



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



In the matter of:)
)
-----) ISCR Case No. 12-04891
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: Nicole A. Smith, Esq.

06/19/2014

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), dated December 23, 2013, 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; Department of Defense 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 September 1, 2006.

In a January 22, 2014, response to the SOR, Applicant admitted the four tax liens referenced under Guideline F and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The case was assigned to me on February 26, 2014. DOHA issued a notice of hearing on March 20, 2014, setting the hearing for April 17, 2014.

The hearing was convened as scheduled. The Government offered five documents, which were accepted as Exhibits (GX) 1-5 without objection. The Government also introduced a Hearing Exhibit (HE), which was similarly accepted as HE 1. Applicant offered testimony and 12 documents, which were accepted without objection as Exhibits (AX) A-L. He was given until April 23, 2014, to submit any additional materials. Upon Applicant's request, the deadline for post-hearing submissions was moved to April 28, 2014. On April 29, 2014, the transcript (Tr.) of the proceeding was received. On April 30, 2014, the Government forwarded four packets of material from Applicant without objection, which were accepted into the record as AX M-P. The record was then closed. Based on my review of the testimony and materials, I find that Applicant failed to mitigate financial considerations security concerns.

Findings of Fact

Applicant is a 60-year-old program manager and senior analyst who has worked at his present place of employment for seven years. He has a master's degree in human resource development. Applicant served on active duty in the United States military for 21 years. He achieved the rank of lieutenant colonel before his 1998 honorable discharge. (Tr. 19) He has maintained a security clearance since 1978. Applicant is married. His wife does not currently work. Their two grown children are in their late 20s. Applicant took out student loans for their undergraduate educations, on which he paid until 2012, when the children took over paying down their loan balances. (Tr 21, 53) Both children are now employed. His daughter earns about \$40,000 a year, while his son earns about \$20,000. They will continue to live with Applicant "until they're on their feet." (Tr. 14) They do not pay their father rent.

Between 2000 and 2001, Applicant's civilian salary climbed from about \$68,000 to around \$125,000. His 2002 credit report reflects that Applicant had rehabilitated some delinquent debts. (Tr. 68) In 2004, Applicant's taxes were audited for tax years 2001, 2002, and 2003. The audit was triggered due to miscalculations made by Applicant's tax preparation service. His taxes were recalculated and a repayment plan for about \$10,000 was instituted, on which Applicant has regularly paid. (Tr. 22-23) A subsequent tax liability for tax year 2007 was rolled in to Applicant's repayment plan balance. There were no issues regarding his tax year 2004, 2005, or 2006 returns.

In the interim, Applicant bought a new home in 2002 after moving to a new state for work. His mortgage company was bought out and the terms of his initial mortgage agreement "kind a changed somewhat," including an increase in his monthly payments from about \$2,200 to \$2,300. (Tr. 24) A subsequent downsizing at work about a year-and-a-half later caused him to miss some of his monthly payments when he was laid off from work, leading him to reassess his finances in order to catch up on his loan obligation. (Tr. 24-25) He was subsequently hired elsewhere, but at a pay cut of about \$10,000. In all, he fell behind about eight payments on his mortgage. In 2005, he was hired back by his former employer, but he was again laid off in 2007. A severance package "pretty much kind of held [them] while [he] was trying to find a new job." (Tr. 27) He was unemployed for about five months. (Tr. 64)

In 2007, Applicant moved to his current state of residence after accepting a new job. As he prepared to sell the house, his mortgagor was being acquired by a bank. Several people expressed interest in the home, but the mortgagor was preoccupied with its own ownership transition. Meanwhile, Applicant's mortgage payments had increased to "well over" \$3,000 a month. (Tr. 28) By this time, he was paying less than this amount. Money became even tighter when he started renting a property in his new state of residence for \$2,700 a month. With input from the Veteran's Administration (VA), Applicant was advised to seek a deed-in-lieu of foreclosure in order to keep from having his credit ruined. Applicant described a deed-in-lieu of foreclosure as "where . . . the mortgage company accepted the . . . deed on the property, and they took control of it and just resold it, and paid off the VA percentage of that money they had recouped." (Tr. 28) All this moved along slowly through 2008, while Applicant continued to make payments on his tax repayment plan. At the time, Applicant earned about \$105,000 a year plus approximately \$20,000 in military retirement disbursements. Applicant also receives \$900 a month for military disability. Therefore, Applicant was earning nearly \$136,000. At the time, his wife was generating an additional \$14,400 a year.

Moving forward from 2008, Applicant owed a little over \$13,000 in taxes for tax years 2008 and 2009; approximately \$18,700 for 2010 and about \$15,000 for 2011. Each year, these obligations were folded into his federal Internal Revenue Service (IRS) tax repayment plan. He continued to owe taxes despite reducing his personal deductions. (Tr. 32) By 2011, he was taking no personal withholding. He had no other forms of deductions for those years, except "your typical deductions, your contributions, and the charitable stuff throughout the year." (Tr. 32)

As the tax repayment plan was repeatedly extended with obligations from subsequent years, Applicant kept in contact with the IRS. The IRS has increased his monthly payments on that plan from \$290 in 2004 to \$800 today. Those sums are based on an IRS calculation and a "suggested figure." (Tr. 34) Last year, the IRS was poised to increase the monthly payment amount, but Applicant requested a review of that raise. Over the years, Applicant has missed payments on the repayment plan, while a recalculation of the amount due was pending. He has also missed payments on the IRS plan because he "just could not pay it." (Tr. 36)

Applicant currently earns \$130,000, an increase from the \$100,000 he earned when he started his current position six years ago. (Tr. 64) In addition, he presently earns \$32,000 from the VA in retirement benefits, plus \$10,800 a year for military disability. In sum, he has a yearly income of about \$173,000. (Tr. 61) His wife no longer works. Applicant's net monthly income is presently \$9,718. He currently contributes to a retirement savings account, which has a present balance of around \$70,000, and a small IRA worth a few thousand dollars. (Tr. 59-60) After all expenses, including a \$260 monthly payment on a state tax repayment plan, Applicant has a net monthly remainder of \$100 or less. (Tr. 70-71) He is otherwise current on his bills. A recent bout with cancer was successfully addressed, and most expenses were covered by TRICARE and TRICARE Supplemental insurance. He has relocated twice in the past two years

because landlords have sold the properties Applicant has rented. Consequently, unanticipated moving expenses were incurred.

Applicant, his wife, and two children share a four bedroom, 3,200 square foot, house. Applicant has two vehicles on which he is making payments, a car loan of approximately \$50,000 with an \$875 a month payment for a GMC Yukon acquired in 2012 and a leased 2010 Cadillac. Applicant stated that he and his wife are surviving on the basics. They seldom entertain or go out. They bundled their phone, cable, and Internet service. Their cell phone bill averages \$210 a month. He might turn in the Cadillac at the end of its lease. He requested an extension to file his 2013 federal taxes while he seeks professional assistance with both his 2013 taxes and his overall financial situation. (Tr. 63-64) Applicant's plan for addressing the tax liens, which remain at issue, is to find and retain a certified public accountant (CPA) who can help him:

put in place some type of better tax management plan throughout the year, so that we don't have to keep incurring these heavy taxes. . . . The second part of that is . . . talking to an attorney to try and help us work with the IRS to perhaps see if the IRS can relieve some of the interest and penalties to make our payments really . . . account for something. (Tr. 71)

As of the time the record closed, there was no evidence Applicant had retained a CPA or attorney for these tax-related purposes.

Applicant submitted multiple letters and other records reflecting him to be a patriot, a valued employee, and an exemplary retiree from the U.S. military. Indeed, he was highly decorated during his time in military service. Numerous recommendations echo these sentiments and refer to his excellence in his civilian professional capacities.

In sum, the December 2013 SOR alleged that four tax liens filed in 2011 for tax years 2008 through 2011 had a collective balance of about \$70,000. Applicant testified that the balance is now closer to \$60,000, but offered no evidence to show how this sum was reduced. He also testified that the balances owed for 2001-2006 were satisfied. A tax advocate made little headway in reducing penalties and interest on Applicant's repayment account in 2010-2011. Applicant's monthly payments on the debt repayment plan are presently satisfying interest and penalties, leaving little progress on the underlying sum owed. Consequently, Applicant is presently "treading water" with regard to his tax debt. There is no indication that notable progress will be forthcoming. In contrast, Applicant hopes to have his state tax issues, which are subject to a \$260 a month repayment plan, satisfied by the end of 2014. (Tr. 70)

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 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 access to classified information will be resolved in favor of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 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.

Section 7 of Executive Order 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

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that 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. An individual who is financially overextended is at risk of engaging in illegal acts to generate funds.

Here, the Government introduced credible evidence showing Applicant had four federal tax liens (2008-2011) filed in 2011, representing close to \$70,000 in delinquent debt. They are the most current federal tax obligations that have been owed by Applicant on a rolling basis for over a decade. This is sufficient to raise two of the financial considerations disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts, and

AG ¶ 19(c): a history of not meeting financial obligations.

Five conditions could mitigate the finance-related security concerns in this case:

AG ¶ 20(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;

AG ¶ 20(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Although Applicant's initial tax issues were the result of poor tax return handling by a tax preparation service that resulted in an audit, he continues to have a federal tax obligation issue every year or so despite taking zero exemptions and deductions. This is not a recent development. Applicant has been aware that he needs professional guidance or help in this area, but has, thus far, failed to retain appropriate assistance. Therefore, it cannot be said that the debts at issue were created by circumstances beyond Applicant's control and that he acted responsibly under those circumstances.

Applicant has also not received financial counseling. As noted, he is contemplating the retention of professionals (a CPA and an attorney) to help him with his past, present, and future tax issues. To date this plan has yet to be implemented.

Meanwhile, Applicant is subject to a tax repayment plan with the IRS, on which monthly payments have risen from \$280 to \$800 as the principal owed to the IRS for various years has risen over the past decade. It appears Applicant cannot presently afford to pay more on the plan: He objected to a recent recommendation to increase his monthly payment to the IRS; he currently has a net monthly remainder of less than \$100; and he already has been late or missed some of his repayment plan payments. There is no evidence he plans to make future adjustments to his life or lifestyle that might increase his available income. Therefore, the evidence does not reflect much in the way of true progress on the actual debt at issue, only on the interest and penalties which have yet to be successfully challenged.

In light of the \$60,000 to \$70,000 outstanding tax debt, monthly payments of \$800 do little to reduce the actual debt at issue; at best, they only help address Applicant's monthly acquisition of new and additional penalties and interest. In the end, Applicant is left "treading water" on the underlying debt itself, with no signs of notable progress occurring in the near future. Moreover, lacking evidence regarding his 2013 tax liability, it is unknown whether he continues to acquire more tax liability. At best, only AG Mitigating Condition ¶ 20(d) applies, to the extent that Applicant has tried to address his tax liens through an IRS-approved repayment plan.

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(a). 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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 60-year-old program manager and senior analyst who has been with his present employer for seven years. He has a master's degree in human resource development. Applicant served on active duty in the United States military for 21 years before receiving an honorable discharge. While in the military, he served with distinction. Applicant is married and has two grown children, both of whom live with Applicant and his wife. He is a mature, accomplished, and credible man.

Through no fault of his own, Applicant acquired some debt when an audit revealed that his tax filings were improperly completed by a professional tax preparation service. The resultant repayment plan, while not onerous, became burdensome in subsequent years when more recent tax filings reflected additional tax liabilities that were rolled onto his IRS repayment plan. Today, due in part to Applicant's monthly \$800 payment on the IRS plan, Applicant is left with a net monthly remainder of under \$100.

Although Applicant admits he missed some payments on his IRS plan, he has been relatively diligent in making payments toward the rolling tax debt he has acquired throughout the past decade. At this point, however, \$800 a month is insufficient to make any true or meaningful progress on the debt itself. Instead, Applicant is basically just paying off interest and penalties. This does little to resolve the debt at issue or to show it is under control. Moreover, Applicant's plan to address the debt at issue – to enlist the aid of a CPA and attorney – has yet to go beyond the planning stage. To date, there is no evidence that this plan has been adopted or successfully implemented. In short, the debt at issue remains in limbo, and Applicant presently does not have the income to increase his payments on the IRS debts in such a way that progress can be made. Consequently, I find that financial considerations security concerns remain unmitigated.

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
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. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge