



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



In the matter of:)
)
) ISCR Case No. 18-01674
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

02/13/2019

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 July 6, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. Applicant responded to the SOR on July 26, 2018, and requested a hearing before an administrative judge. The case was assigned to me on November 1, 2018.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 16, 2018, scheduling the hearing for January 24, 2019. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through J, all of which were admitted without objection, except AE C, which was admitted over the Government's objection. The record was held open for Applicant to

submit additional information. He submitted documents that I have marked AE K through N and admitted without objection.

Findings of Fact

Applicant is a 65-year-old employee of a defense contractor. He has worked for his current employer since November 2016. He has a doctorate degree (PhD), which was awarded in 1997. Applicant married in 2013, although he and his spouse have been cohabitating since 1997. He does not have children.¹

Applicant had periods of unemployment and underemployment from about 2008 until he obtained his current job in November 2018. He also developed cognitive problems that made it difficult to work at his previous level. As a consequence, he was unable to pay all his bills. Debts became delinquent and taxes went unpaid.²

Applicant and his spouse filed a Chapter 13 bankruptcy case in August 2015. Under Schedule D, Creditors Holding Secured Claims, the petition listed \$24,860 owed on a car loan. Under Schedule E, Creditors Holding Unsecured Priority Claims, the petition listed \$4,500 owed to the IRS and \$3,000 owed to his state. The petition listed debts totaling \$50,237 under Schedule F, Creditors Holding Unsecured Nonpriority Claims. The bankruptcy court allowed claims totaling \$15,055 from the IRS and \$3,084 from the state.³

The Chapter 13 bankruptcy case was dismissed upon Applicant's motion in July 2016 because he could not afford to maintain the monthly payments. The trustee's report shows that Applicant paid \$10,817 into the plan. Applicant's attorney was paid \$3,310; the trustee was paid \$678; the IRS was paid \$4,954; the state was paid \$1,124; and \$750 was refunded to Applicant.⁴

The SOR alleges the dismissed Chapter 13 bankruptcy case; a \$1,097 state tax lien; two unpaid judgments totaling \$5,537; and four delinquent debts. However, one of the delinquent debts is the underlying debt that resulted in one of the judgments. The total amount of the three remaining debts is \$25,198. The allegations are established through credit reports, Applicant's admissions, and the Chapter 13 bankruptcy petition.

Applicant's spouse has managed the family's finances since before they married. Applicant did not have any tax problems before his 2013 marriage. He always had

¹ Tr. at 15-19, 32; GE 1, 2.

² Tr. at 21-25, 31-32, 44-48; GE 1, 2; AE A.

³ Tr. at 25, 56; Applicant's response to SOR; GE 1-6. The SOR does not specifically allege Applicant's unpaid federal taxes, but I consider the above information to be facts and circumstances surrounding the Chapter 13 bankruptcy case, which was alleged. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in assessing Applicant's overall financial situation, in the application of mitigating conditions, and in the whole-person analysis.

⁴ Tr. at 56-58; Applicant's response to SOR; GE 1-6.

enough withheld from his salary to pay his taxes. His spouse is self-employed. Nothing is withheld from Applicant's spouse's paycheck, and he is responsible for paying his taxes throughout the year. Applicant's spouse did not pay enough in taxes for several years. They filed joint returns, which made Applicant jointly liable for all the taxes owed from their combined income.⁵

Applicant has been paying the IRS and his state since 2016. His state reported that he made payments totaling \$3,561 between April 2016 and December 2018. The payments were applied to taxes owed for tax years 2012, 2013, and 2014. He currently owes the state \$2,757 for tax year 2013 and \$3,471 for 2015.⁶

Records from the IRS show that Applicant made payments totaling \$5,302 between March 2017 and January 2019. The IRS applied \$500 to tax year 2017, the rest was applied to tax year 2015. He entered into a \$366 per month installment agreement with the IRS in July 2018. He has made payments to the IRS every month, but the last three monthly payments were \$277, \$600, and \$250, which totaled more than \$366 per month for three months. He currently owes the IRS \$4,524 for tax year 2017.⁷

Applicant's financial adviser recommended that he file 2018 tax returns as "married filing separately." This will prevent Applicant from assuming his spouse's tax problems. He increased his federal withholding by \$300 per month and his state by \$50 per month. Any additional refunds generated by the increased withholdings will be applied toward his back taxes. He filed a Request for Innocent Spouse Relief petition, which if approved would alleviate some of his tax problems from previous years. Applicant listed on the form that he had cognitive problems.⁸

Applicant has not paid any of the non-tax judgments and debts alleged in the SOR. He felt it was more important to address his taxes first, and then his other debts. He will attempt to settle the debts through lump-sum payments. He has not accrued any new delinquent debts. His financial advisor has assisted him in creating a budget.⁹

Applicant submitted letters attesting to his honesty, responsibility, work ethic, intelligence, diligence, selflessness, generosity of time and spirit, conscientiousness, professionalism, enthusiasm, dedication, and integrity. His psychiatrist has treated him for ten years. He opined that Applicant's "judgment is intact and that he is stable, reliable and trustworthy."¹⁰

⁵ Tr. at 32, 36-37, 51, 60-61; AE C.

⁶ Tr. at 39, 43, 50-51; Applicant's response to SOR; AE C, K, L.

⁷ Tr. at 39-42; AE H, I, M, N.

⁸ Tr. at 38-39, 61-63; AE C, D, J.

⁹ Tr. at 44, 49-56; Applicant's response to SOR; AE E-G.

¹⁰ AE A, B.

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.

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;
- (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 has a history of financial problems, including unpaid taxes, judgments, and delinquent debts. The evidence is sufficient to raise the above disqualifying conditions.

SOR ¶ 1.c alleges the underlying debt that resulted in the judgment alleged in SOR ¶ 1.g. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 1.c is concluded for Applicant.

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 had periods of unemployment and underemployment from about 2008 until he obtained his current job in November 2018. He also developed cognitive problems that made it difficult to work at his previous level. Those conditions were beyond his control. His tax issues, while primarily caused by his spouse's failure to pay his taxes, were within Applicant's control, as Applicant permitted his spouse to handle their family's finances and file joint returns. By doing so, Applicant accepted responsibility for all the taxes owed as a family unit.

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).

Applicant is credited with paying the IRS and his state since 2016. However, it does little good to pay back taxes while not paying the current year's taxes. He currently owes the state \$2,757 for tax year 2013 and \$3,471 for 2015, and the IRS \$4,524 for tax year 2017. He is taking steps in the right direction as recommended by his financial adviser. He will file 2018 tax returns as "married filing separately." He increased his federal withholding of his pay by \$300 per month and his state by \$50 per month. He filed a Request for Innocent Spouse Relief petition, which if approved would alleviate some of his tax problems from previous years. He also has a budget and has not accrued any new delinquent debts.

Applicant has not paid any of the non-tax judgments and delinquent debts alleged in the SOR. He stated that he is addressing the taxes first, and will then work on

his other debts. 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).

There is insufficient evidence for a determination that Applicant's financial 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 debts. His financial problems are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. Security concerns arising out of Applicant's finances 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 considered Applicant's excellent character evidence. The letters describe a kind-hearted man who is professionally and personally respected. I found him to be honest and credible. However, Applicant's tax problems are worse today than what he reported on his 2015 bankruptcy petition wherein he listed that he and his spouse owed \$4,500 to the IRS and \$3,000 to his state. He currently owes the IRS \$4,524 for tax year 2017, and the state \$2,757 for tax year 2013 and \$3,471 for 2015.

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.h: | Against Applicant |

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