



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 18-01788
)
Applicant for Security Clearance)

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

04/30/2019

Decision

DAM, Shari, Administrative Judge:

Applicant failed to responsibly resolve a 2012 Federal tax lien. He did not mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On August 27, 2018, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing on October 1, 2018, and requested a hearing before an administrative judge (Answer). The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 7, 2019. DOHA issued a Notice

of Hearing on February 12, 2018, setting the hearing for February 27, 2019. The hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits. Applicant did not object to the Department's exhibits, or offer any exhibits. The Department's exhibits were admitted into evidence. The record remained open until March 18, 2019, to give Applicant an opportunity to submit additional documents.¹ Applicant timely provided exhibits that I marked as Applicant Exhibit (AE) A through I and admitted into the record without objection. DOHA received the hearing transcript (Tr.) on March 11, 2019.

Findings of Fact

In his Answer, Applicant admitted the sole allegation contained in the SOR and provided an explanation for the debt. (Answer)

Applicant is 43 years old and divorced since 2004. He and his former wife have two children, ages 20 and 16. He has joint custody and provides financial support for the children. He attended college between 1996 and 1997. He enlisted in the Army in June 1997 and served until he was honorably discharged in June 2000, as an E-4. He held a security clearance while serving. While serving, he was awarded soldier of the month. (Tr. 16-17; GE 1, GE 5; AE B)

In March 2017, Applicant submitted an electronic Questionnaires for Investigations Processing (e-QIP). He listed full employment from January 2001 until April 2016. He disclosed that he failed to file or pay Federal and state tax returns for tax year 2009. He estimated that he owed about \$13,000. He stated that he had an installment agreement with the Internal Revenue Service (IRS) to pay the debt while he was employed. However, after being laid off in April 2016, he was unable to make the payments. He further disclosed that he was filing an Unable to Pay Status form with the IRS. He stated that he had joined a credit repair service to improve his credit score. (GE 1)

In February 2018, a government investigator interviewed Applicant about the background information he provided in his e-QIP. During the interview, the investigator informed Applicant that the IRS had filed a \$17,003 lien against him in May 2012.² Applicant agreed, and said that the tax debt was the same debt he disclosed in his e-QIP. Applicant stated that the debt's balance was \$13,000 because he had been making monthly payments of \$500, until he lost his job in April 2016. (GE 5) He did not provide a document confirming that balance.

¹Per my request, Applicant agreed to submit the following information: the initial amount of the IRS tax lien filed in May 2012; the tax years included in that lien; and the current balance owed on that tax lien. (Tr. 33, 40)

²Applicant testified that this lien may have been over \$20,000 at some point. (Tr. 32)

Applicant worked full-time from January 2001 to April 2016, at which time he was laid off. (GE 1) He was then unemployed until about August 2017 when he took a position as a truck driver. He worked for two months and left in October 2017 to find a better paying position. He remained unemployed until he started a position in February 2019. (Tr. 24; GE 5)

Applicant stated his tax problem began after he and his wife divorced in 2004, which created some tax confusion. In 2009, he hired a tax consultant to prepare his tax returns for years 2006 through 2009. After retrieving his returns from the consultant, he did not review the prepared returns or other documents, and instead mailed the sealed envelope directly to the IRS. The IRS audited him and filed a lien against him in May 2012 for about \$17,000. That lien remains unpaid and represents monies owed for those years three years and possibly more. (Tr. 19-24)

Applicant admitted that he failed to timely file his Federal 2010 and 2011 income tax returns, and he may owe taxes for those years as part of the 2012 lien. (Tr. 19-24) He said he timely filed his 2012, 2013, 2014, and 2015 Federal taxes. (Tr. 28)

Applicant testified he filed his Federal income tax returns for 2016, 2017, and 2018, on February 27, 2019, the day before his hearing.³ (Tr.23, 28). He believes he will receive a tax refund of about \$7,285 for 2016 and 2017. He said that refund will be applied to the outstanding IRS lien. (Tr. 30-31) He stated that he did not file those returns sooner because he was unable to prepare them himself and he could not afford to hire a tax consultant or pay any outstanding taxes. (Tr. 29)

