



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



In the matter of:)
)
) ISCR Case No. 12-02328
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

02/05/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline F, financial considerations. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On September 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under DOD Guideline F, financial considerations. The action was taken under Executive Order 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 DOD on September 1, 2006.

Applicant answered the SOR on September 25, 2013, and requested a hearing before an administrative judge. The case was assigned to me on December 6, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 7, 2014. Applicant waived his right to 15-days-notice, and I convened the

hearing as scheduled on January 16, 2014. The Government offered exhibits (GE) 1 through 5, and they were admitted into evidence without objection. Applicant testified and offered Applicant's Exhibits (AE) A through W. The exhibits were admitted into evidence without objection.

Findings of Fact

Applicant admitted the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 56 years old. He earned a bachelor's degree in 2010. He was married in 1989 and divorced in 2004. He has two children, ages 24 and 19 years old. He remarried in 2013.¹

Applicant spent most of his career in the commercial music industry. He later abandoned it for a more reliable income and has now been working in the software industry for about two and a half years. While working in the commercial music industry, Applicant's income was unpredictable. His income in 2000 was \$125,000. In 2004, it was \$50,000, and in 2009 it was \$36,000. The nature of the business was changing, with clients seeking less conventional methods of obtaining music for their commercial endeavors. There was less work available, more competition, and less pay. This was the reason Applicant decided to change careers.

Applicant separated from his wife in 1997 and filed for divorce in 1998. The divorce had two trials, both in 1998. In 1998, he was also at the peak of his earning and estimated his income to be around \$185,000. He was required to pay his spouse \$5,000 a month and an extra \$5,000 for one month in the summer. This payment ended in 2001. The divorce was long, protracted, and expensive. Applicant's divorce proceeding took seven years to complete and was final in 2004. There was a child custody dispute. The court ordered joint legal custody to both parents, and Applicant had primary residential custody of the children. The children began living with him full time in about 2000, after Applicant's wife lost all visitation rights because of mental issues and the questionable character of her boyfriend who was living with her at the time. Applicant's wife never paid child support to him when he had the children. He did not have the financial resources to obtain a modification of the spousal support because he was unable to pay his attorney. He estimated he paid between \$210,000 and \$220,000 in spousal support and expenses. His wife obtained a judgment against him for \$70,000 (SOR ¶1.c) for unpaid spousal support. She placed a lien against a house Applicant owned. Applicant was unable to sell the house with the lien and it was foreclosed. He does not owe any deficiency on the foreclosure.

Applicant's income began going down in 2001, and he was overwhelmed with the legal proceedings and costs associated with the divorce. In addition to his attorney's fees, Applicant's was required to pay his wife's attorney's fees and other fees for a

¹ AE B.

forensic psychologist and psychiatrist. He estimated the total cost of the fees associated with his divorce to be around \$250,000. He estimated that he paid about \$220,000. Applicant filed bankruptcy in 2004 and the remainder of the amount owed to his attorney was discharged. He believes he had a total of about \$240,000 in debt discharged in bankruptcy.

Applicant filed his federal income tax returns, but failed to pay his 2001, 2002, and 2003 taxes when he was self-employed. In 2001, he received a notice from the IRS that he owed approximately \$6,000 to \$8,000 in income taxes. He did not have the money to pay the taxes. In 2002, his income went down, but he had his children full time and had to pay both his and his wife's lawyers. He was unable to pay his tax debt.

In 2005, Applicant and his children moved to a new state where the cost of living was less and where his parents were living, and they could help with child care. He was working part time in the music industry. He earned about \$50,000 that year. The children's mother was not involved in their lives at that point.

He filed his 2005 federal income tax returns, but did not have the money to pay the taxes. He was overwhelmed because of his inability to pay his taxes. He contacted the IRS and offered a compromised settlement. The IRS rejected the offer and placed his account in a "currently uncollectible status." He continued to work in the music business from 2005 to 2008. In 2006, in addition to his music work, he also worked part-time at a grocery store and was able to get health benefits. He began earning his college degree online in 2006 and completed it in 2010. In 2008, he began working full time at the grocery store and was no longer working in the music industry. He financed his college studies through an education program offered by the grocery store and obtained about \$10,000 in student loans. His parents assisted him in paying off his student loans. He got his first job in his new field in 2011. His starting salary was \$55,000.

From 2006 to 2012, Applicant filed and paid his federal income taxes. The IRS withheld any refunds he was to receive and applied them to his delinquent debt. His cumulative tax debt at this point is approximately \$80,501. The IRS contacted him in 2012 and an agreement was reached. He has had an installment payment plan since December 2012 and pays \$1,200 a month until the debt is satisfied. The penalties and interest were not waived. He and his wife's combined annual income is about \$85,000. He estimated he has paid about \$15,000 toward the tax debt.²

Applicant's son attended college from 2007 to 2011. He earned a degree and has a job. His son took out student loans and received grants to pay for college. Applicant also helped him financially. He estimated he provided about \$500 monthly. His daughter is currently in college and is financing her college tuition with loans and grants. Applicant is providing her about \$500 in monthly support. Applicant credibly

² GE 2 includes nine copies of checks to the IRS for \$1,200 beginning in July 2013. AE A includes copies of check to the IRS for August, September, and October 2013, each for \$1,200. AE I is a copy of a check to the IRS dated November 11, 2013, for \$1,200.

testified that he intends to continue to pay his tax debt and when he is in a better financial position, he will pay the judgment owed to his ex-wife. She has not contacted him about repayment. Applicant also has a personal loan from his parents that he is repaying. He has been paying them \$239 a month since 2004. The remaining balance is about \$15,000. Applicant received debt counseling when he filed bankruptcy in 2004. He recently completed a one-hour financial counseling course in November 2013.³

Three character witnesses testified on Applicant's behalf, in addition to him providing three character letters.⁴ Applicant is described as the "go to guy" in the office and a top performer. He has integrity and is considered honest, trustworthy, professional, dedicated, family-oriented, mature, focused, patriotic, exceptional, of high moral values and beyond reproach.

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 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, these guidelines are applied 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

³ AE K, V.

⁴ AE F, G, H.

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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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. I have considered all of the disqualifying conditions under AG ¶ 19, and the following two are potentially applicable:

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

Applicant filed bankruptcy in 2004. He has two delinquent debts. He owes the IRS (\$80,501) and a judgment to his ex-wife (\$70,000). I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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.

AG ¶ 20(a) is not established because Applicant's is still resolving his delinquent debt to the IRS and has not yet resolved the judgment owed to his ex-wife. Applicant attributed his history of financial problems to a long, protracted, and expensive divorce; payments of spousal support based on his annual income at the time that later decreased drastically; having full custody of his children; and a career change due to the limited opportunities of the business he was in. These conditions were beyond his control. For the full application of AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. Applicant filed bankruptcy in 2004 allowing him to start to put his finances in order. He filed his tax returns, but was unable to pay his taxes and attempted to arrange a settlement with the IRS. His first offer was rejected, but he now has an agreement to pay all of his delinquent taxes. He is paying \$1,200 a month. He is unable to pay his ex-wife's judgment at this time, but credibly testified as he becomes more financially stable, he will. Applicant explained that he had sole responsibility for his children and was prioritizing his budget to ensure they were cared for, and he was paying his monthly expenses. He left a business that was no longer financially viable, went back to school, and now has a stable job. He also moved to a state that was more affordable and where he had family support. AG ¶ 20(b) applies.

Applicant is making monthly payments on his IRS tax debt. He had financial counseling when he filed bankruptcy and recently participated in additional financial counseling. Applicant earned his degree and has been working in a stable job since 2011. He provided financial support for his son to attend and complete college, and he is doing the same for his daughter. Applicant is paying his other debts, and there are clear indications that his finances are under control. AG ¶ 20(c) applies. AG ¶ 20(d) applies to the IRS debt.

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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 56 years old. He began experiencing financial problems when he went through a long, expensive and protracted divorce that lasted six years. In addition, his career in the commercial music industry changed and his annual salary decreased. He and his ex-wife were to have joint custody of their children, but Applicant has had full custody since 2000. Applicant moved his family to a different state and started over. He has completed college and started a new career. He filed his federal tax returns when he was going through his divorce, but was unable to pay them. He has a payment agreement with the IRS. He still owes his ex-wife \$70,000 and intends to pay her once he satisfies his debt to the IRS. Applicant has acted responsibly in addressing his financial problems, and although his finances are not perfect, they do not rise to the level of being a security concern.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the financial considerations guideline.

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.c: 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 grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge