



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



In the matter of:)	
)	
)	ISCR Case No. 12-10062
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

12/10/2014

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for financial considerations. His request for a security clearance is denied.

Statement of the Case

On April 3, 2014, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns under Guideline F (financial considerations). This 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; and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006. In his Answer to the SOR, Applicant admitted the four allegations under Guideline F.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 5, 2014, setting the hearing date for September 24, 2014. Before the hearing, Department Counsel provided Applicant with a copy of the Government exhibits to be offered. I marked Department Counsel's cover letter accompanying the documents as Hearing Exhibit I. At the hearing, I admitted into

evidence four Government exhibits (GE 1-4).¹ The Government's exhibit list is marked HE II-a.² Applicant testified and presented seven exhibits, admitted into evidence as Applicant exhibits (AE) A-G. I granted Applicant's request to hold the record open for additional documentation. He timely submitted seven exhibits, which I admitted as AE H-N. I marked Department Counsel's memorandum in response to Applicant's post-hearing submission as HE III. DOHA received the transcript of the hearing (Tr.) on October 2, 2014.

Findings of Fact

Applicant's admissions are incorporated as findings of fact. After a thorough review of the pleadings and the evidence, I make the following additional findings of fact.

Applicant is 36 years old. He married in December 2005, and has 4 children 8 to 14 years of age. Three of the children do not live with him, and he provides child support. He is attending college and expects to complete a bachelor's degree in information technology in 2017. He has worked for the past two years as a satellite communications engineer and project coordinator for a defense contractor. Applicant has held a security clearance for approximately 12 years. (GE 1; Tr. 32-42, 47)

From 1999 to 2002, when he was 21 to 24 years old, Applicant worked in the United States and lived with his parents. His mother completed his income tax returns, and he signed them. He believes he received refunds. Starting in 2002, he served in the Army National Guard for several years. He then began working for defense contractors, and was employed overseas in countries A (May 2004 – February 2007) and B (June 2007 – January 2009).³ (GE 1; Tr. 29-32, 43-53)

Applicant did not timely file federal income tax returns for 2004 through 2012, or state tax returns for 2005 through 2010. While living overseas between 2004 and 2009, coworkers told him that his income was not taxable because he was working outside the United States, and that after he returned home, he had three years to file the returns. (Tr. 60) When asked to clarify, he testified,

¹ At the hearing, Applicant noted that his 2002 credit report, GE 4, lists an incorrect address. He also noted that an address he provided during his security interview (at page 11 of his DOHA interrogatory response), is incorrect. With these corrections, Applicant did not object to the exhibit. (GE 2, 4; Tr. 14-18)

² Department Counsel inadvertently offered an inaccurate exhibit list, included in the record as HE II-b. She replaced it with a corrected version, marked as HE II-a. (Tr. 12)

³ Applicant's security clearance application indicates he left country B in November 2009, but he testified he left in January 2009. (GE 1; Tr. 49)

APPLICANT: From when you came back stateside, you had at least three years for each tax year.

ADMIN. JUDGE O'BRIEN: So, if you came back in 2010, you thought you would have three years from 2010 to 2013, to file your 2004 tax return?

APPLICANT: Yes, yes, Ma'am.

He also believed that because he was owed refunds, he did not have to file returns. He planned to recover the refunds by filing when he returned to the United States. However, he did not recoup refunds, because he did not file returns within the required time frame. Applicant also testified he did not claim the appropriate filing status for his income level, which resulted in his owing taxes to the Internal Revenue Service (IRS) and to his state of residence. He has now adjusted his filing status to single with no exemptions in order to avoid such problems in the future. (GE 1; Tr. 29-32, 43-53, 59-61, 74, 82)

On July 21, 2011, the IRS filed a tax lien against Applicant for tax years 2004 through 2007. It was based on returns the IRS had filed for Applicant, and showed delinquent income taxes totaling \$42,248. Applicant stated in his June 2013 response to DOHA interrogatories that the \$42,248 balance was inaccurate because he was due refunds for 2004 through 2008. However, the IRS tax lien document shows he owed balances for 2004 through 2007. On September 26, 2011, he filed his first delinquent tax return, for tax year 2008.⁴ The lien was released on May 29, 2013. (GE 2; AE K, L, N)

At his security interview in May 2012,⁵ Applicant stated he was aware that the federal government might have filed a tax lien against him because he had not filed timely returns between 2004 and 2011. He also stated he filed his 2004 and 2008 federal returns before completing his security clearance application in April 2012. As of the date of his security interview, he planned to file his returns one at a time, every other week. He believed a refund was due to him for each unfiled tax year. He planned to pay any penalties he owed, and have all his back taxes resolved by August 2012. (GE 2)

⁴ Applicant's interrogatory response shows his 2005 tax return was filed in January 2006. (GE 2 at 54) However, Applicant denied that it was filed then because he was in country B at the time. The 2005 return does not show Applicant's signature or indicate when it was filed. Applicant's AE K shows the 2005 return was filed in 2012. (GE 2; AE L; Tr. 65)

⁵ DOHA provided Applicant with a copy of the written report of his security interview to review. He made one comment concerning a disputed insurance debt, which is not alleged in the SOR. He signed a notarized statement on June 11, 2013 indicating that, other than the disputed insurance debt, the report accurately reflected the information he provided during the interview. (GE 2)

Applicant submitted a chart (AE K) stating that he filed his federal returns between 2011 and 2014, as follows:

- 2004, 2005, 2006 April 26 through May 21, 2012
- 2007 April 17, 2013
- 2008 September 26, 2011⁶
- 2009 through 2013 February 11 through April 7, 2014⁷

Applicant's income tax delinquencies appear in his credit report of April 2012. He testified that he currently owes the IRS \$30,500. He stated the IRS would not allow him to begin a payment plan until it had finished processing all his returns. He stayed in touch with the agency regarding processing. On May 5, 2014, he requested the IRS accept a payment plan of \$200 per month toward his delinquencies, and he paid \$200 in June, July, and August 2014. Subsequently, he was able to increase the payment. On August 20, 2014, the IRS agreed to a payment plan of \$450 per month. In September 2014, he paid \$450. The four payments he made in 2014 were applied to his 2009 tax liability. If Applicant fails to meet the plan conditions, the IRS can take enforcement action including a tax lien or a levy on his wages or bank accounts. Interest and penalties will continue to accrue until his taxes are paid. (GE 3; AE C, E, G; Tr. 74-82)

As to his delinquent state income taxes, Applicant provided evidence of a May 2014 agreement with his state taxing authority to pay a balance of \$670 in 14 monthly payments. (Answer at 4) In May and June 2014, he made payments of \$50 and \$65 toward his 2010 state income tax. A September 23, 2014 printout from the state department of taxation shows that currently he has paid the taxes for tax years 2008, 2009, and 2010. He made a payment of \$49 on June 25, 2014, which paid his 2013 state income tax in full. In July, August and September, he paid a total of \$150 toward his 2011 state tax debt. As of September 23, 2014, he owed \$383 in delinquent state taxes for tax years 2011, and \$219 for 2012. (Answer; AE D, F)

Applicant's June 2013 personal financial statement (PFS) shows that he and his wife earned net monthly income of \$7,580. At that time, he estimated monthly expenses of \$2,825, debt payments of \$626, and a monthly net remainder (MNR) of \$4,129. However, at the hearing, Applicant testified that the 2013 PFS was inaccurate. After the hearing, he provided pay statements showing he and his wife currently earn monthly net income of \$7,237. He also provided an updated budget, which includes the \$450 monthly IRS payment and \$50 monthly state payment. It shows a detailed list of monthly expenses, which total \$7,309. His current MNR is negative \$74. (GE 2; AE H, I, J; Tr. 82-94)

⁶ Applicant's documentation shows his tax preparation service billed him for the 2008 tax return preparation on August 25, 2011. (AE N)

⁷ Applicant filed his 2013 federal return timely, on April 7, 2014. (AE K)

Applicant provided character reference letters, which describe him as having exceptional integrity, a strong work ethic, subject-matter expertise, and professionalism. A former military officer and current project manager, who works with him daily, describes him as honest and trustworthy, and recommends him for a security clearance. His facility security officer notes that Applicant is a dedicated worker with good moral character. In 2009 and 2010, Applicant was inducted into a group of high achievers in his company. He has received numerous certificates of appreciation for his contributions to U.S. military missions overseas. (AE A, B, M)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and policy in the AG.⁸ Decisions must reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented require consideration of the adjudicative factors addressed under Guideline F (financial considerations).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁹ for an applicant to either receive or continue to have access to classified information. The Government must produce admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the Government must prove controverted facts alleged in the SOR. If the Government meets its burden, then the applicant must refute, extenuate, or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.¹⁰ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust. The Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about suitability for access in favor of the Government.¹¹

⁸ Directive. 6.3.

⁹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; AG ¶ 2(b).

Analysis

Guideline F (Financial Considerations)

AG ¶18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. . .

Applicant failed to file his federal income tax returns for tax years 2004 through 2012. He also failed to file his state income tax returns for tax years 2005 through 2010. He currently owes approximately \$30,000 in federal taxes and \$600 in state taxes. The record supports application of the following disqualifying conditions under AG ¶19:

(c) a history of not meeting financial obligations; and

(g) failure to file annual Federal, state, or local income tax returns as required. . . .

The Financial Considerations guideline also contains factors that can mitigate security concerns. I have considered the mitigating factors under AG ¶ 20, especially the following:

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

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's failure to file returns began in 2005, with his failure to file his 2004 federal return, and it continued to 2011, when he filed his first delinquent return. His failure to meet his duty to file income tax returns is not recent. However, it was frequent, because it involved returns for numerous years. The fact that Applicant did little during a period of six years to investigate the validity of information from coworkers about his tax obligations casts doubt on his reliability and judgment. AG ¶ 20(a) does not apply.

AG ¶ 20(b) applies where an individual experiences events over which he had no control, and which affected his finances. Nothing in the evidence indicates that events beyond Applicant's control caused him to fail to timely file his income tax returns. AG ¶ 20(b) does not apply.

Applicant contacted the IRS, worked with the agency on his delinquencies, and received advice on how to resolve them. He has paid back state taxes for four tax years, and is making payments on his federal and remaining state delinquencies. However, his current PFS, including the \$450 monthly payment to the IRS and the \$50 payment to the state, shows a negative monthly remainder. Applicant's ability to maintain his payment plans is unclear. Applicant receives partial credit under AG ¶ 20(c).

Applicant cannot receive full credit for a good-faith effort to meet his tax obligations. The Appeal Board has defined "good faith" as, "[r]easonableness, prudence, honesty, and adherence to duty or obligation."¹² Here, Applicant failed in his civic obligations when he did not investigate or confirm the advice of his coworkers regarding his tax obligations; as a result, his tax returns went unfiled for years. He did not file his first delinquent return until two years after he returned to the United States, after the IRS filed a tax lien against him. At the time of his security interview in 2012, he had filed one delinquent return; he stated he would file the remaining returns over the next several months, but he failed to do so. His 2004, 2005, and 2006 returns were not filed until 2012. Although his state income taxes were relatively small, his state tax payment agreement was not established until May 2014. Only limited mitigation is available under AG ¶ 20(d).

¹² ISCR Case No. 06-14521 at 3 (App. Bd. Oct 15, 2007).

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should 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 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

I have considered the positive aspects of Appellant's history. He is a responsible husband and father, and is in the process of earning a bachelor's degree. He provided laudatory character references. He has worked with defense contractors for more than a decade, and has been acknowledged for providing outstanding support to U.S. military forces. He has established payment plans for his federal and state taxes, and made payments on his delinquencies.

When Applicant worked for defense contractors overseas, he was in his twenties. He showed immaturity by accepting the statements of coworkers about his tax obligations, without further investigation. Even after his return to the United States, he did not take appropriate action regarding for his federal and state tax obligations. He failed to demonstrate reliability when he waited two years to file his first delinquent return, after the IRS issued a tax lien in 2011.

Applicant owes approximately \$30,000 in back taxes to the federal government. The delinquencies have been paid in part through seizure of tax refunds. Although he has begun payment plans with the IRS and the state, he did not begin them until 2014. It appears that Applicant is currently operating at a deficit each month, and it is unclear if he will be able to maintain his payment plans.

The Appeal Board had held,

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. [citations omitted] . . . Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligations to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information.¹³

The evidence at this time fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude he has not mitigated the security concerns raised by the financial considerations guideline.

Formal Findings

Paragraph 1, Guideline F	AGAINST APPLICANT
Subparagraphs 1.a – 1.d	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge

¹³ ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).