



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 12-09201
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel
For Applicant: *Pro se*

June 17, 2016

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on January 31, 2012. (Government Exhibit 1.) On February 25, 2015, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F (Financial Considerations) concerning Applicant. 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 Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on April 1, 2015, (Answer) and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 1, 2015. This case was assigned to another administrative judge on July 13, 2015. It was reassigned to me on September 9, 2015. The Defense Office of Hearings and Appeals (DOHA) issued notices of hearing on September 8, and September 15, 2015. I convened the hearing as scheduled on October 22, 2015. The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant submitted Applicant Exhibits A through C, which were also admitted without

objection, and testified on his own behalf. At Applicant's request the record was left open for the receipt of additional documentation. On November 12, 2015, Applicant submitted Applicant Exhibits D and E, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 4, 2015. The record closed on November 12, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 49 and married. He is an honorably retired veteran of the United States Navy. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant denied all the allegations under this paragraph.

The SOR allegations primarily concern Applicant's failure to file Federal and state tax returns, and pay the back taxes he owes. For ease of discussion, a single allegation regarding a judgment will be discussed first, followed by the tax return situation, and finally the allegations concerning his back taxes for specific years.

1.g. Applicant denied that he owed a judgment to his state taxing authority in the amount of \$7,734.88. According to Applicant the only judgment on his record concerns his condominium homeowners' association. The available credit reports in the record do not show any judgment debt, either to the state or Applicant's homeowners' association. Department Counsel conceded at the hearing that there is no support for this allegation. Accordingly, it is found for Applicant. (Government Exhibits 3, 4, and 5; Applicant Exhibit C; Tr. 19-25.)

1.e. Applicant freely admits that he did not file his Federal income tax returns in a timely manner for tax years 2010, 2011, and 2012. However, Applicant states that he has now filed all the applicable returns. He submitted copies of all three tax returns, which show they were filed in approximately August 2014. (Applicant Exhibit B at 6-7, Exhibit E at 13-14; Tr. 25-26, 52-56, 64-65.)

1.f. Similarly, Applicant freely admits that he did not file his state tax returns for the tax years 2006 through 2012. Once again, Applicant states that he has now filed all the applicable returns. He submitted copies of these returns, which also show they were filed in approximately August 2014. Applicant states he does not owe the state any money for back taxes. (Applicant Exhibits A and D; Tr. 26, 50-52, 68, 71.)

1.a. Applicant denied that he owed \$5,000.85 to the IRS for 2006 back taxes. His 2006 Federal tax return, which he filed in August 2014, showed that he is due a refund of \$2,011. According to Applicant that refund has been applied to other Federal taxes that he owes. The available record does not confirm that statement. Applicant thought he would owe money that year, which is why he did not file or pay his taxes. (Government Exhibit 2 at 22-23; Applicant Exhibit B at 3, Exhibit E at 3-5; Tr. 39-40, 56-58.)

1.b. Applicant denied that he owed \$30,012.05 to the IRS for 2007 back taxes. His 2007 Federal tax return, which he filed in August 2014, showed that he owed \$5,271. The IRS notified Applicant on July 13, 2015, that they had changed his tax return and he was owed a refund of \$1,582.13. According to Applicant that refund has been applied to other Federal taxes that he owes. (Government Exhibit 2 at 24-25; Applicant Exhibit B at 4, Exhibit E at 6-8; Tr. 40-41, 58-59.)¹

1.c. Applicant denied that he owed \$41,633.75 to the IRS for 2008 back taxes. His 2008 Federal tax return, which he filed in August 2014, showed that he owed \$11,067. The IRS notified Applicant on July 13, 2015, that they had changed his tax return and he now owed \$18,457.19. Applicant has not yet resolved this tax situation. (Government Exhibit 2 at 26-27; Applicant Exhibit B at 5, Exhibit E at 9-11; Tr. 50-51, 59-60.)

1.d. Applicant denied that he owed \$47,429.79 to the IRS for 2009 back taxes. His 2009 Federal tax return, which he filed in August 2014, showed that he owed \$17,012. Applicant has not yet resolved this tax situation. (Government Exhibit 2 at 28-29; Applicant E at 12-13; Tr. 51-52, 61-62.)

In general, Applicant believes he currently owes about \$40,000 to the IRS for back taxes. However, Applicant was uncertain of his situation and was unable to provide documentation showing with specificity how much he owes to the IRS. Applicant indicated that his 2010 through 2014 Federal income tax returns show him receiving refunds that total approximately \$25,000.² However, Applicant was unable to provide any information as to the status of those tax returns. He currently has no payment plan with the IRS to resolve his back taxes, but he has requested one. (Applicant Exhibit E at 14-23; Tr. 65, 72-73.)

Applicant admits that he was seriously delinquent in taking care of his tax liabilities for several years. Most of this was due simply to his procrastination. Another reason was that Applicant was running two households for several years - 2006 through 2009. In addition, his wife was ill in 2006. According to Applicant, he knew that he owed back taxes, but did not have the money to pay them and elected not to file his tax

¹There is documentary evidence that refunds from tax years 2011 and 2013 were also applied to the 2007 tax year. (Applicant Exhibit B at 6,8.)

²His 2013 Federal tax return is dated August 6, 2014. The 2014 Federal tax return is dated October 1, 2015. (Applicant Exhibit E at 20-23.)

returns. He acknowledges that these were poor decisions on his part. Applicant was unable to satisfactorily explain the sources of his financial problems from 2007 onwards. His budget as of February 2014 showed a monthly net remainder of \$2,659. (Government Exhibit 2 at 15; Tr. 27-39, 41-50, 67.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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. 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. 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, 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline F, Financial Considerations)

The security concern relating to the guideline for Financial Considerations is 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts, is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations,” may raise security concerns. Finally, AG ¶ 19(g) states a “failure to file Federal, state, or local income tax returns as required or fraudulent filing of the same,” may also raise security concerns. Applicant, by his own admission, and as supported by the documentary evidence, failed to file Federal and state tax returns for a substantial period of time and has a large Federal tax debt. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), disqualifying conditions may be mitigated where “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.”

Applicant intentionally failed to file his Federal and state tax returns for about eight years. While several incidents happened along the way, which affected his ability to file his taxes to some extent, in general the fault was simply procrastination that became a habit. He allegedly filed all of his back tax returns in August 2014, which is a little more than a year before the record closed. He has virtually no track record of filing his tax returns in a timely manner. AG ¶ 20(a) does not apply to the facts of this case.

In addition, AG ¶ 20(b) states that disqualifying conditions may be mitigated where “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.” Applicant’s problems do not rise to the level required to apply this mitigating condition, especially given the eight year period when he did not file tax returns.

I also cannot find that Applicant has “initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” as required by AG ¶ 20(d). The situation concerning his Federal taxes is, in a word, confusing. Beginning in 2012, when he filled out his e-QIP, Applicant knew of the Government’s concerns about his unfiled and unpaid Federal and state taxes. (Government Exhibit 1.) He answered Interrogatories in April 2014 concerning the same issues, attaching some documentation. The SOR was issued in February 2015. Yet, as of the date of the hearing in October 2015, Applicant was unable to state with any particularity how much he owed the IRS in back taxes, or how he intended to pay it. As stated, he believed that tax debt to be approximately \$40,000, towards which he is not making payments despite a substantial monthly budget surplus. Accordingly, I cannot find that “there are clear indications that the problem is being resolved or is under control,” as required by AG ¶ 20(c).

The DOHA Appeal Board has stated, “A security clearance adjudication is not a proceeding aimed at collecting an applicant’s personal debts. Rather, it is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness.”³ Applicant is asking DOHA to trust that he will fulfill his Federal income tax responsibilities. Based on the current record that is not a supportable position. There are simply too many unanswered questions concerning his tax situation and his judgment. The stated mitigating conditions do not apply to the facts of this case. Paragraph 1 is found against 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 the relevant circumstances. 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. The administrative judge must consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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

³ISCR Case No. 07-09966 at 3 (App. Bd. June 27, 2008).

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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guideline F, above, applies here as well. Applicant has not submitted sufficient evidence showing his tax situation has been responsibly addressed or resolved. That is his burden to meet and he has not done so.

Under AG ¶ 2(a)(2), I have considered the facts of Applicant's tax history. Based on the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); or that there is a low likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, 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 has not mitigated the security concerns arising from his financial situation. Accordingly, the evidence supports denying his request for a security clearance.

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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge