



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



In the matter of:)
)
) ISCR Case No. 14-00723
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

09/19/2014

Decision

COACHER, Robert E., Administrative Judge:

Applicant did not mitigate the financial considerations, but he did mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 9, 2014, the Department of Defense Consolidated Adjudication Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F and Guideline E. The DOD CAF acted under Executive Order (EO) 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).

Applicant answered the SOR on May 5, 2014, and requested a hearing before an administrative judge. The case was assigned to me on June 18, 2014. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 16, 2014, and the hearing was convened as scheduled on July 23, 2014. However, because of a miscommunication Applicant did not appear. The hearing was rescheduled and held on August 13, 2014. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel's discovery letters were marked as Hearing Exhibits (HE) I and II. His exhibit list was marked as HE III. Applicant testified and offered exhibits (AE) A through E, which were admitted into the record without objection. The record was held open for Applicant to submit additional information, and he submitted AE F through P, which were admitted into evidence without objection. Department Counsel's transmittal memorandum was marked HE IV. DOHA received the hearing transcript (Tr.) on August 21, 2014.

Findings of Fact

In Applicant's answer to the SOR (Answer), he admitted the allegations listed in SOR ¶¶ 1.a and 1.b. Those admissions are adopted as findings of fact. He denied the allegation listed in SOR ¶ 2.a. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 45 years old. He is married and has three adult children ages 26, 24, and 22. He has worked for his current employer, a defense contractor, for ten years. He is a high school graduate who has taken some college courses. He has not served in the military and has never held a security clearance.¹

The SOR alleged that Applicant failed to file his federal tax returns for the period 2008 through 2011. Additionally, he owed federal taxes in the amount of approximately \$18,000 for tax years 2008 and 2010 through 2012. The SOR also alleged that he failed to file state income tax returns for tax years 2003 through 2012. He also owes approximately \$6,950 in unpaid state taxes. These allegations are supported by Applicant's admissions in his security clearance application and his Answer.²

Applicant explained in his September 2013 security clearance application that the reason he didn't file federal and state income tax returns was because his oldest child began attending college, followed by the younger two children. He stopped filing state income tax returns in 2003, when his oldest child was either 15 or 16 years old. During his hearing testimony, he stated that he was "scared" of the Internal Revenue Service (IRS) and that was another reason he did not file federal tax returns for the relevant years. He was "afraid" to file his taxes. He could not explain the reason for his fear. He knew he was required to file federal and state returns and he knew he owed taxes for those years, but he failed to file his returns. He continues to fear the IRS and avoids opening any mail from them addressed to him. During the time he was not filing federal or state tax returns, he was claiming ten dependents for tax withholding purposes, so

¹ Tr. at 7-8, 31, 33; GE 1.

² GE 1; Answer.

that the minimum amount would be withheld by his employer from his regular pay checks.³

Applicant presented documentary evidence showing that he filed his 2008 through 2012 federal tax returns sometime in 2013. He also filed his 2013 federal return in a timely manner. He currently owes about \$13,632 in federal back taxes for years 2008 through 2012. He received a refund for tax year 2013 that was applied to his tax debt. Beginning in June 2013, he began making \$300 monthly payments to the IRS. His bank statements for those periods show the payments to the IRS. He did not present any correspondence from the IRS reflecting the current status of any payment plan.⁴

Applicant has not filed his state tax returns for the period indicated. He was not even sure for what years he had not filed his state tax returns. He calms to have contacted the state taxing authority and was told to file his returns. He asked if the taxing authority could just estimate his taxes for the years he didn't file and he was told they could do so and he would not have to file the returns. He did not present any written correspondence reflecting this conversation or agreement with the state taxing authority. He currently owes approximately \$6,646 for tax years 2005 through 2007. He does not have a regular payment plan with the state for these delinquent taxes. He pays "chunks" when he can do so. He made two payments in April 2013 that went toward his delinquent 2010 state taxes (\$1,579) and his 2013 taxes (\$289).⁵

On April 3, 2013, Applicant completed a questionnaire for public trust position. He answered "yes" to the following questioning: "Are you now 180 days delinquent on any loan or financial obligation. Include loans or obligations funded or guaranteed by the Federal Government?" If he responded "yes" to the question, he was asked to provide an entry for each reportable occurrence. He listed two entries. The first was for his "09/2012" home owner's association (HOA) dues, and the second was for "taxes" for "04/2010 (Estimated)" to the "IRS". On September 23, 2013, Applicant completed a security clearance questionnaire. He answered "yes" to the following question: "In the past seven years, have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" He went on to list and describe that for tax years 2008 through 2012, he failed to file and pay his Federal and state taxes. The SOR alleged that he failed to disclose his 2008, 2009, and 2011 delinquent Federal and state debt in his April 2013 public trust position questionnaire.⁶

Applicant believed that the April 2013 questionnaire was only asking him for Federal debt obligations. He referenced the second question telling him to include all loans or obligations funded or guaranteed by the Federal Government as the source of

³ Tr. at 35-36, 52, 55.

⁴ Tr. at 36, 54, 58; AE F, H, I, K-P.

⁵ Tr. at 37-38, 57-58, 61; AE G, J.

⁶ GE 1-2.

his understanding. Therefore, he did not believe he was required to list his state tax debts. He believed his use of “04/2010 (Estimated),” indicated that he was estimating for what years he owed federal taxes.⁷

Applicant presented his work appraisal forms for years 2009 through 2013. He was given the following overall rating for the respective years: 2009-Superior; 2010-Superior; 2011-Superior; 2012-Strong; 2013-Strong. There are four rating levels: Needs Improvement, Solid, Strong, and Superior.⁸

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

⁷ Tr. at 45-47; GE 1, 3.

⁸ AE A-E.

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 about potential, rather than actual, risk of compromise of 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

AG ¶ 18 expresses the security concern for 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 overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following apply:

(a) inability or unwillingness to satisfy debts;

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

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant has delinquent federal and state tax debts that remain unpaid or unresolved. He did not file his federal and state tax returns as required. He still has not filed his state tax returns. I find all the disqualifying conditions are raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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 tax debts are recent and remain unresolved. He has made some strides to address his tax obligations, in particular, filing his Federal tax returns and making regular monthly payments to the IRS. However, his irregular payments on his state tax obligation cast doubt on his current reliability, trustworthiness, and good judgment. I find mitigating condition AG ¶ 20(a) does not apply. Applicant used his children's college expenses as a reason he failed to file his federal and state tax returns and pay the amount he owed for several years. Neglecting a citizen's obligation to file and pay taxes in order to fund his children's college education is not a condition beyond his control. AG ¶ 20(b) does not apply. Applicant presented no evidence of financial counseling, and while there is some evidence that Applicant has begun to address his federal tax issues, the state tax issues remain unresolved. His effort to resolve his federal tax issue only began once he was involved with the security clearance process. Evidence that he has made a good-faith effort to address his tax issues is lacking. I find AG ¶¶ 20(c) and 20(d) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire

Applicant failed to completely list his federal tax obligations when he completed his 2013 public trust questionnaire. Giving him the benefit of the doubt and understanding his failure to list his state tax obligations were the result of misreading the question, Applicant unintentionally failed to list this state tax information. The same cannot be said for his failure to list all the years he owed a federal tax obligation. He stated that he knew he was required to file and that he knew that he owed federal taxes. After evaluating all the evidence, I find Applicant deliberately provided false information concerning his federal tax debts. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and considered the following as potentially applicable:

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

Applicant corrected his federal and state tax information when he completed his September 2013 security clearance questionnaire. He stated the complete details of his obligation to both the state and Federal Government. There is no evidence to indicate he was confronted with the facts before he completed the September 2013 questionnaire. AG ¶ 17(a) applies.

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(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.

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 guideline 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 considered Applicant's outstanding work record. On the other hand, I also considered that he failed to honor his obligation to file and pay both federal and tax taxes. He only recently filed his federal tax returns

for the years 2008 through 2013. He has not filed his state tax returns for the same period of time. He is paying monthly payments to the IRS, but a significant balance remains. He has no formal payment arrangement with the state. His indifference to his obligation to file and pay his taxes shows a lack of reliability, trustworthiness, and good judgment.

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 failed to mitigate the security concerns arising under Guideline F, financial considerations, but mitigated the Guideline E, personal conduct concerns.

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: Subparagraphs 1.a – 1.b:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraph: 2.a:	FOR APPLICANT 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.

Robert E. Coacher
Administrative Judge