



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-02458
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

October 8, 2008

Decision

CURRY, Marc E., Administrative Judge:

On, April 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on June 9, 2008, admitting the allegations and requesting a hearing. The case was assigned to me on August 6, 2008. The next day, DOHA issued a notice of hearing scheduling it for September 8, 2008. During the hearing, I received 10 government exhibits, 12 Applicant exhibits, and Applicant's testimony. At the hearing's conclusion, I left the record open at Applicant's request to allow him to submit additional exhibits. Within the time allotted, Applicant submitted three additional exhibits. Department counsel had no objections to their admissibility,

and I incorporated them into the record. DOHA received the hearing transcript (Tr.) on September 15, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 67-year-old married man with four adult children. He has a bachelor of science degree in electrical engineering. He has worked in the defense contracting industry since finishing college in 1965, and has continuously held a security clearance since 1967.

Currently, Applicant is a mechanical development group supervisor. He is highly respected by his colleagues. According to his supervisor, he has a stellar performance record, and is “an outstanding role model for his employees [who] fosters a very inclusive, positive environment for them” (Exhibit G). A former subordinate described Applicant as “a driving force in [his] career” whose advice he continues to seek (Exhibit I). In 2007, Applicant received an award from his employer for outstanding ethical conduct (Exhibit G).

In the mid-to late 1980s, Applicant’s wife was charged criminally with embezzling \$250,000 over an approximate five-year period from her then-employer, a jewelry store owner (Tr. 34, 86). Two successive trials ended in mistrials (Tr. 35). Shortly after the prosecution began preparing for a third trial, Applicant’s wife decided to make a plea admitting that the state had enough evidence to convict her, but maintaining her innocence (Tr. 35) The court then ordered her to pay restitution (Tr. 49).

Applicant’s wife did not report the money that she had illegally obtained from her employer to the U.S. Internal Revenue Service (IRS). In 1995, after she entered the plea, the IRS audited her back tax returns, and concluded she owed an additional \$98,000 (Tr. 98). Because Applicant and his wife filed joint tax returns, he became jointly responsible for the income tax debt.¹

Applicant neither participated in his wife’s criminal scheme nor had knowledge of it before she was charged. During the entire period it occurred, she told Applicant that her father was gifting her the money to help them cover the expenses from the extensive renovation of a 200-year-old house which they had purchased (Tr. 88; Exhibit 10 at 3).

In November 1997, the IRS obtained a lien against Applicant’s property for \$98,104, and levied his entire 401k account (Exhibit 2; Answer, SOR ¶ 1.a; Exhibit K; Tr. 38). The trustee of the 401k account then distributed \$12,704 to the IRS.

¹This nearly led to the breakup of their marriage. They separated for a year, then reconciled after attending marital counseling (Tr. 35).

Between December 1997 and March 1999, Applicant made \$500 monthly payments toward the lien's satisfaction (Exhibit 7 at 7-8). Then, he began negotiating an offer in compromise (Ex 4 at 2). At the instruction of an IRS representative, he suspended his monthly payments while negotiating the offer in compromise (Tr. 64-65; Exhibit 4 at 3). In approximately 2001, Applicant's efforts at negotiating an offer in compromise failed because he was unable to afford the proposed lump sum payment (Tr. 36,100-101). He did not resume monthly payments. Each year, the IRS applied successive income tax refunds to the delinquency ranging between two and five thousand dollars (Exhibit 7 at 8). Applicant's repayment strategy has been to primarily use his refunds to satisfy the delinquency (Tr. 41). He attempted to maximize the amount of these yearly refunds by intentionally not claiming many deductions on his income tax returns (*Id.*).

In February 2006, the IRS garnished Applicant's wages for \$22,265 (Exhibit O). Each week, \$1,188.27 of Applicant's wages was applied to the delinquency (Exhibit 10 at 3). By July 2006, Applicant satisfied the garnishment.

