



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



In the matter of:)
)
) ISCR Case No. 17-00822
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Heather C. Tenney, Esq.

02/08/2019

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 23, 2017, 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 (Exec. Or.) 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 DOD on June 8, 2017.

Applicant responded to the SOR on September 15, 2017, and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on May 11, 2018, scheduling the hearing for June 12, 2018. Applicant retained an attorney on May 24, 2018, and requested a continuance for additional time to prepare.

With no objection, I granted Applicant's request and DOHA issued an amended NOH on May 29, 2018, rescheduling the hearing for July 9, 2018. I convened the hearing as rescheduled.

I appended to the record, as Hearing Exhibit (HE) I, the Government's discovery letter and exhibit list. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through D, which I admitted in evidence without objection. At Applicant's request, I kept the record open until July 23, 2018, for additional evidence. By that date, Applicant submitted additional documentation, which I marked as AE E and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on July 13, 2018.

Findings of Fact

Applicant admitted both of the SOR allegations. He is 49 years old. He married in 1991, divorced in 1995, remarried in 1996, divorced in 2011, and remarried in 2011. He has three children: one is an adult from his second marriage, and the other two are minors from his current marriage.¹

Applicant graduated from high school in 1987, earned a bachelor's degree in 1992, and earned a juris doctorate degree in 1995. He worked in state law enforcement from around 2001 to 2007, and he has since served as a reserve officer. He has worked for various DOD contractors since 2008. As of the date of the hearing, he worked as a division vice president for a DOD contractor since January 2018. He has never held a security clearance.²

The SOR alleges a delinquent consumer account for \$5,709 (SOR ¶ 1.a) and a state tax lien from December 2006 for \$31,253 (SOR ¶ 1.b). SOR ¶ 1.a is established by a 2017 credit bureau report. Applicant disclosed and discussed SOR ¶¶ 1.a and 1.b in his 2015 security clearance application (SCA), 2016 background interview, and 2017 response to interrogatories.³

SOR ¶ 1.a is for the outstanding balance on an apartment lease placed in collection for \$5,709. Applicant and his wife broke their lease seven months early. She unexpectedly became pregnant with their second child in 2013 and they decided they needed to rent a bigger place. Prior to breaking the lease, he unsuccessfully attempted to work with the apartment company to resolve the outstanding balance, but was told there was nothing that could be done and his balance would be placed in collection.⁴

¹ Applicant's response to the SOR; Tr. at 18-77; GE 1.

² Tr. at 5-6, 18-77; GE 1, 2; AE A.

³ GE 1-4; AE A, E.

⁴ Tr. at 22-27, 40-43, 61-66; GE 1, 2, 4; AE A, D.

In 2014, Applicant unsuccessfully attempted to work with the collection agency when he received a demand letter for payment. The collection agency only wanted a full or a half payment, which he could not then afford. He paid a security deposit and the first and last month's rent on his new rental; he was paying child support for his eldest child; and he was ensuring that his mortgage on his home, as further discussed below, remained current. He stopped trying to work with the collection agency in 2014, when it threatened to sue him. Between 2014 and 2017, he received telephone calls from the collection agency demanding payment in full, which he still could not then afford.⁵

In December 2017, Applicant contacted the collection agency to try to resolve the debt. He was motivated, in part, from having received the August 2017 SOR. He managed to rebuild his credit, and he had a credit card that he could use to resolve the debt. He also had enough money in his 401k retirement account that he could use, if necessary. He sought to pay in full with his credit card, only to learn that the collection agency stopped accepting any payments from his credit-card company. In May 2018, he resolved the account in full with a loan from his 401k retirement account.⁶

SOR ¶ 1.b is for a \$31,253 state tax lien entered against Applicant in 2006. Applicant attributed the lien to incorrect advice that he and his parents received from a certified public accountant (CPA) in 2003. In around 2000, his parents put his name on their home; the home was fully paid, he was living in it, and they retired and wanted to move elsewhere. When he sold the home in 2003 and gave the money to his parents, the CPA advised him that he would not have to pay taxes on the proceeds from the sale of the home.⁷

In 2006, Applicant received a letter from the IRS and the state Department of Revenue (DOR), informing him that he owed back taxes on the sale of the home in the amounts of approximately \$60,000 to the IRS and \$30,000 to the state DOR, for a total of \$90,000. He could not then afford to pay the back taxes, as he earned \$30,000 annually working as a state police officer and his then-wife was a bank teller. The IRS and the state consequently placed tax liens on his home, which he and his first wife purchased in 2004, effectively preventing him from selling it. His ability to sell the home was further hampered when the economic downturn affected its value from 2006 through 2010.⁸

Applicant testified that his and his then-wife's yearly federal income tax refunds from 2006 to 2017, totaling approximately \$5,000 to \$10,000, were applied to the \$60,000 in back taxes owed to the IRS, and the IRS released its lien in 2016. He testified that his yearly state income tax refunds from 2006 to 2009,⁹ and his then-wife's

⁵ Tr. at 22-27, 40-43, 61-66; GE 1, 2, 4; AE A, D.

⁶ Tr. at 22-27, 40-43, 61-66; GE 1, 2, 4; AE A, D.

⁷ Tr. at 27-35, 43-56, 66-77; GE 1, 2, 3; AE A, B, E.

⁸ Tr. at 27-35, 43-56, 66-77; GE 1, 2, 3; AE A, B, E.

⁹ Applicant moved out of that state in 2008. Tr. at 48, 55-56.

yearly state tax refunds from 2006 to 2014, totaling approximately \$3,000 to \$5,000, were applied to the \$30,000 in back taxes owed to the state DOR. He testified that the state has not made any efforts to collect on its lien since 2014. He hired an attorney in 2017 to assist him with resolving the outstanding state tax lien, though she had been advising him since the lien was placed against his home in 2006 because he has known her for a long time both professionally and personally. He testified that his attorney advised him against setting up a payment plan for the back taxes when his and his then-wife's federal and state income tax refunds were being intercepted, since the IRS and the state DOR already placed a lien against his property and he could not then afford a payment plan; he testified that he also did not attempt an offer-in-compromise (OIC) because he could not then afford a sufficient offer amount to do so.¹⁰

In 2017, Applicant started to see value return to his home, and he had \$50,000 in equity in it as of the date of the hearing. However, he testified that he had not listed the home for sale because the existing lien would prevent him from securing a buyer. His attorney advised him that his best course of action is to find a qualified buyer who is aware of the lien on the home; notify the state DOR that they have a qualified buyer; negotiate with the state DOR on an OIC for the outstanding state tax lien; and use the proceeds from the sale of the home to resolve the negotiated OIC for the lien. He intends to follow his attorney's advice. His attorney is assisting him with finding a qualified buyer for the home. His prior renter from 2015 to 2018 desired to purchase the home, but she ultimately did not qualify for financing. His current renter desires to get prequalified to purchase the home, but her efforts are at a standstill until her pending divorce is final. He believed the balance on the state tax lien as of the date of the hearing was approximately \$50,000 to \$60,000, with penalties and interest.¹¹

Applicant's household annual income was \$254,000 as of the date of the hearing. His wife started working as a teacher in 2018. In 2008, his annual income was approximately \$78,000; in 2009, it was \$90,000; in 2012 it was \$150,000; in 2015 it was \$170,000; and in 2016 it was \$185,000. He has approximately \$8,000 in savings and \$30,000 in his 401k retirement account. After his income and expenses, his monthly net remainder is approximately \$1,000. He testified that he has timely filed his federal and state income tax returns. He does not have any other delinquent debts. He is current on his expenses, to include his mortgage of \$1,000 monthly and repayment of his 401(k) loan. Other than the financial advice given to him by his attorney, he has not received financial counseling.¹²

Two former supervisors described Applicant as an exemplary worker and a man of professional integrity. Applicant's landlord from 2016 to at least 2018, who also considered Applicant a friend, attested to Applicant's timely rental payments as well as

¹⁰ Tr. at 27-35, 43-56, 66-77; GE 1, 2, 3; AE A, B, E.

¹¹ Tr. at 27-35, 43-56, 66-77; GE 1, 2, 3; AE A, B, E.

¹² Tr. at 35-40, 50-51, 56-61, 74-75; GE 4; AE B, D.

his trustworthiness and unquestionable ethics. Other character references also described Applicant as a responsible and diligent individual.¹³

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(a), 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 national security eligibility will be resolved in favor of the 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 extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

¹³ AE C.

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable 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 to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant was unable to pay his debts, to include a state tax lien from 2006. The evidence is sufficient to raise AG ¶¶ 19(a), 19(c) and 19(f) as 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit

counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Conditions beyond Applicant's control, as previously discussed, contributed to his financial problems. Thus, the first prong of AG ¶ 20(b) applies to SOR ¶¶ 1.a and 1.b. For the full application of AG ¶ 20(b), he must provide evidence that he acted responsibly under his circumstances. He credibly testified that he unsuccessfully tried to work with the apartment company and the collection agency for SOR ¶ 1.a prior to the SOR. He then continued his efforts upon receipt of the SOR and when he had the financial capability to resolve this debt, which he did in May 2018. I find that AG ¶¶ 20(b) and 20(d) apply to SOR ¶ 1.a.

Applicant's ability to sell his home to satisfy the state tax lien in SOR ¶ 1.b was hampered when the economic downturn affected the home's value from 2006 through 2010. He credibly testified that though he did not hire an attorney to assist him with resolving the lien until 2017, the attorney has given him advice, which he has been following, since the lien was entered against him 2006. On the attorney's advice, he relied upon the state DOR's interception of his and his then-wife's yearly state income tax refunds from 2006 to 2014, collectively, to resolve the lien during this period. He did not attempt to set up a payment plan or present an OIC to the state DOR. He indicated that he also lacked the income during this period, however he has earned upwards of \$150,000 annually since at least 2012. He did not list the home for sale because he testified that the existing lien would prevent him from securing a buyer.

Applicant believed the balance on the lien as of the date of the hearing was approximately \$50,000 to \$60,000. On his attorney's advice, he planned to find a qualified buyer who is aware of the lien on the home; notify the state DOR that they have a qualified buyer; negotiate with the state DOR on an OIC for the outstanding state tax lien; and use the proceeds from the sale of the home to resolve the negotiated OIC for the lien. He intends to follow his attorney's advice. As of the date of the hearing, he had not secured a qualified buyer, as his prior renter from 2015 to 2018 did not qualify for financing, and his current renter's efforts to secure financing are at a standstill until she finalizes her divorce. As such, I find that AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(g) do not apply to SOR ¶ 1.b.

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(d):

(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. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate 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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge