



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



In the matter of:)
)
) ISCR Case No. 20-02287
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations and Guideline J, criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On January 4, 2020, the Defense Counterintelligence and Security Agency issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline J, criminal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

In Applicant’s undated answer to the SOR, he requested a hearing before an administrative judge. The case was assigned to me on December 15, 2021. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 10, 2022, scheduling the hearing for January 27, 2022. I convened the hearing as scheduled. The Government offered exhibits (GE) 1 through 6. There were no objections and the exhibits were admitted into evidence. Applicant did not offer any exhibits. The record was held open until February 15, 2022, to permit Applicant an opportunity to provide any documents he wanted considered. He did not provide any and the record closed. Hearing Exhibits I and II are confirmation emails that Applicant was sent and received the Government's exhibits. DOHA received the hearing transcript on February 4, 2022.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.i, and 2.a. He denied the SOR allegations in ¶¶ 1.b through 1.h. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 59 years old. He earned some college credits, but not a degree. He was married from 1987 to 2004 and from 2007 to 2009. Both marriages ended in divorce. He has two grown children. He has been working for his present employer since December 2018 and has been steadily employed since February 2017. He stated that he would like to serve his government. (Transcript (Tr.) 19-22, 52; GE 1)

Applicant and his father were in business together. Originally Applicant owned three shops and his father owned ten shops. They merged their businesses. At some point, Applicant was the chief executive officer and the chief financial officer. It is unknown if or when his father no longer participated in the business. Applicant had about 300 employees. He was aware he was required to withhold federal payroll taxes and FICA payments associated with the business and turn it over to the IRS. He had complied with this requirement in the past. At some point, he experienced financial difficulties, and did not turn over the payments he withheld from his employees to the IRS as required. He testified that he was trying to keep his employees paid. (Tr. 24-37; GE 6)

Applicant was charged criminally and in about January 2010, he pled guilty and was found guilty for failure to pay over withholding and FICA taxes for tax year 2004. Five other charges were dismissed as part of his plea agreement. He was sentenced to imprisonment for 12 months and one day and required to make restitution in the approximate amount of \$148,702. Applicant testified that he served six months in federal prison and the remaining six months and a day in a halfway house. The plea agreement required that he pay \$100 a month, based on his income. (Tr. 24-37; GE 6)

In Applicant's January 2019 security clearance application (SCA), he disclosed his periods of unemployment from September 2015 to February 2017. Applicant testified that he made the monthly restitution payments until he got sick, and he was unemployed and on disability. He said 15% of his disability payment was garnished to pay the restitution during this time. Applicant resumed working in February 2017. He testified that he has not resumed paying the required restitution. He said he contacted the Government about resuming his payments, but was told his wages would be garnished. They were not. Since

at least January 2017, he did not contact the Government about resuming payments and has not made any payments from the time his pay was garnished until the present. Applicant testified that a few days prior to his hearing, the Government froze his bank account and put a levy on his checking account. He testified that he is now in negotiations for resolving his restitution issues. He said he has been saving his money in anticipation of resuming his restitution payments and has put about \$11,000 in his 401(k) pension plan. He does not know how to withdraw money from this account, but he is making inquiries for help in doing so. He stated that he has paid approximately \$15,000 in restitution. No supporting documents were provided. (Tr. 24-40, 50-51; GE 1, 6)

Applicant testified that he did not initiate contact with the Government because he was scared. He stated that he has filed his past income tax returns, and he owes federal income taxes for tax years 2004, 2012, and other tax years that he could not recall. He estimated he owes approximately \$10,000 in delinquent federal income taxes. Applicant testified that he also owes approximately \$7,000 to \$8,000 for state income taxes and also business taxes for his now defunct business. He does not know the amount and has no payment plan at this time to resolve these taxes. (Tr. 38-40, 44-45)

Any derogatory information that was not alleged in the SOR, will not be considered for disqualifying purposes, but may be considered in the application of mitigating conditions, when making a credibility determination, and in a whole-person analysis.

The SOR alleged a charged-off credit card debt (§ 1.a -\$18,349) and medical debts (§§ 1.b through 1.h-totalling approximately \$2,128). Applicant admitted the credit card debt, which he said became delinquent in December 2015, when he was sick and could not pay it. He testified he contacted the creditor in either 2016 or 2017 and told them he could not pay the debt. He believed the debt was written-off as a bad debt by the creditor. No other information was provided. The debt is not resolved. (Tr. 40-44)

Applicant denied all of the medical debts in the SOR. He stated that he was on disability when the debts were incurred, and they should have been paid by Medicaid. He stated he contacted the creditors and disputed them over the telephone and also disputed them with the credit bureaus. He indicated he would attempt to find the documents regarding his disputes. No information was provided regarding the resolution of his disputes or other documents to support he is not responsible for these debts. All of the alleged SOR debts are supported by credit reports from January 2022, March 2021, September 2019, and January 2019. These debts are unresolved. (Tr. 40-44; GE 2, 3, 4, 5)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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." 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to 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 EO 10865 provides that 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 relating to the guideline 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant has a delinquent credit-card debt and numerous medical debts that are unresolved. As an employer, he withheld federal taxes and FICA payments from his employees and failed to turn the funds over to the IRS as required. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 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

(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.

Applicant has a felony conviction for failing to pay the Government the amounts he withheld from his employees for federal taxes and FICA payments. Pursuant to his plea agreement, he is required to pay \$100 a month in restitution. He said he paid the restitution for a period and then was unemployed and it was garnished from his disability payments. He did not provide documents to show his past payments. He said he was told sometime in 2017 that his pay would be garnished and applied to the restitution. He also said he has not had contact with the Government regarding the payments since 2017, until recently when his account was frozen. Applicant did not provide any evidence of his efforts to resolve his other delinquent debts or provide evidence of his disputes and the resolution of those disputes. His delinquent debts cast doubt on his current reliability, trustworthiness and good judgment. Although, he said he stopped paying his court-ordered restitution because he became ill and it was being withheld from his disability payments, he did not provide evidence to substantiate his statements. His financial problems were caused by his criminal conduct. His inability to make restitution payments after he became ill was beyond his control, but he has not made a reasonable effort to resume the payments or to address his other delinquent debts. AG ¶ 20(b) has minimal application. There is no evidence of financial counseling or a good-faith effort to resolve his delinquent debts. None of the other mitigating conditions apply.

Guideline J: Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In 2010, Applicant pled guilty to and was found guilty of a felony for failure to pay over withholding and FICA taxes for tax year 2004. Five other charges were dismissed as part of the plea agreement. He was sentenced to imprisonment for 12 months and a

day and required to make restitution in the approximate amount of \$148,702. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant was required to pay restitution of \$148,702 as part of his plea agreement. He was to make \$100 payments. He testified that he made payments, but stopped sometime in 2015 when he became sick and was unable to work. He said the Government garnished 15% of his disability payments to be applied to his restitution. When he resumed working in 2017, he said he was told his wages would be garnished. They were not, and he has not had any contact with the Government about resuming his restitution payments, until his account was recently frozen. He provided no evidence to substantiate his testimony that he has paid about \$15,000 in restitution.

Although Applicant's criminal conduct occurred in 2004 and he was sentenced in 2010, he has failed to comply with the terms of his plea agreement and the court-ordered restitution. There is insufficient evidence of rehabilitation. His felony conviction is serious and calls into question his willingness to comply with laws. His conduct casts doubt on his reliability, trustworthiness, and good judgment. The above mitigating conditions do not apply.

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 the 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 and Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those Guidelines, but some warrant additional comment.

Applicant has a felony conviction for failing to turn over withholding and FICA payments to the Government. He is required to pay restitution, but has failed to make payments since at least 2017 and has a substantial debt to the Federal Government. He has not paid income taxes owed for other tax years and state taxes that were not alleged. He owes other debts that he has not resolved.

The DOHA Appeal Board has held that:

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. August 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).¹

Applicant's criminal conduct and failure to make payments pursuant to the court-ordered restitution as part of his plea agreement raise serious concerns. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations and Guideline J, criminal conduct.

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.i: Against Applicant

¹ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge