



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



In the matter of:)
)
) ISCR Case No. 14-02828
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire
For Applicant: *Pro se*

09/15/2015

Decision

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

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

Statement of the Case

On July 18, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The 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 (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a response dated September 15, 2014, Applicant denied each of the single allegations raised under each guideline. He also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on February 4, 2015. DOHA issued a notice of hearing on March 24, 2015, setting the hearing for April 15, 2015. The hearing was convened as scheduled.

The Government offered six documents, which were accepted without objection as exhibits (Exs.) 1-6. It also stipulated that the actual debt cited in the sole allegation under Guideline F was no longer outstanding. (Transcript at 7) Applicant offered testimony and four documents, which were accepted without objection as Exs. A-D. The record was held open until May 1, 2015, in the event Applicant had additional documents to submit. The transcript (Tr.) was received on April 24, 2015. Two additional documents were timely received by the government and forwarded to me. They were accepted into the record without objection as Exs. E-F on May 1, 2015. The record was then closed.

Findings of Fact

Applicant is a 76-year-old consultant who has worked for his present employer for over a year. He has earned a bachelor's degree and completed some graduate study. During his career, he rose from an entry-level engineering position to the level of senior director. He has maintained a security clearance since 1962 without incident. Applicant is a widower who is active with multiple charitable causes. During his career, he has been given several honors for his work performance.

Since 1995, Applicant has had money withheld from his paychecks for his Internal Revenue Service (IRS) and home state income taxes, and paid estimated taxes. In 2006, he stopped filing his federal and state tax returns. (Tr. 20-22) Consequently, no tax return was submitted for tax year (TY) 2005. He did this because a businessman told him that as long as he was owed a refund, he did not have to file a tax return. (Tr. 21) He was then given the caveat: "that only works for three years.' And you don't get any penalty for not filing." Applicant never checked with the IRS regarding the accuracy of this information. (Tr. 23) Disliking the task of preparing tax returns, and knowing he had taxes paid or withheld, he thought, "that allows me to procrastinate." (Tr. 21) He figured he could file for extensions and pay estimated taxes, then let the extensions pass without more action. (Tr. 24, 27) Therefore, he was surprised when he later received a letter from the IRS stating he owed "\$250,000 or some such number" in taxes. (Tr. 21) He did not file tax returns the following year, in 2007, or again in 2008 and 2009. (Tr. 27)

In August 2011, a tax lien was imposed against Applicant for TY 2005 and TY 2006. (Tr. 26, 29) This occurred about six months after he had received a letter from the IRS. That letter advised him that it had not received his tax returns for TY 2005 and TY 2006, and that he owed the IRS \$248,000. Already knowing he had not filed those returns, he had ignored the notification letter. News of a forthcoming tax lien, however, motivated him to contact the IRS and a tax preparation service he had seen advertised on television. (Tr. 32) He had little luck with the latter, so he focused on working with the IRS. An IRS agent helped Applicant put together what he needed to complete some of his previously unfiled tax returns. (Tr. 35) Applicant was advised that the tax advice a businessman had given to him was incorrect. Ultimately, the lien was released and he received refunds for TY 2008 and TY 2009. (Tr. 36)

From 2011 through 2012, Applicant provided comfort and care for his terminally ill wife. He timely filed a federal tax return in 2011 for TY 2010. (Tr. 43-44) He testified that he filed for an extension to file TY 2011 federal taxes in 2012 because, after his wife passed away, there were many estate-related issues that needed to be addressed. To date, his 2012 and 2013 federal tax returns are unresolved, but he testified that he is working with an IRS agent toward their completion. (Tr. 39)

Applicant relies on the IRS agent because he is reluctant to go to an accountant. (Tr. 40) Applicant maintains that the IRS gave him three years to file his tax returns for TY 2012 and TY 2013. Applicant is poised to satisfy the requirements for these tax years in the near future. (Tr. 40-41) He provided no evidence indicating he had three years to file these tax returns. There is no documentary evidence that his TY 2012 and TY 2013 tax filings are currently subject to any filing extensions.

Applicant completed a security clearance application (SCA) in January 2014. In response to a question asking whether he had failed to file or pay federal, state, or other taxes in the past seven years, he answered “no.” (Tr. 47-47; Ex. 1) He did so because he thought he had remediated such problems through his work with the IRS. He also answered “no” to a question asking whether he had a lien placed against him in the preceding seven years. (Tr. 48; Ex. 1) He testified that, at the time, he did not yet know about a 2013 state tax lien, and thought his earlier IRS tax lien was not at issue because it had been addressed and released, albeit belatedly. (Tr. 49-50)

In March 2014, Applicant learned from investigators that a state tax lien for \$65,000 from the mid-2000s had been imposed in 2013. He was surprised, as he had recently been approved for a car loan. He had been aware, however, of a 2013 adverse state judgment against him for \$65,000. He had failed to equate the judgment as being the same as a lien. He satisfied that state lien on April 24, 2014, with a lower payoff amount, which was applied toward his debt on May 29, 2014. (Tr. 59-60) The appropriate state tax return was filed at that time. (Tr. 60)

Applicant is unsure why he did not disclose on his SCA to having had adverse judgments in the preceding seven years. (Tr. 54) He had some difficulty with some of the financial and legal terminology at issue. (Tr. 54-55) He testified he has since learned the applicable terminology. (Tr. 55-56) He has received some help from a financial advisor, although he has not received financial counseling. (Tr. 56) Applicant admits he procrastinated with regard to his tax issues. (Tr. 76-77)

Multiple favorable references provide a positive image of Applicant, professionally and personally. He is known as generous, intelligent, and reliable. He is equally generous with making charitable contributions to both religious and medical causes. He is active within his church.

At the end of the hearing, Applicant was asked to provide evidence supporting his assertion that an individual has three years to file federal tax returns and that no penalties were imposed if one’s taxes were overpaid. He wrote that he based his

position on discussions he had with peers, the fact that the IRS did not send him notices of belated filings until after three years had passed, and because he was not penalized for years when he had overpaid or over-withheld taxes. (Ex. E)

The government urged that 26 U.S. Code 7203 is controlling with regard to a citizen's annual tax filing obligations. It noted, "about the Guideline F part [of the case] . . . it doesn't seem from the government's standpoint that there is a legitimate basis for [Applicant's] belief that he doesn't have to file." (Tr. 72) It urged that "it may be true that he may not be financially penalized if there is a refund. But he still has to file [a return] . . . There is a legal obligation to file, even if you have a refund or . . . a zero balance owing to the taxes " (Tr. 72-73) It further stressed that Applicant's delay in addressing his state tax lien lasted for nine years. (Tr. 73)

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. Likewise, I have not drawn 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, 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).

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 purporting to show Applicant is indebted to his state for a tax lien entered against him in 2013 for approximately \$65,000. It asserted that the state tax lien remained unpaid. This is sufficient to invoke 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 these finance related security concerns:

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.

The SOR allegation focuses solely on this state tax lien. It does not reference any other aspect of Applicant's finances, taxes, or his handling of those matters. The government stipulated that the lien at issue has been released, and the evidence supports that conclusion. Consequently, this particular situation is under control and that lien-based debt has been resolved. Therefore, AG ¶ 20(c)-(d) apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, where the significance of conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations is defined ([p]ersonal conduct can raise questions about an individual's reliability, trustworthiness and ability to protect classified information). Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The SOR allegation under this guideline focuses on Applicant's SCA answers regarding liens and judgments. On his SCA, Applicant answered "no" to questions asking whether, in the preceding seven years, he 1) had failed to file any taxes when required by law and 2) had a lien placed against him for failing to pay taxes and other debts. It is alleged that these denials were intentionally untrue.

Under this guideline, the following disqualifying conditions are available:

AG ¶ 16(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

AG ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information . . . ; and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing

Applicant's explanation for answering "no" to the questions at issue stretches credulity. By the time he completed his SCA in 2014, Applicant had faced multiple problems related to how he had been handling his taxes for nearly a decade. The questions at issue asked about liens and judgments in the preceding seven years. By then, he should have understood those terms enough to realize at least one of the questions merited an answer of "yes." Moreover, the questions are worded simply and directly. Nothing in the questions suggests some liens or judgments should be excluded from disclosure because of any criterion except their age, i.e., the intervening satisfaction of a lien, judgment, or debt; the granting of an extension; etc. Again, sound judgment should have led him to answer at least one, if not both, of these questions in the affirmative. Such action would have given investigators sufficient notice regarding these issues, and shown Applicant to be a reliably forthcoming and trustworthy source.

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

AG ¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's conduct is recent and significant. In failing to give notice of some of the issues he had been having regarding his taxes, liens, and judgments, he seriously undermined the security clearance adjudication process. I find that none of the mitigating conditions apply to his SCA omissions.

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.

My comments under Guidelines F and E are incorporated in this whole-person analysis, as are the facts noted above related to Applicant and his life. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature and educated man. He has maintained a security clearance without incident for decades. As a threshold matter, I note that the debt at issue has been satisfied and related Guideline F security concerns mitigated.

Issues regarding personal conduct remain unmitigated. Applicant's explanation as to why he answered "no" to questions concerning past tax return filings and liens is convoluted and hard to believe. This is especially true for someone who has maintained a security clearance for so many years. His omissions were either intentional or Applicant lacks a basic understanding of the issues involved herein. Regardless, these omissions raise serious security concerns that have not been mitigated. Overall, the record evidence leaves me with questions and doubts as to his present eligibility and suitability for a security clearance. Applicant mitigated the security concerns under the financial considerations guideline, but failed to present sufficient evidence to mitigate the security concerns under personal conduct guideline.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	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 interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge