



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



In the matter of:)
)
) ISCR Case No. 17-03025
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Renee B. Appel, Esq.

01/02/2019

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On December 21, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and F (financial considerations). Department Counsel subsequently amended the SOR to withdraw the personal conduct allegations and SOR ¶¶ 1.d and 1.e of the financial considerations allegations. Applicant responded to the SOR on February 1, 2018, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on July 20, 2018, and reassigned to me on October 10, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 5, 2018, scheduling the hearing for October 11, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) A through R, which were admitted without objection.

Findings of Fact

Applicant is a 47-year-old chairman and chief executive officer of a Subchapter S corporation¹ doing business as a defense contractor. He has been the primary owner of the company since 2002. He served in the U.S. military from 1989 until he was honorably discharged in 1991. He seeks to retain a security clearance, which he has held for many years. He has a bachelor's degree, which was awarded in 1994, and a master's degree, which he earned in 1995. He is married, but separated. He has four adult children.²

Applicant sold a division of his company in 2011. With the profit from the sale and his other income, his adjusted gross income for federal tax purposes was \$5,942,002. His tax liability was \$1,013,836. The IRS reported that \$36,068 was withheld from his pay; \$72,836 was credited from a previous tax period; \$200,000 was paid in October 2012; and the federal income tax return was filed in December 2012. Applicant paid another \$200,000 in April 2013; \$480 in October 2014; and \$8,882 in October 2015. His tax refunds for 2013 and 2014 were withheld, and \$1,021 and \$26,542 were transferred to his 2011 tax debt in April 2015. The IRS issued a notice of intent to levy in November 2014. As of June 2017, with penalties and interest, his tax liability for 2011 was \$705,014. As of July 2018, it had increased to \$724,332.³

Applicant also owes the IRS for tax year 2012, when he received the final payment for the sale of the division of his company. His adjusted gross income was \$267,151. The IRS reported that he was credited with \$2,000 and \$862 in April 2013, but the IRS records do not indicate any other payments. His federal income tax return was filed in February 2015. As of June 2017, with penalties and interest, his tax liability for 2012 was \$58,728. As of July 2018, it had increased to \$60,757.⁴

Applicant stated that he had little choice but to sell the division of his company to a large company in 2011, as the large company would have taken their business away if he had not sold. The loss of the profitable division adversely affected Applicant's company financially. He stated that his accountant advised him to pay the IRS \$200,000, and that he would be able to receive credits from losses that would permit him to offset the taxes.⁵

¹ S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income at the entity level. <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations>.

² Tr. at 22-24, 28, 32, 71; Applicant's response to SOR; GE 1.

³ Tr. at 32, 66-67; Applicant's response to SOR; GE 2; AE A.

⁴ Tr. at 33-36; Applicant's response to SOR; GE 2; AE D

⁵ Tr. at 32-46, 67.

Applicant was unable to offset the taxes for 2011 and 2012. He stated that he put much of the money that he received from the sale of the division back into the company. He used about \$1.6 million from the sale to pay the mortgage loan on his house. He also paid credit cards and car loans, and he put about \$200,000 away for his children's college education.⁶

When he submitted a Questionnaire for National Security Positions (SF 86) in September 2015, Applicant wrote that he was "[i]n process of putting payment plan in place with IRS." In July 2017, he responded to DOD interrogatories and wrote that his accountants contacted the IRS to establish an installment agreement, but his case was awaiting assignment to a local IRS collection office. He wrote that "[o]nce the accounts are assigned, we will continue working with the IRS to establish an installment agreement." He testified that his tax experts worked with the IRS for a payment plan, but one was never reached. He stated that he was unaware that he could pay the IRS outside of an established payment plan. Applicant stated that his company is doing better financially and has been awarded several contracts. He plans to pay his back taxes from the additional profits generated by his company.⁷

While his company was struggling, Applicant took on personal debt, and he personally guaranteed debt in order for his company to receive credit. A past-due credit card with a \$38,688 balance was closed by the creditor and transferred to a collection company (SOR ¶ 1.c). A creditor obtained a judgment of \$685,000 against Applicant's company and Applicant personally in July 2017 (SOR ¶ 1.f). Another creditor obtained a judgment of \$399,363 against Applicant and his company in July 2017 (SOR ¶ 1.g).⁸

Applicant entered into a payment agreement with the collection company handling the \$38,688 debt in SOR ¶ 1.c. He agreed to pay \$403 per month for 96 months. He made the first payment under the plan on October 1, 2018.⁹

Applicant and his company entered into a confidential settlement agreement with the creditor holding the \$685,000 judgment in SOR ¶ 1.f, and the judgment was vacated. Applicant's company agreed to pay \$20,000 per week until \$479,000 was paid to the creditor. Applicant documented that from July 2018 to September 2018, the company made the ten \$20,000 payments required under the settlement agreement.¹⁰

Applicant and his company settled the \$399,363 judgment in SOR ¶ 1.g. They paid \$109,898 to complete the settlement in June 2018.¹¹

⁶ Tr. at 40-45, 63-64, 74-75; Applicant's response to SOR; GE 2, 7; AE A, C, D.

⁷ Tr. at 65-71, 77-80; GE 1, 2, 7; AE B-D, I-K.

⁸ Tr. at 33, 49-51, 57-59; Applicant's response to SOR; GE 3-6.

⁹ Tr. at 49-50; Applicant's response to SOR; GE 3, 4; AE E.

¹⁰ Tr. at 50-56, 59, 75-76; Applicant's response to SOR; GE 3-5; AE F, R.

¹¹ Tr. at 57-59, 76; Applicant's response to SOR; GE 3, 4, 6; AE G, H.

Applicant submitted letters attesting to his honesty, trustworthiness, leadership, patriotism, and integrity. He regularly volunteers in his community.¹²

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 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.

¹² AE L-O.

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 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;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (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’s adjusted gross income was more than \$6 million in 2011 and 2012, but he did not pay all his income taxes. His additional financial problems include judgments and a delinquent debt. 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

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

(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; 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.

Applicant settled the two judgments and has a payment plan to resolve his credit card debt. While he only documented one payment, and he still has more than seven years of payments, I believe he will continue with the plan. His non-tax debts are mitigated.

Applicant's tax issues are another matter. He sold a division of his company in 2011. His adjusted gross income was \$5,942,002 in 2011 and \$267,151 in 2012. He used about \$1.6 million from the sale to pay the mortgage loan on his house. He also paid credit cards and car loans, and he put about \$200,000 away for his children's college education. Yet he did not pay all of his federal income taxes. As of July 2018, he owed \$724,332 for 2011 and \$60,757 for 2012. Applicant stated that he intends to pay his taxes. Intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013).

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).

There is insufficient evidence for a determination that Applicant's tax problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or made a good-faith effort to pay his federal taxes. His tax issues are recent and ongoing. They continue to cast doubt on his current reliability,

trustworthiness, and good judgment. I find that the security concerns arising out of Applicant's unpaid taxes are not mitigated.

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. I also considered Applicant's excellent character evidence.

Overall, the record evidence leaves me with questions and doubts about 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 |
| Subparagraphs 1.a-1.b: | Against Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraphs 1.d-1.e: | Withdrawn |
| Subparagraphs 1.f-1.g: | For Applicant |
| Paragraph 2, Guideline E: | Withdrawn |
| Subparagraphs 2.a-2.c: | Withdrawn |

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge