



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



In the matter of:)
)
-----) ISCR Case No. 11-11774
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: Joseph Testan, Attorney At Law

September 24, 2013

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (E-QIP) on September 24, 2010. (Government Exhibit 3.) On April 12, 2013, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on May 9, 2013, and he requested an administrative hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on July 16, 2013. A notice of hearing was issued that same day, and the hearing was scheduled for August 8, 2013. At the hearing the Government presented nine exhibits, referred to as Government Exhibits 1 through 9, which were admitted without objection. The Applicant called one witness and presented seven exhibits, referred to as Applicant's Exhibits A through G, which were also admitted into evidence. He also testified on his own behalf. The record remained open until close of business on August 22, 2013, to allow the Applicant to submit

additional documentation. The Applicant submitted one Post-Hearing Exhibit, referred to as Applicant's Post-Hearing Exhibit A which was admitted without objection. The official transcript (Tr.) was received on August 20, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 37 years old and unmarried. He is employed as a Software Engineer for a defense contractor. He is seeking a security clearance in connection with his employment in the defense industry.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

Applicant admitted each of the allegations set forth in the SOR under this guideline and provided an explanation. (See Applicant's Answer to SOR.) Credit Reports of the Applicant dated June 25, 2003; September 30, 2010; September 26, 2012; and August 6, 2013, reflect that at one time Applicant was indebted to the federal and state taxing authorities set forth in the SOR, in an amount totaling nearly \$120,000. (Government Exhibits 2, 4, 6, and 9.)

In 2003, Applicant joined the United States Air Force Reserves and has served with honor and distinction since then. He received a security clearance shortly after joining the military.

Applicant attended a prestigious university for three years and left before graduating to pursue his interest in engineering. Up until 2007, he always paid his income taxes, and filed his federal and state income tax returns on time. Applicant explained that from September 2007 to August 2008, he was employed with his current employer as an independent contractor and no taxes were withheld from his pay. During this period, Applicant formed his own corporation, but did not have the knowledge, skill or experience to properly handle his income tax matters. Realizing in retrospect that he should have hired a tax professional for assistance, Applicant allowed the problem to snowball eventually leaving him with a tremendous tax bill.

Applicant became indebted to the Internal Revenue Service (IRS) for back taxes owed for tax years 2007, 2008, 2009, 2010 and 2011 in an amount in excess of \$100,000. Applicant also became indebted to the state franchise tax board for back taxes owed for tax years 2008, 2009 2010 and 2011 in the amount of \$16,212.

Applicant also failed to file his federal and state income tax returns for tax years 2007 and 2008.

Applicant left his employer in August 2008, but returned to work for the company again in January 2010 as an independent contractor. In early 2012, he was offered a full time job as an employee of the company. He now has standard tax withholdings deducted from his paycheck.

In 2013, Applicant hired an accountant to assist him in resolving his delinquent tax debt. Also that year, Applicant made a payment to the IRS in the amount of \$56,376.79, and set up an installment agreement to resolve the remaining \$49,000 that he owes. (Applicant's Exhibit C.) The 60 month installment agreement indicates that Applicant will pay \$750 monthly until the debt is paid in full. Applicant made his first payment of \$750 in May 2013, and states that he plans to honor the agreement. Applicant testified that while working as an independent contractor he anticipated a large tax debt since he had not been paying taxes. To handle this, he saved about one third of his pay that he placed in a separate account. At some point he planned to use the money to pay his taxes.

Over the past year, Applicant has made numerous attempts to resolve his delinquent tax debt owed to the state in the amount of \$16,212. Each time, he has encountered problems. For example, Applicant made a \$2,500 payment by cashier check that was never credited to his account, and that there was no record of receipt. Applicant sent the state fax copies of the check to verify his payment. He also made several requests for an accounting statement that he never received. In June 2013, he made a \$10,000 payment to be credited toward the debt. (Tr. p. 74.) He later learned from the state that they had no record of the payment as it had been erroneously applied to the wrong account. Wisely, Applicant kept copies of his checks to prove that he had made the payment. Applicant was finally advised to make the payments on line. He made his most recent payment on line in the amount of \$5,844. Although he is not certain because he has yet to receive a response from the state, he believes this should bring his balance fairly close to zero. (Applicant's Exhibit A.) Applicant's accountant is actively involved in helping the Applicant to resolve this matter. (Applicant's Post-Hearing Exhibit A.)

Applicant's annual salary is \$135,000. His monthly budget indicates that after paying his regular fixed monthly expenses, including variable expenses, he has about \$1,720 left in discretionary funds at the end of the month. (Applicant's Exhibit B.) He reports a FICO score summary of 772. (Applicant's Exhibit G.)

Applicant testified that he has learned a hard lesson from this past experience. He realizes that had he paid his income taxes and filed his returns on time he would have avoided much of his tax liability that included penalties and interest. He also acknowledged that if he were ever confronted with a situation like this again, he will hire a tax professional for assistance.

A Vice President of the company, who holds a security clearance, and who has known the Applicant for nearly five years, testified that as the Applicant's direct supervisor during both periods Applicant has worked for the company, Applicant has consistently demonstrated reliability and trustworthiness. He recommends the Applicant for a security clearance. (Tr. pp. 16 - 26.)

Letters of recommendation from a senior Air Force officer, other military officers and colleagues with whom the Applicant serves, Applicant's Facility Security Officer and coworkers from his employer, all attest to Applicant's honesty, reliability and trustworthiness. It is also their opinion that Applicant exercises good judgment and personal integrity. (Applicant's Exhibit F.)

Applicant has received a number of awards and decorations since joining the Air Force Reserves that include the Air Force Outstanding Unit Award, the Air Reserve Forces Meritorious Service Medal, the National Defense Service Medal, the Global War on Terrorism Service Medal, the Air Force Longevity Service Medal, the Small Arms Expert Marksmanship Ribbon (Rifle) and the Air Force Training Ribbon. (Applicant's Exhibit F.)

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. *The Concern.* 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.

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts; and

19.(c) a history of not meeting financial obligation.

Conditions that could mitigate security concerns:

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; and

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

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct and surrounding circumstances;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavior changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility, which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that the Applicant had no tax problems until he started working as an independent contractor in 2007. At that time, he fell behind on his tax responsibilities. He did not file his income tax returns on time, and he became severely delinquently indebted. Over the past year, he has been working to resolve his tax problems. Presently, he has filed all of his income tax returns that were due, and has made a substantial payment toward resolving his tax debt owed to the IRS. He has set up an installment agreement to resolve the remaining debt owed to the IRS that he plans to honor. Although it has not been determined official, it would seem that he has paid off his debt owed to the state. He has acted responsibly and reasonably under the circumstances. In addition, common sense would dictate that the difficulties he has encountered from this experience should be a strong deterrence from ever getting into this situation again.

As an Air Force Reservist and a full time defense contractor employee, Applicant understands the responsibilities associated with holding a security clearance. He is no longer an independent contractor and should never have these tax problems again. In the event that he again becomes an independent contractor, he now understands that he must remain fiscally responsible at all times. Applicant has made a good-faith effort to resolve his past due indebtedness, and has made great progress at resolving his delinquent debts. He has demonstrated that he can properly handle his financial affairs. There is clear evidence of financial rehabilitation. However, in the event that he becomes excessively indebted again, his security clearance will be in immediate jeopardy. Considering all of the evidence, the Applicant has introduced persuasive

evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Under Guideline F (Financial Considerations), Disqualifying Conditions 19.(a) *inability or unwillingness to satisfy debts*; and 19.(c) *a history of not meeting financial obligations*, apply. However, Mitigating Conditions 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*; and 20.(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, and a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

I have considered all of the evidence presented. It mitigates the negative effects of his financial indebtedness and the effects that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

- Paragraph 1: For the Applicant.
- Subpara. 1.a.: For the Applicant.
- Subpara. 1.b.: For the Applicant.
- Subpara. 1.c.: For the Applicant.

DECISION

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

Darlene Lokey Anderson
Administrative Judge