (Gx. 3; Tr. 67 - 68, 90 - 91)

The record remained open after hearing to afford Applicant more time to produce documentation of his dispute regarding SOR 1.h, and his claims that he has paid or otherwise resolved some of his remaining debts. The information received post-hearing, however, did not address his debts or repayment efforts. Instead, it consists of positive statements about Applicant's reliability and character. That information shows Applicant is an excellent employee who has established a reputation in the workplace for reliability and trustworthiness. (Ax. B; Tr. 61, 111)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,³ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). 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:

³ See Directive. 6.3.

(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 determinative of a conclusion for or against an applicant. 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.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. 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.⁵

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.⁶

Analysis

Financial Considerations

The Government's information, along with Applicant's admissions, supported all of the SOR allegations. The facts established raise a security concern that is articulated, in relevant part, at AG ¶ 18 as follows:

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

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, available 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 ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

Applicant's response to the Government's information requires consideration of the following AG ¶ 20 mitigating conditions:

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

Applicant's financial problems are recent and not isolated. He claimed that some of the alleged debts have been resolved but provided insufficient information to support his claims. He still has significant unresolved debt that arose almost ten years ago. AG ¶ 20(a) does not apply.

In support of AG ¶ 20(b), Applicant averred that his financial problems arose from a severe leg injury that, in turn, caused his roofing business to fail. This information

partially satisfies the first prong of AG ¶ 20(b), but it does not explain his failure to file his tax returns for tax years 1999, 2001, 2002, or 2003. Further, Applicant fell short of showing that he acted responsibly under the circumstances. He testified he used the proceeds of the sale of his home to pay off vehicles and other assets from his business, and that he then sold those assets. His testimony indicated there could have been in excess of \$40,000 in proceeds from the sale of his home, after paying for relocation to his current location, that could have been applied to some of his debts. Yet, despite having additional time after his hearing, he did not corroborate his efforts to resolve any of his debts.

The reduction in Applicant's tax debt occurred only through involuntary diversion of his tax refunds, rather than Applicant's negotiation with the IRS in response to tax liens against him. Applicant's Chapter 13 bankruptcy was a responsible way to resolve his debts; however, before it was dismissed in 2008 for failure to pay, there is no indication Applicant tried to negotiate better terms. After the Chapter 13 was dismissed, it does not appear Applicant continued to resolve his debts on his own using money he would have been paying to the Chapter 13 plan. Without additional information from Applicant, the record shows he has not paid or otherwise tried to resolve his debts since 2008. AG ¶ 20(b) does not apply.

The mitigating conditions at AG ¶¶ 20(c) and (d) do not apply because Applicant has not engaged any financial counseling or professional debt resolution firms to improve his financial situation. As discussed above under AG ¶ 20(b), he has not acted to pay or resolve his debts in a prompt, good-faith manner. Nor did he establish that his current finances are sound and that he can resolve his debts and avoid such problems in the future. AG ¶ 20(b) does not apply.

As to AG ¶ 20(e), Applicant disputed the county tax debt at SOR 1.h as previously paid, and he generally claimed he has either paid or is attempting to resolve his other debts. His affirmative defense in response to the SOR left with him the burden of supporting his claims in this regard. He has not met that burden. In large part, Applicant relied on the fact that his debts do not appear on his most recent credit reports. However, that does not end the inquiry. Debts removed by the mere passage of time are nonetheless still his responsibility. He did not show, as it was still his obligation to do, what action he took to resolve his debts. He did not do so and AG ¶ 20(e) does not apply. On balance, Applicant failed to mitigate the security concerns established by adverse information about his finances.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a mature, responsible adult who has worked hard to support his family. He experienced financial problems, in part, through an unforeseen injury and business failure. His problems also have resulted from his own poor judgment in not filing tax returns. Applicant presented information showing

he is an excellent employee. Nonetheless, the positive information in his background is, at this time, insufficient to overcome the adverse information about his finances. Applicant did not adequately support the claims about the status of his debts and his efforts to resolve his financial problems. His response to the Government's information leaves doubts about his suitability for access to classified information. Because protection of the national interest is the primary concern in these matters, those doubts must be resolved against the Applicant.

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: AGAINST APPLICANT

Subparagraphs 1.a - 1.l: Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge