



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 18-01800
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

10/04/2019

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the personal conduct security concern, but he did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 22, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 December 28, 2018 and requested a hearing before an administrative judge. The case was assigned to an administrative judge on March 5, 2019 and reassigned to me on March 13, 2019, due to Applicant's request for a change of venue. The Defense Office of Hearings and Appeals (DOHA) issued a

notice of hearing (NOH) on March 18, 2019, scheduling the hearing for April 1, 2019. Applicant waived the 15-day hearing notice requirement, as provided in ¶ E3.1.8 of the Directive. I convened the hearing as scheduled. (Tr. at 11-12).

I admitted Government Exhibits (GE) 1 through 4 in evidence without objection. Applicant testified, called one witness, and submitted Applicant Exhibits (AE) AA through LL and A through T, which I admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on April 11, 2019.

Findings of Fact

Applicant admitted all of the SOR allegations but ¶ 2.a, which he denied. He is 51 years old. He married in 2001, separated in 2017, and his divorce was pending as of the date of the hearing. He has three minor children. (Tr. at 43-44, 68, 74, 77, 80; GE 1, 2; AE JJ, LL, B, O).

Applicant earned a bachelor's degree in 1997 and a master's degree in 2004. He served honorably in the U.S. military from 1988 until 2018. He was a retired officer from the Reserve as of March 2018. He has worked as a solo independent contractor for a DOD contractor since March 2019. He was first granted a security clearance in 1989. (Tr. at 9-10, 47-50, 61-62, 64-65, 82-83, 94-95; GE 1, 2; AE GG, JJ, KK, B, C, D, E, F, G, H).

The SOR alleges that Applicant filed Chapter 13 bankruptcy in July 2016 (SOR ¶ 1.a). It alleges that he was delinquently indebted to the U.S. Government for \$345,660 for tax years 2010 through 2014 and \$72,657 in business trust fund taxes (SOR ¶¶ 1.b, 1.g). It alleges that he was delinquently indebted to a county tax authority in state C for \$11,098 in real estate taxes and \$1,356 in unpaid taxes, and to the state C tax authority for \$2,638 in unpaid taxes (SOR ¶¶ 1.c, 1.i, 1.j). It alleges that he was delinquently indebted to the state A tax authority for \$6,301 in employee withholding tax, an unpaid tax assessment of \$5,847, and \$4,263 in unpaid taxes (SOR ¶¶ 1.d, 1.h 1.k). It alleges that he was delinquently indebted to the state B tax authority for an unpaid tax assessment of \$5,398, \$472 in state unemployment taxes, and a \$27,258 judgment (SOR ¶¶ 1.e, 1.f, 1.l). The SOR also alleges that he falsified his September 2017 security clearance application (SCA) by responding "No" to section 26, which inquired whether he had failed to file or pay required federal, state, or other taxes within seven years of completing his SCA (SOR ¶ 2.a).

Applicant and his wife previously owned an independent contracting business in state C, where they live, from approximately 2006 to 2016. During this period, his estimated annual salary was \$80,000; he was unaware how much his wife earned. He testified that it was his wife's responsibility to work with their certified public accountants (CPAs) and tax attorneys in managing all of their finances, to include their taxes, as he worked 40 to 50 hours weekly primarily in states A and B. He cites to her failure to do so responsibly that led to his bankruptcy and delinquent taxes. He testified that she also spent money irresponsibly, to include charging upwards of \$30,000 on their credit cards, haphazardly spending a \$300,000 business loan, and misspending money he had given

her for their mortgage. He testified that though their home and business address were the same, he did not see mail concerning their delinquent taxes or understand the depth of their financial problems until late 2015, approximately six months before they filed bankruptcy. He also cites to bad advice from tax attorneys and CPAs as a reason for his financial issues. Between 2013 and 2017, he traveled for pleasure to the Bahamas four times, and to Costa Rica, Mexico, and Canada. (Tr. at 43-103; GE 1, 2, 3; AE KK, LL, L).

Applicant and his wife initially filed joint Chapter 13 bankruptcy in July 2016. He severed their bankruptcy case in December 2017 and has since proceeded as an individual debtor. His delinquent federal, county, and state A and C taxes are listed in his bankruptcy (SOR ¶¶ 1.a-1.d, 1.g-1.k). As of the date of the hearing and since December 2017, he made 30 months of payments at \$400 monthly towards his bankruptcy and the bankruptcy court had not yet approved his plan. (Tr. at 43-103; GE 1, 2, 3, 4; AE BB, CC, FF, KK, LL, I, K, L, M, O, S).

Applicant acknowledged that his delinquent state B taxes, to include the state B judgment of \$27,258, remain unresolved. He hoped to resolve them through his divorce and bankruptcy proceedings (SOR ¶¶ 1.e, 1.f, 1.l). He was unaware of the outstanding liability, if any, for his state C taxes for tax years 2014 and 2015, which he expected to file promptly after the hearing date. He has owned his home since 2005. He testified that his mortgage became delinquent because no payments were made for approximately one year and a half. He testified that he was advised by his bankruptcy and divorce attorneys not to make any mortgage payments for that duration because he was attempting to switch the mortgage to solely his name without a quitclaim deed. He testified that as of the date of the hearing, he was attempting to obtain a quitclaim deed through the divorce process. He testified that he entered into a trial loan modification of \$2,000 monthly from February through April 2019; he made the payments for February and March 2019; he did not foresee any issue with making the April 2019 payment; and he hoped to be approved for a modified loan with the delinquent balance tacked onto it. He testified that he did not have any other delinquent debts. (Tr. at 43-103; GE 1, 2, 3, 4; AE BB, KK, LL, K, M, O, S).

Applicant testified that his ongoing divorce is a contested one, primarily due to the allocation of debts that were incurred during their marriage. He received financial counseling through his bankruptcy in February 2016. He testified that he has also received financial counseling from his bankruptcy attorney and CPA. He testified that he relies on himself, his CPA, his bankruptcy attorney, as well as a payroll firm whom he hired in late December 2018, to keep all of his personal and business finances organized and current. He testified that he filed his taxes for tax year 2018. He acknowledged that he should have taken more responsibility with his finances sooner than he did. He signed a statement of intent to file and pay his required federal and state taxes in the future. (Tr. at 43-103; AE DD, EE, HH, J, N, O).

Applicant earns \$60,000 annually. He is rated 30% disabled by the U.S. Department of Veterans Affairs, for which he receives \$500 monthly. His total net monthly income is approximately \$4,020, and his total net monthly remainder after

expenses is approximately \$300. He depleted all of his retirement accounts with his bankruptcy, with the exception of approximately \$10,000 in his children's 529 college savings plans. He testified that he is loyal to the United States. (Tr. at 43-103; AE N, O, T).

Appellant testified that he did not intend to deceive by failing to affirmatively answer "Yes" to the portion of section 26 of his 2017 SCA that inquired whether he had failed to file or pay required federal, state, or other taxes within seven years of completing his SCA. He testified that evidence of his lack of intent to deceive is demonstrated by his disclosure of his bankruptcy, in which he had listed his delinquent taxes, in the same SCA. Specifically, he listed that he filed Chapter 13 bankruptcy in July 2016, with a total amount of \$230,000 involved in the bankruptcy, and indicated that not all of his debts were discharged and some had to be repaid. He made no mention of his delinquent taxes in this portion of his response. He discussed his bankruptcy and delinquent taxes during his April 2018 background interview. (Tr. at 58-60; GE 1, 2; AE KK, LL).

Applicant's bankruptcy attorney testified. Applicant hired her in December 2018 to replace his previous bankruptcy attorney, who was conflicted from representing both Applicant and Applicant's wife due to their ongoing divorce proceedings and the continuing nature of a Chapter 13 bankruptcy. She testified that Applicant's bankruptcy was pending as of the date of the hearing; she was scheduled to file an amended plan within approximately 30 days of the date of the hearing, after having facilitated with Applicant and his CPA the filing of his local taxes to state C for 2014 and 2015; and she expected that Applicant's plan would then be up for approval by the bankruptcy court. She testified that there had been contested issues with the bankruptcy because there are two debtors, Applicant and his wife, and they have to find a way to pay the required tax claims that is agreeable to both debtors, their respective attorneys, and the taxing authorities. She testified that Applicant addressed the tax claims made by the IRS and states A and C in his bankruptcy. Though he did not address any tax by state B because no such claims had been filed by that state tax authority, she testified that she intended to follow up with state B to determine why they were delinquent in not filing a claim. She wrote:

[Applicant] is now well on his way to financial fidelity and back on track to getting his financial house in order. . . . I am confident now that with my help and my firms help he will no longer face the kind of financial difficulties that his ex-wife left him to handle and clean up over the last three years.

(Tr. at 21-42, 58; AE II, A, L, M, N, Q, R, S).

Multiple character references attested to Applicant's honesty, integrity, and reliability. He received the Navy Achievement Medal, Good Conduct Medal, Navy Reserve Meritorious Service Medal, and various unit awards. (Tr. at 21-42, 58; AE II, JJ, A, B, F, P, Q, R, S).

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).

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:

- (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 failed to timely file pay his taxes to the federal government and to states A, B, and C from approximately 2006 to 2016. He owes a significant amount in back taxes as a result, which he is attempting to resolve through his Chapter 13 bankruptcy. The evidence is sufficient to raise AG ¶¶ 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.

It is well established that failure to comply with tax laws suggests that an applicant has difficulty with abiding by government rules and regulations. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). It is also well established that the mere filing of past-due returns or resolution of delinquent tax debts does not compel a favorable security-clearance adjudication. ISCR Case No. 17-01907 (App. Bd. Mar. 7, 2018). The timing of corrective action is an important factor in determining whether security concerns raised by tax delinquencies are mitigated. Applicants who wait until their clearances are in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

Applicant's failure to timely pay his taxes did not happen so long ago, was not infrequent, and did not occur under such circumstances that are unlikely to recur. It continues to cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 20(a) is not established.

Conditions beyond Applicant's control, as previously discussed, contributed to Applicant's failure to timely pay his taxes. Thus, the first prong of AG ¶ 20(b) applies. For the full application of AG ¶ 20(b), he must provide evidence that he acted responsibly under his circumstances. He acknowledged that he should have taken more responsibility with his finances sooner than he did. As such, AG ¶ 20(b) is not established.

Applicant has attempted to resolve his financial delinquencies through his Chapter 13 bankruptcy. He received financial counseling through the bankruptcy process as well as from his bankruptcy attorney and CPA. Though he has made consistent payments into his bankruptcy plan since his filing, the plan was not yet approved as of the date of the hearing and his outstanding liabilities remained unresolved. As such, AG ¶¶ 20(c), 20(d), and 20(g) are not established.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The guideline notes conditions that could raise security concerns under AG ¶ 16. The disqualifying condition potentially applicable in this case includes:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities

Applicant credibly testified that he did not intentionally falsify his response to section 26 of his SCA when he did not disclose his delinquent taxes. He credibly testified that he believed he had disclosed his delinquent taxes by disclosing his bankruptcy, since his delinquent taxes were listed as part of his bankruptcy. I find that AG ¶ 16(a) has not been established and I find SOR ¶ 2.a for Applicant.

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 Guidelines F and E 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 that Applicant mitigated the personal conduct security concern, but he 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.l:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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