



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 15-00453
)	
)	
Applicant for Security Clearance)	

Appearances

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

03/29/2016

Decision

HOGAN, Erin C., Administrative Judge:

On May 21, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant 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 (DODD) 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 after September 1, 2006.

On June 16, 2015, Applicant answered the SOR and requested a decision on the record. Department Counsel issued a File of Relevant Material (FORM) on October 8, 2015. Applicant received the FORM on December 14, 2015. Applicant had 30 days to submit a response to the FORM. He did not submit a response to the FORM. On February 1, 2016, the FORM was forwarded to the Hearing Office and assigned to me on March 1, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings on Evidence

Item 7 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. It is a summary of Applicant's Personal Subject Interview completed by the investigator conducting his background investigation on September 17, 2012. It is unsworn and unauthenticated. DODD 5220.6, Enclosure 3, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte* because Item 7 is not properly authenticated. Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule because he more than likely was unaware of the rule. Waiver means "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, editor-in-chief, 9th ed., West 2009).

While Department Counsel mentions the authentication requirement of ¶ E3.1.20 of the Directive in Footnote 1 of the FORM, I cannot conclude Applicant expressly waived this rule because he did not submit a response to the FORM. I also cannot conclude the Applicant understands to the implications of waiving an objection to the admissibility of the interview. In accordance with the Directive, Enclosure 3, ¶ E3.1.20, Item 3 is not admissible and will not be considered in this decision.

Findings of Fact

In his response to the SOR, Applicant admits to the allegations in SOR ¶¶ 1.b, 1.d – 1.m, 1.o, and 1.q. He denies SOR ¶¶ 1.a, 1.c, 1.n, and 1.p. (Item 2)

Applicant is an employee of a DOD contractor seeking to maintain his security clearance. He has worked for his current employer since February 2009. He is a high school graduate. He is divorced and has no children. (Item 3)

On January 31, 2012, Applicant submitted an Electronic Questionnaire for Investigation Processing (e-QIP). In response to Section 26 – Delinquency Involving Routine Accounts, Applicant listed that he owed state and federal taxes for fiscal years 2003, 2004, 2005, 2008, and 2009. His failure to pay taxes was the result of a lack of business profit. He estimated the total amount owed was \$200,000. He indicated that he was on a monthly payment plan with the state Department of Revenue and that his federal taxes were determined uncollectible by the Internal Revenue Service (IRS). He also listed a home foreclosure in January 2012 and a \$51,175 debt owed to an insurance company since August 2009. (Item 3, section 26)

A subsequent background investigation revealed the following delinquent accounts which are alleged in the SOR: a \$1,601 delinquent medical account (SOR ¶ 1.a: Item 6 at 2); a \$384 delinquent medical account (SOR ¶ 1.b: Item 6 at 2); a \$290 delinquent medical account (SOR ¶ 1.c: Item 6 at 2); a \$65,990 state tax lien entered in February 2008 (SOR ¶ 1.d: Item 4 at 3-4; Item 5 at 3; Item 6 at 3); a \$48,121 state tax lien entered in February 2008 (SOR ¶ 1.e: Item 4 at 3-4; Item 5 at 3; Item 6 at 3); a \$49,451 state tax lien entered in November 2010 (SOR ¶ 1.f: Item 4 at 3, 4; Item 5 at 3; Item 6 at 3).

Additional delinquent accounts include: an \$8,231 federal tax lien entered in October 2010 (SOR ¶ 1.g: Item 4 at 5; Item 5 at 5; Item 6 at 3); an \$11,419 federal tax lien entered in August 2011 (SOR ¶ 1.h: Item 4 at 5; Item 5 at 5; Item 6 at 3); a \$3,175 federal tax lien entered in July 2011 (SOR ¶ 1.i: Item 4 at 5; Item 5 at 5; Item 6 at 3); a \$47,957 judgment entered against Applicant in October 2008 (SOR ¶ 1.j: Item 4 at 6; Item 6 at 3); a \$162,068 federal tax lien entered in September 2011 (SOR ¶ 1.k: Item 4 at 5; Item 5 at 5); a \$20,690 federal tax lien entered in June 2010 (SOR ¶ 1.l: Item 4 at 5; Item 5 at 5); and a \$141,365 federal tax lien entered in May 2010 (SOR ¶ 1.m: Item 4 at 6; Item 5 at 5).

Additional delinquent accounts include: a \$383 medical account placed for collection (SOR ¶ 1.n: Item 4 at 7; Item 5 at 7); a \$305 buyer's club account placed for collection (SOR ¶ 1.o: Item 4 at 8; Item 5 at 8); a \$314 delinquent medical account (SOR ¶ 1.p: Item 4 at 9; Item 5 at 9); and a \$50 traffic ticket placed for collection in February 2011. (SOR ¶ 1.q: Item 4 at 10; Item 5 at 9).

In his answer to the SOR, Applicant states that he owned his own business for over 20 years. Between 2004 and 2005, Applicant lost his business when the economy slowed down. Applicant was attempting to stay in business and make the payments to the IRS. In addition, he could not keep up with the workman's compensation and general liability premiums which resulted in the judgment alleged in SOR ¶ 1.j. His home also went to foreclosure. (Item 2 at 4)

Applicant planned to file for bankruptcy in 2014. He learned he was unable to file because his name was on the deed of his grandmother's house. If he filed for bankruptcy, his grandmother would lose her house. He claims the IRS told him that his debt was uncollectible because his annual income was too low. Over the past three years, Applicant has earned approximately \$40,000 per year. He is not familiar with the medical accounts alleged in SOR ¶¶ 1.a, 1.c, 1.n and 1.p. He did not indicate whether he took any action to determine whether they were his debts such as entering a formal dispute with the credit reporting agencies. (Item 2 at 4) He did not provide any additional information about the debts alleged in SOR ¶¶ 1.b, 1.o, and 1.q.

Applicant did not provide any character references, performance evaluations, or awards that could be considered under the whole person.

Policies

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 must be considered when determining 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining 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 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.

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).

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 disqualifying conditions that could raise security concerns. I find AG ¶19(a) (an inability or unwillingness to satisfy debts) and AG ¶19(c) (a history of not meeting financial obligations) apply to Applicant's case. Applicant encountered financial problems since about 2004. The SOR alleges 17 delinquent accounts with a total approximate balance of approximately \$561,794. The debts consist of five delinquent medical accounts with an approximate total of \$2,972; six tax liens filed by the Federal Government between October 2008 to September 2011, an approximate total balance of \$346,948; three state tax liens filed against Applicant between February 2008 and November 2010, with an approximate total balance of \$163,562; a \$47,957 judgment owed to a liability insurance company; a \$305 collection account; and a \$50 traffic ticket placed for collection. All of the accounts are unresolved. Both AG ¶19(a) and AG ¶19(c) apply.

An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to pay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005)).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions potentially apply:

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); and

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

AG ¶ 20(a) does not apply. None of Applicant's debts are resolved. His financial problems are ongoing. AG ¶ 20(b) partially applies because Applicant lost his business as a result of a business downturn. However, this mitigating condition is given less weight because I cannot conclude Applicant behaved responsibly under the circumstances. He has not demonstrated any attempt to resolve any of these delinquent accounts, to include a \$50 traffic ticket and several debts that have balances around \$300.

AG ¶ 20(c) does not apply because there is no proof that Applicant attended financial counseling. The status of his delinquent accounts remain unresolved. His financial situation remains uncertain. AG ¶ 20(d) does not apply, because Applicant did not demonstrate that he made a good-faith effort to resolve his delinquent accounts. While Applicant mentioned on his security clearance questionnaire that he was in a repayment plan for the state tax debt, he did not mention this in his answer to the SOR. He also did not provide documentation verifying the payment plan as well as proof that he was following the terms of the payment plan. None of the debts alleged in the SOR are resolved.

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 guidelines and the whole-person concept.

In requesting an administrative determination, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts that would mitigate financial considerations security concerns. While Applicant disputed several of the small medical accounts, he did not present evidence to establish that he attempted to resolve these accounts either through payment or formal disputes. The status of the state tax liens remain uncertain. He states the IRS concluded his federal tax debts are uncollectable. He did not provide documentation verifying this. Should Applicant earn more income in the future, it is likely the IRS will attempt to collect on his debt. Applicant did not provide a budget. It is unknown whether Applicant has sufficient income to meet his financial obligations. Applicant did not mitigate the concerns arising from financial considerations.

The determination of an individual's eligibility for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating to the evidence presented. Under Applicant's current circumstances, the granting of a security clearance is not warranted. In the future, if Applicant takes proactive steps towards resolving his delinquent accounts and establishes a track record of repayment, he may demonstrate persuasive evidence of his security worthiness.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's seven years of employment with a defense contractor. In the future, he may be able to demonstrate a track record of resolving his financial obligations. It is too soon to make this conclusion at this point. The security concerns raised under financial considerations are not mitigated.

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

Subparagraphs 1.a – 1.q: 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge