



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



In the matter of:)
)
-----) ISCR Case No. 07-11259
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

May 12, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (Financial Considerations). Clearance is denied.

Statement of the Case

On September 25, 2007, Applicant submitted an Electronic Questionnaires for Investigations (e-QIP) or Security Clearance Application (SF 86).¹ On November 20, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security*

¹Item 4. There is no allegation of falsification of the 2007 SF 86.

²Item 1 (Statement of Reasons (SOR), dated Nov. 20, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

Clearance Review Program (Directive), dated January 2, 1992, as amended, modified and revised.³ The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 3, 2007, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 2). A complete copy of the file of relevant material (FORM), dated March 10, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.⁴ Applicant provided a two-page letter with four enclosures. Applicant's submission was received at DOHA on April 30, 2008. Department counsel did not object to consideration of the documents Applicant submitted in response to the FORM. The case was assigned to me on May 2, 2008.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted responsibility for seven debts (SOR ¶¶ 1.a to 1.e, 1.g and 1.h), said he paid one debt (SOR ¶ 1.i), and was current on his debt payments for one debt (SOR ¶ 1.j)(Item 2). He also admitted his 1996 Chapter 7 bankruptcy discharged many of his debts (SOR ¶ 1.f). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 55 years old.⁵ He married his current spouse in 1978. His children were born in 1979, 1981, 1983, and 1985. He graduated from a technical community college in 1999 with an AAS in Information Systems degree. From 2002 to the present he has been employed by a university as an instructor. From July 2006 to present, he has also been employed by a government contractor as a consulting system engineer. From 2003 to 2006, he was an instructor at a community college. From 1999 to 2003, he was employed as a customer support engineer. He has not served in the United States military. He has never been fired from a job, and has no police record. He has

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

⁴Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Mar. 13, 2008; and Applicant's receipt is signed and dated Apr. 1, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

⁵Item 4 (2007 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

not used illegal drugs in the last seven years, and has never used illegal drugs while in a sensitive position.

On his security clearance application, he disclosed that a lien had been placed against his property for failure to pay debts. He described a \$74,000 lien for tax years 1995 to 1998. He also said he was current with all taxes for the last seven years (1999 to 2005). For financial delinquencies, he disclosed a delinquent credit card debt for \$3,712. He explained, "I realize that my debts should be paid on time. I just want to say that I have spent the last 26 year[s] raising my 4 children and helping them through[] college and their entrance into adult life. My income has gotten better and my burden is less." (Item 4 at page 35).

Financial Considerations

The SOR lists nine debts that were delinquent in the last 25 years, and a Chapter 7 bankruptcy. He was self-employed between 1986 and 1998 (FORM Response). He filed tax returns, but did not pay or sometimes fully pay his taxes (FORM Response). Some of his tax debts were subsequently paid and some lapsed due to the Internal Revenue Services' (IRS) failure to file a levy on his accounts. In 2008, he refinanced his home and paid his last remaining, legally enforceable federal tax debt. Specific information about each of the SOR allegations listed in ¶ 1 follows:

a. On April 14, 1993, the Federal IRS filed a federal tax lien against Applicant for \$64,698 for taxes and additions assessed for tax years 1984, 1986, and 1987 through 1991. On May 19, 1997, and August 15, 1999, the IRS issued Certificates of Release for the tax liens because more than ten years had elapsed since the assessments. The unpaid balance of assessment was \$64,698 according to the certificate filed on August 15, 1999.

b. On June 2, 1986, the IRS filed a federal tax lien against Applicant for \$4,399 for taxes and additions assessed for the tax period ending on March 31, 1985. On March 10, 2002, the IRS issued a Certificate of Release for this tax lien.

c. In March 1993, Applicant's state tax authority filed a state tax lien against Applicant for \$10,516. As of August 31, 2007, his state tax authority reported Applicant having no outstanding tax liability to his state of residence.

d. On April 30, 1993, the IRS filed a federal tax lien against Applicant for \$5,021 for taxes and additions assessed for tax year 1992. On August 15, 1999, the IRS issued a Certificate of Release for this tax lien.

e. On May 23, 1996, the IRS filed a federal tax lien against Applicant for \$18,896 for taxes and additions assessed for tax years 1993 and 1994. In May 2005, Applicant paid the account balance owed for taxes and additions assessed for tax year 1993. In August 2007, his account balance of \$5,144.00 for taxes and additions assessed for tax year 1994 was cleared due to a statutory expiration. On September 6, 2007, the IRS

issued a Certificate of Release for the tax lien, which listed an unpaid balance of assessment of \$18,896.

f. Applicant filed for Chapter 7 Bankruptcy in May 1996. This Bankruptcy discharge was effective in August 1996.

g. In March 1999, Applicant's state tax authority filed a state tax lien against Applicant for \$7,497. As of August 31, 2007, his state tax authority reports Applicant had no outstanding tax liability to his state of residence.

h. On February 18, 2005, the IRS filed a federal tax lien against Applicant for \$74,730 for taxes and additions assessed for tax years 1995, 1996, 1997, and 1998. In September 2007, his account balance of \$11,260.00 for taxes and additions assessed for tax year 1995 was cleared due to a statutory expiration. As of September 17, 2007, Applicant still owed \$58,825.00 for taxes and additions assessed for tax years 1996, 1997, and 1998. On February 29, 2008, he paid the IRS \$35,457, resolving this debt.

i. As of August 20, 2007, Applicant owed about \$1,362 on a credit card account. On November 22, 2007, Applicant paid this debt in full (Item 2 (Encl to SOR Response, letter from creditor, dated Dec. 3, 2007)).

j. As of August 20, 2007, Applicant owed about \$4,000 on an account that was past due. On July 30, 2007, he paid \$681, and the creditor indicated on August 22, 2007, the debt was \$2,067 (Item 6).

Applicant had ample warning about the security concerns of his delinquent debt. On August 8, 2007, he responded to interrogatories from DOHA (Item 5). He explained that his four children attended college in the following years: (1) 1998-2002; (2) 1999, 2004-2007; (3) 2001-2006; and (4) 2003-2007. He described August 2007 as his "first month of financial freedom from our Children in 27 years." His plan was to borrow against the equity in his home to pay his tax debt. A mortgage statement attached to Item 6 indicates on July 30, 2007, Applicant's mortgage balance was \$121,302; his monthly payment was \$1,708; and this included a payment on a past due amount of \$6,661 (about half of this amount was for past due late charges). He subsequently brought his mortgage to current status.

Applicant's tax returns for the last seven years show the following adjusted gross income (AGI): 2001-\$104,857; 2002-\$105,940; 2003-\$122,822; 2004-\$64,112; 2005-\$69,252; 2006-\$98,701; and 2007-\$147,467 (Item 6 and FORM Response). His AGI over those seven years totals \$713,151 and his average AGI is \$101,878. Applicant paid all state taxes owed from 2000 to 2006 (Item 6, statement from state tax authority, dated Aug. 1, 2007).

Applicant's monthly gross salary is \$12,582, his monthly net salary is \$8,800, his monthly expenses are \$3,710 and his monthly debt payments are \$3,483 (Item 6). His monthly net remainder is about \$1,600 (Item 6).

Applicant refinanced his home and on February 29, 2008, and paid the IRS \$35,457, resolving his last remaining, legally enforceable delinquent tax debt (Form Response). The IRS provided a release for tax years 1995, 1996, 1997, 1998 and 2001 (Form Response). Applicant does not currently have any delinquent debt. See credit report dated April 15, 2008, showing no delinquent debt (Form Response).

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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

⁶ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guideline F (Financial Considerations). AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides one Financial Considerations Disqualifying Condition that could raise a security concern and may be disqualifying in this case. The government established AG ¶ 19(c), which states, “a history of not meeting financial obligations.” AG ¶ 19(g) does not apply because Applicant did file a federal tax return each year. Applicant’s profound history of delinquent tax debt is documented in his response to DOHA interrogatories, his SOR response and his FORM response. He has a history of excessive and chronic indebtedness. Although he recently made significant progress resolving his SOR-listed debts, his tax debts were delinquent for so many years that his recent efforts do not fully undercut the government allegations. AG ¶ 19(c) fully applies.

⁷ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

(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;

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

(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.

Applicant avoided paying some of his federal taxes because the IRS failed to aggressively pursue payment through filing of tax levies.⁸ He became aware of the security significance of his financial problems on August 9, 2007, when he responded to DOHA inquiries concerning his delinquent debts. The importance of resolving his debts was reinforced when he responded to the SOR on December 3, 2007. His effort to resolve his debts in February 2008, when he refinanced his residence, was the type of action he should have taken earlier. His decisions over most of the last ten years to emphasize paying for his children's college educations over his responsibilities to pay his delinquent federal and state taxes is not an appropriate prioritization of payments. Applicant's conduct does not warrant full application of AG ¶¶ 20(a) and 20(b) because

⁸ A levy must be made or proceeding in court begun to collect a federal tax lien within 10 years after a tax assessment is made. See 26 U.S.C. § 6502; *United States v. Galletti*, 541 U.S. 114, 119 (2004). The running of the statute of limitations is tolled during a bankruptcy proceeding, see *United States v. Doe*, 438 F.Supp.2d 796 (S.D. Ohio 2006), by agreements (made before Dec. 20, 2000), see *United States v. Ryals*, 480 F.3d 1101, 1106 (11th Cir. 2007), or while an offer in compromise (made on or after Dec. 31, 1999) is pending. *Id.* I infer that collectibility of some of his federal tax liens was barred by the 10-year statute of limitations.

he did not act more aggressively and responsibly to resolve his delinquent debts.⁹ His overall conduct pertaining to state and federal taxes over the last ten years casts doubt on his current reliability, trustworthiness, and good judgment.

Applicant does not receive full credit under AG ¶ 20(c) because he did not provide evidence that he received financial or credit counseling. There is record evidence of “clear indications that the problem is being resolved or is under control” and he receives substantial credit because his current financial condition as of February 29, 2008, is excellent.

Guideline ¶ 20(d) does not fully apply because there is insufficient information to establish that Applicant showed good faith¹⁰ in the resolution of his debts. AG ¶ 20(e) is not applicable because he did not provide “documented proof to substantiate the basis of the dispute or [provide] evidence of actions to resolve the issue” with respect to his SOR debts.

Applicant did not show sufficient responsibility under the circumstances to fully mitigate security concerns. He has been employed for the last seven years, and his adjusted gross income for those seven years averaged over \$100,000 per year. He should have showed a consistent track record of significant, delinquent tax debt reduction. His financial problems may recur. He should have been more diligent and made greater efforts over a longer period of time to resolve his delinquent debts. He has not carried his burden of proving his financial responsibility. Based on my evaluation of the record evidence as a whole, I conclude the passage of time has mitigated the security concerns pertaining to most of his financial problems, and I find For Applicant

⁹“Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)).

¹⁰The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

on all SOR paragraphs except for SOR ¶¶ 1.e and 1.h. No mitigating conditions sufficiently apply to remediate all security concerns.

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) 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 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. AG ¶ 2(c).

Applicant's record of good employment weighs in his favor. His stable marriage and his dedication to the welfare of his four children support approval of his clearance. There is no evidence of any security violation. Aside from his tax problems, he is a law abiding citizen. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. Applicant was well aware of his tax responsibilities, and had ample resources to pay his fair share of taxes. He did not become truly serious about paying his back taxes until he became aware of the security significance of these debts. His efforts to resolve his tax debts were insufficient when compared to available income that he could have used to address his delinquent debts, especially from 2001 to 2003. He did not show adequate actions for timely resolution of his tax debts. Instead he chose to rely on the IRS' failure to file tax levies against his income and property. In sum, he did not make sufficient efforts to repay or resolve tax debts prior to 2008, and those actions were not adequate to fully resolve security concerns.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to financial considerations.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”¹¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

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 to 1.d: | For Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraphs 1.f and 1.g: | For Applicant |
| Subparagraph 1.h: | Against Applicant |
| Subparagraphs 1.i and 1.j: | For Applicant |

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge

¹¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).