In March 2008, the IRS, certifying that Applicant had satisfied all of his back taxes and any statutory additions, released the lien (Exhibit A). Applicant contends that although the lien was released, he still owes the IRS approximately \$21,000 in penalties. He has continued to attempt to make payments, but the debt is no longer enforceable because the 10-year statute of limitations for collecting federal tax delinquencies has expired (Tr. 43). Applicant consulted a tax attorney about paying this remainder. His attorney told him that his only alternative was to continue paying the debt informally and to instruct the IRS to deposit these additional payments into the general tax fund (Tr. 43). There is no other record evidence regarding a possible outstanding delinquency other than Applicant's testimony and a spreadsheet he prepared by hand (Exhibit L).

As of January 2008, Applicant had not filed his federal and state income taxes for tax years 2005 and 2006 (Answer, SOR ¶¶ 1.b, 1.c). He has had an ongoing problem with filing taxes timely since his wife opened a seasonal antiques business in the late 1990s. She is not a good record keeper, and the problem is compounded because she maintains her records in the state where she operates the business, hundreds of miles from their home (Tr. 45). Because her records are "a jumble," Applicant procrastinates (Tr. 45). Recently, Applicant retained a tax attorney to help organize his wife's financial records (*Id.*).

On June 4, 2008, Applicant filed his 2005 federal income tax return (Exhibit D). He received a \$3,364 refund that he instructed the IRS to apply to the general tax fund (Exhibit D). On September 4, 2008, Applicant filed his 2006 federal income tax return (Exhibit C). He anticipates a \$5,818 refund that he has instructed the IRS to apply to the general tax fund (*Id.* at 2).

On May 12, 2008, Applicant filed his 2005 state income tax return (Exhibit E). He received a \$2,007 refund (*Id.* at 2). He filed his 2006 state income tax return in September 2008, and anticipates a \$2,177 refund (Exhibit B).

Applicant earns a salary of \$136,000 per year (Tr. 68). His pension pays him an additional \$25,000 per year (Tr. 69). He is also collecting social security, which pays him \$2,100 per month (Tr. 70). He maintains a \$2,000 balance in his checking account and his wife earns \$65,000 per year (Tr. 73). A November 2006 credit report reflects no derogatory information other than the tax lien which he has since satisfied (Exhibit 5).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, they are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a 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. 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.

Analysis

Guideline F, Financial Considerations

Under this guideline, "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" (AG ¶ 18). Applicant's longstanding tax delinquency and his late return filings trigger the application of AG ¶¶ 19(a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations."

Applicant's tax delinquency was unrelated to any bad judgment, irresponsibility, or inability to manage finances. Instead, it accrued because of his wife's malfeasance. He has satisfied the lien through monthly payments, wage and retirement account garnishments, and the application of successive income tax refunds to the delinquency.

Given Applicant's salary, he probably could have satisfied the delinquency sooner. He only made monthly, voluntary payments for 16 months. Nevertheless, I conclude he acted reasonably. He stopped the monthly payments at the instruction of an IRS representative to focus on negotiating an offer in compromise. When the IRS rejected the offer in compromise, he then began satisfying the delinquency by structuring his salary withholdings to maximize the amount of refunds he would receive each tax year, and applying each annual refund to the delinquency.

Unlike the tax delinquency, Applicant's failure to file his 2005 and 2006 federal and state income tax returns timely is solely related to his irresponsibility. He identified the problem, retained a tax attorney to help organize his records, and filed all of his returns. He received refunds for each of the late tax years. 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 AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," apply.

Applicant earns a \$136,000 annual salary, and an additional \$45,000 annually in pension and social security benefits. He currently has no financial delinquencies. He has mitigated the financial considerations security concern.

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."

The amount of Applicant's tax delinquency was significant. He satisfied it, and he filed the late income tax returns. Given his current financial well-being and the steps he has taken to organize his financial records, the risk of recurrence is minimal.

Department counsel argues that because Applicant never paid \$21,000 of the tax lien, its release does not satisfy the government's security concern. The only evidence that the lien was not satisfied completely was provided by Applicant. Moreover, he has been receiving refunds since the release, and attempting to apply them to the remaining deficiency even though he is no longer legally responsible. The positive security inference generated by his disclosure of this information and the steps to satisfy the potentially outstanding delinquency outweigh any potentially negative security implications. Evaluating this case in the context of the whole person concept, I conclude that Applicant's application for a security clearance should be granted.

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
Subparagraphs 1.a - 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY
Administrative Judge