Applicant stated he initially entered into a payment plan with the IRS to resolve the 2012 lien either in 2012 or 2013 and began making monthly payments of about \$560. He said he made those payments until he was laid off in April 2016. (Tr. 26) His tax exhibits do not confirm that he consistently made payments over those years. There is evidence that he made monthly installment payments as follows: \$100 in September, October, and December 2010; \$100 in January, March, and April 2011⁴; \$376 in March, April, and June 2013; \$386 in July through December 2014; \$386 from January through October 2015; and \$386 in January, February, and March 2016. (AE C through G)

Applicant thinks he initially owed the IRS about \$20,000. (Tr. 32-33) He said he filed all of his state income returns. He does not believe that he owes the state unpaid taxes because he has not received communication from it regarding the matter. (Tr. 35-36)

³The SOR did not allege security concerns related to the late filing of Applicant's Federal tax returns for 2010, 2011, 2016, and 2017. Those derogatory facts will not be considered in analyzing pertinent disqualifying conditions. They may be considered in assessing Applicant's credibility, and analyzing mitigating conditions and the whole-person concept.

⁴There is no information in this record pertinent to any installment agreement on which Applicant was making payments in 2010 and 2011, prior to the filing of the 2012 lien.

Applicant submitted a budget based on his new job. His annual salary is about \$72,592. His net monthly pay is \$3,600 and expenses are \$2,435. He established another payment plan with the IRS in March 2018 to address the outstanding lien. It is scheduled to start on May 5, 2019, and requires a \$346 monthly payment. Applicant included the payment in his monthly expenses. (Tr. 29; AE B, AE I)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying and mitigating conditions, which are useful 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 AG ¶ 2 describing 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." 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 avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that an adverse decision 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are 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. Financial distress can also be caused by 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 acts to generate funds.

AG ¶ 19 sets out disqualifying conditions that could potentially raise security concerns. Three 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.

In May 2012, the IRS filed a tax lien against Applicant for over \$17,000. Applicant thinks it included unpaid taxes for tax years 2006 to 2009, and possibly subsequent tax years. The debt is not resolved. The evidence is sufficient to raise the above disqualifying conditions.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out four conditions that could potentially mitigate financial security concerns under this guideline:

- (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; 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's 2012 tax lien remains unresolved and ongoing. AG ¶ 20(a) does not apply. There is some evidence that Applicant's initial tax problem may have arisen as a consequence of his 2004 divorce. However, two years after the divorce he failed to file and pay taxes for years 2006 through 2009, and later. Those years were within his control. He was fully employed from January 2001 until April 2016, when he was laid off, which was a circumstance beyond his control. He subsequently obtained a job in 2017 that he quit after working two months. From 2010 into 2016, he attempted to manage his IRS debts through payment plans. However, those payments were inconsistent. The evidence establishes minimal mitigation under AG ¶ 20(b).

Applicant hired a credit repair company to improve his credit score. It is unknown if that company also provided credit counseling. Although he recently initiated a payment plan with the IRS, the evidence is insufficient to conclude that his tax problems are under control or that he is in compliance with the new repayment agreement. The evidence establishes minimal mitigation under AG ¶¶ 20(c) and 20(g).

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 national security eligibility must include 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 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(d) were addressed under that guideline, but some warrant additional comment.

Applicant is a 43-year-old man, who honorably served in the Army for three years. He has a history of Federal tax problems, which began in 2006 and continued into 2012 or 2013 when he began addressing a tax lien for unpaid paid taxes for prior years. He admitted that he failed to timely file his 2010 and 2011 Federal tax returns, and his 2016 and 2017 Federal tax returns, which he filed the day before his hearing. A month after his hearing, he arranged another repayment plan with the IRS to resolve the outstanding debt. It starts in May 2019. He agreed to submit information from the IRS documenting the initial amount of the lien, the years included in it, and the current balance of the lien, but did not do so. The record does not contain sufficient information to clarify the status of his Federal taxes.

Applicant has not established a sufficient record of responsibly managing his taxes. He has not made a payment to the IRS for three years. His history of non-compliance with a fundamental legal obligation to timely file tax returns and pay tax debts raises security concerns. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations 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. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).⁵

The record evidence leaves me with doubts as to Applicant's judgment and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

⁵ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	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 a security clearance. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge