



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-17410
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

June 8, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant answered and signed his Security Clearance Application (SF 86), on June 14, 2004. He submitted additional requested information concerning his previous addresses and employment on May 3, 2005. On December 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F and E for Applicant. 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 acknowledged receipt of the SOR and elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's

written case on April 9, 2009.¹ Applicant received a complete file of relevant material (FORM) on April 22, 2009, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's case. Applicant submitted additional information. Department Counsel did not object and the information was entered into the record. The case was assigned to me on June 2, 2009. Based upon a review of the case file, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated February 16, 2009, Applicant denied the factual allegations in ¶¶ 1.a through 1.d of the SOR. He also denied the factual allegations in ¶¶ 2.a and 2.b of the SOR with explanations and denied any intentional falsification. He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 57-year-old employee of a defense contractor. He graduated from high school, and attended college in 1991. He served in the United States Army from 1971 until 1979. His first marriage ended in divorce in 1989. Applicant remarried in 1993 and has no children. His wife resides outside of the U.S. He has worked for his current employer (overseas) since June 2004 (Item 4).

Applicant has worked out of the country for the past ten years or more. He had used his mother's address in the United States for his address of record. He has worked steadily during his career except for noted unemployment from December 16, 2002 until January 29, 2003 (Item 4).

Applicant was interviewed overseas by a DoD investigator on April 2, 2007 as part of the security clearance investigation. He explained to the agent that he had not filed his individual income tax returns for the years in question (1990, 1991, and 1992) because he had been out of the U.S. for 330 days and believed that he did not have to file the taxes based on that fact and the amount of his income was below \$80,000.² Applicant elaborated when he found out about the delinquent fees that he contacted the IRS. Applicant was told that ultimately he did not owe anything. He explained that he would produce documentation that the debt has been cleared. Concerning the two delinquent accounts (SOR ¶ 1.b and ¶ 1.c), Applicant did not know about the debt for \$309 (medical services). He explained that the \$273 debt (SOR ¶ 1.c) was due to a cancellation fee on a phone contract. He cancelled his contract early and told the company that he believed his pre-payment of \$250 for mobile phone service would be credited toward the cancellation fee. He never looked at his credit reports (Item 7).

¹The Government submitted eleven (11) items in support of its contention.

²IRS Tax Guide (Publication 54) discusses Foreign Earned Income Exclusion for U.S. citizens living abroad-330 day rule.

On April 20, 2008, Applicant explained that in 1997, an IRS agent told him that a tax lien from 1996 in the amount of \$45,444.28 had been filed against him. He learned about this when he was on leave for a few days while visiting his mother in the U.S. He was due to return overseas and could not file the tax forms immediately. He also explained that his legal and professional papers were stored in a trunk in his mother's home and had been misplaced. According to Applicant, the IRS had not initiated any other action against Applicant (Item 7).

The SOR alleges two delinquent debts, and a federal tax lien in taxes, penalties and interest for the tax years 1990, 1991, and 1992 (years that taxes were not filed) in the amount of \$45,444. The total amount of other debt that Applicant owes is approximately \$582 (Item 8).

The current status of Applicant's delinquent debts is as follows: the taxes assessed for tax years 1990, 1991, and 1992 have been satisfied in the amount of \$45,444. A Certificate of Release of Federal Tax Lien was prepared and signed on April 22, 2009 (SOR ¶ 1.a). Applicant submitted a Form 2848 (Power of Attorney and Declaration of Representative), signed April 9, 2009. This allowed the designated person (an enrolled agent) to represent Applicant before the IRS to resolve any tax issue regarding income for tax periods from 1989 until 2008.

Applicant settled the account alleged in SOR ¶ 1.c in January 2009 for \$163.81. His credit report confirms the account as settled. Applicant also provided documentation of his cancelled check and payment coupon with his answer to the SOR. He explained in his answer to the SOR that when he signed his 2004 security clearance form, he did not know that there was an outstanding balance as discussed above. He explained that he paid it to avoid any further issues with the account (Item 3).

Applicant's submissions to the FORM document his payment of \$309 for the medical bill (SOR ¶ 1. b) on February 5, 2009. He did not realize that his hospital bill for an emergency visit in August 2003 was not covered by his employer as part of a Workmen's Compensation claim. He was told by the company that it was covered. Applicant explained that since it was showing on his credit report and to avoid any further issues, he paid it.

Applicant completed his June 2004 security application which had an addendum signed on May 2005. In that application he answered "no" to questions 38 and 39 concerning financial delinquencies in the last seven years for over 90 or 180 days (Item 4).

In 2009, in his answer to the SOR, Applicant explained that when he completed the SF 86 in 2004 he did not know of the two delinquent accounts or that he had a current "judgment" filed against him. He elaborated in his answer to the SOR that his "supposed indebtedness to the IRS in the amount of \$45,444 for the years 1990, 1991, and 1992 is still an unresolved and outstanding issue (Item 3). When Applicant completed his June 2004 security clearance application, he answered "no" to questions

28 and 39: Your Financial Delinquencies. He incorrectly answered the questions but did not falsify his application.

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, 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.

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).

Analysis

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 conditions that could raise security concerns. Under AG & 19(a), an inability or unwillingness to satisfy debts[@] is potentially disqualifying. Similarly under AG & 19(c), Aa history of not meeting financial obligations[@] may raise security concerns. Also, AG ¶ 19(g), “ failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same” is potentially disqualifying. Applicant accumulated delinquent debts on two accounts. He did not file federal income tax returns for 1990, 1991, and 1992. A tax lien in the amount of \$45,444 was filed on January 22, 1996. His credit reports confirm the debts. The evidence is sufficient to raise these disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where Athe 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.[@] Applicant did not file federal tax returns for 1990, 1991 and 1992 based on his belief that living and working out of the country for 330 days out of a year and making less than \$80,000 did not require him to do so. He also had two delinquent accounts from August 2003 and September 2003 that he did not realize were delinquent accounts. This mitigating condition applies in this case.

Under AG & 20(b), it may be mitigating where Athe 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.[@] I do not find this a factor fo consideration in this case.

Evidence that 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 is potentially mitigating under AG & 20(c). Similarly, AG & 20(d) applies where the evidence shows the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. Applicant has resolved the federal tax lien. The two accounts are paid. His efforts are sufficient to carry his burden in this case. I conclude these mitigating conditions apply.

AG ¶ 20(e) applies where the evidence shows “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.” In this case, Applicant stated that he did not believe he owed the tax lien based on working and living abroad and referred to a tax provision for citizens living abroad. However, he has satisfied the lien. I conclude this mitigating condition applies in part.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel 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” is potentially disqualifying.

In this case, when Applicant completed his 2004 security application, he did not list any delinquent debts in response to questions 38 and 39. He stated in his answer to the FORM in 2009, that he answered the questions to the best of his ability and did not know about the indebtedness. He incorrectly answered the questions but he did not intentionally falsify his application. He denied that he intentionally falsified his answers or attempted to deceive the Government.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission

occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case NO. 02-23133 at 5 (App. Bd. Jun. 9, 2004)). Thus, 16(a) does not apply in this case. I find for Applicant (SOR ¶ 2.a-b).

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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and conclude they are sufficient to overcome the Government's case. Applicant has worked for a defense contractor overseas for approximately ten years. He is currently working overseas. He served in the U.S. Army from 1971 until 1979. He did not file federal tax returns in 1990, 1991, and 1992 because he did not believe he was required to do so. He believed that he did not owe any tax. He has resolved the tax lien in the amount of \$45,444. He did not know that two accounts from 2003 and 2004 were delinquent. He has paid the two delinquent accounts and provided documentation. He answered questions 38 and 39 concerning financial delinquencies in the last 7 years to the best of his ability. He did not falsify his SF 86. His answer and submissions to the FORM are sufficient for him to meet the burden in this case.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations and personal conduct.

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

Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2, Guideline E:	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge