



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



In the matter of:)
)
) ISCR Case No. 08-05344
)
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Roderic G. Steakley, Esquire

October 30, 2009

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted a Questionnaire for Sensitive Positions (SF 86) as part of his employment with a defense contractor on January 28, 2008. On February 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for financial considerations. 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 on March 5, 2009.

Applicant answered the SOR in writing on March 18, 2009. He admitted the factual allegation but denied the security concern based on the factual allegation. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 17, 2009. The case was initially assigned to another administrative judge, and reassigned to me on July 22, 2009. The previous administrative judge issued

a Notice of Hearing on June 24, 2009, for a hearing on July 14, 2009. That hearing was postponed. I issued a Notice of Hearing on July 30, 2009, for a hearing on August 18, 2009. I convened the hearing as scheduled. The government offered 11 exhibits, marked Government Exhibits (Gov. Ex.) 1 through 11. Five exhibits were admitted and six were not admitted. Applicant and three witnesses testified on his behalf. He offered two exhibits, marked Applicant Exhibits (App. Ex.) A and B, which were received without objection. DOHA received the transcript of the hearing (Tr.) on August 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issues

Applicant objected to the admissibility of nine of the eleven offered government exhibits. He objected to Government Exhibits, 2, 3, 4, and 5, credit reports and a letter from the Internal Revenue Service (IRS), as irrelevant and hearsay. I admitted Government Exhibits 2, 4, and 5 as authentic, not hearsay as a business record, and relevant to a determination of Applicant's security worthiness. I did not admit Government Exhibit 3 since it was cumulative with other government exhibits that were admitted.

Applicant objected to Government Exhibits 7, 8, 9, 10, and 11 as irrelevant to a determination of Applicant's security worthiness. Government Exhibit 7 is an IRS monthly statement concerning taxes owed for 1992 and 1998. Government Exhibit 8 is Applicant's statement in 2001 to security investigators concerning taxes owed from 1998. Government exhibits 9 and 10 are handwritten statements by Applicant concerning tax debts and other debts from 1989. Exhibit 11 is a 1989 statement to security investigators from his corporate security official that Applicant has financial difficulties and may file bankruptcy. The documents were not admitted since the financial security concerns were federal tax liens from 1989 and 1998 and are not relevant to tax issues from 1999 to 2002 (Tr. 16-37).

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 59 year old electrical and systems engineer employee of a defense contractor performing document reviews to determine contractor compliance with government requirements. He is a college graduate with a bachelor's degree in electrical engineering. He is a graduate of the Air Force Reserve Office Training Corps (ROTC) program, and served over seven years on active duty in the Air Force and over ten years in the Air Force Reserves. He has held a security clearance since 1974. He has been married since 1976, and all of his children are grown. He worked for various defense contractors since leaving active duty with the Air Force in 1981. He was with a previous defense contractor employer from August 1997 until February 2009. He has been with his present defense contractor employer since February 2009. Applicant has

been continuously employed from 1974 until present except for the period from January 1994 until February 1995. Applicant stated that his loyalty to the United States has never been challenged and he has never compromised classified information (Tr. 103-116, 150-152; Gov. Ex. 1, SF 86, dated January 28, 2008).

The credit reports and IRS documents that were admitted into evidence show that Applicant is indebted to the IRS for tax years 1999-2003 in the approximate amount of \$42,848.14 (SOR 1.a). However, Applicant also acknowledged that he had previous federal tax issues in 1992, 1995, and 1998. He acknowledged that he did not have sufficient funds to pay his taxes for tax year 1992. He had moved from one company to another and withdrew his retirement funds from the previous employer. He was advised by the IRS that he had to pay interest and a penalty for withdrawal of the funds. His tax debt was over \$12,000. He entered an installment agreement with the IRS in 1995 for payment of the 1992 taxes. (Tr. 116-121, 175-180; Gov. Ex. 2, Credit report, dated August 12, 2009; Gov. Ex. 4, Credit report, dated February 15, 2008; Gov. Ex. 6, Lien, dated September 14, 2004; Gov. Ex. 7, Monthly IRS statement, dated May 16, 2001).

Applicant filed his federal tax returns on time from 1995 until 1998. Applicant could not pay in full his federal taxes due for tax years 1995 and 1998. In 1995, he had ended a period of unemployment and received full salary. The taxes owed were about \$700 to \$900 but he did not have funds available for payment. In tax year 1998, Applicant made more than expected and again owed about \$2,300 in federal taxes but did not have funds to pay. Applicant never adjusted his tax withholding after 1995 or 1998. He tried to meet his tax debt by earning more income in order to have additional funds to use to pay taxes. Applicant's tax debt for these years was added to the 1995 installment agreement. The installment agreement was completed in 2005 and the taxes have been paid (Tr. 133-142, 180-185).

Applicant admitted that he failed to timely file federal tax returns for tax years 1999 and 2000. Applicant claims he could not file on time because his wife was ill after knee surgery and he could not obtain records for his wife's in-home bridal gown business. She earned about \$3,500 per year but her expenses at times exceeded her business income. Applicant was notified by the IRS in 2003 that he had not filed his 2000 tax return. However, the IRS calculated his taxes and assessed penalties. When notified that he did not file his 2000 federal tax return, he also discovered that he had not filed his 1999 Federal tax return. He voluntarily notified the IRS of his failure to file the 1999 Federal tax return. Applicant also noted that at the time he had a medical problem that caused him to be easily distracted and led to some short term memory loss (Tr. 121-128; App. Ex. A, IRS Account Transcript, dated July 13, 2009; App. Ex. B, Doctor's letter, dated October 1, 2001).

Applicant entered into an installment agreement in early 2005 with the IRS to pay \$433 a month until the tax debt for 1999 and 2000 was paid. After approximately 18 months, the IRS terminated the agreement and requested payment of the entire sum owed. Applicant notes that he made all of the payments required up to that point, and do not know why the installment agreement was cancelled. By this time, however,

Applicant also had tax payments owed for tax years 2001, 2002, and 2003. Applicant made an Offer in Compromise to the IRS for his entire tax debt which was rejected. He subsequently negotiated a new installment agreement with the IRS in September 2008 to make payments of \$760 month on his entire tax debt until the debt is resolved (Gov. Ex. 5, Installment agreement, dated August 21, 2008).

Applicant never adjusted his tax withholding after realizing he owed federal taxes each year. He tried to earn more income to pay his federal taxes rather than adjust his withholding. He timely filed his federal tax returns for tax years 2004 through tax year 2008 and paid all amounts due (Tr. 128-133, 142-150; App. Ex. A, Tax Account Transcript, dated July 13, 2009).

Applicant made payments in October and November 2008 on the installment agreement with the IRS. He was notified by his employer in December 2008 that his position may be eliminated because of lack of funds. He notified the IRS he may be laid off and the payment on his installment agreement was deferred. His position was eliminated in January 2009. He started working with his present employer on February 9, 2009. He has timely made every payment under the installment agreement. He estimates his present debt to the IRS at approximately \$38,000 (Tr. 150-156, 194-197).

Applicant's yearly salary at his previous employer was until December 2008 \$92,000. His expenses many months exceeded his income. In general, he had very little, if any, discretionary funds left each month. Applicant used high interest (sometimes as high as 40%) short term loans to obtain funds to make ends meet and pay bills many months. Two or three of these loans are still outstanding and he pays on them each month. When he started working for his present defense contractor in February 2009, his yearly salary increased to \$122,500. Applicant labeled this as a "whopping big" salary increase. The increase was partially off-set by increased medical insurance costs of about \$12,000 to \$15,000. However even with this increase in salary, his expenses many months are still more than his income. Applicant continues to manage the income/expenses shortfall by either reworking his budget to find funds, by obtaining another high interest loan, or by adding to an already existing high interest loan. Applicant acknowledged that financially he is living "on the edge" (156-194).

Applicant's former supervisor testified that she has a bachelor's degree in mathematics and a master's degree in computing information sciences. She has held a security clearance for over 34 years. Applicant worked directly for her from March 2008 until December 2008. She observed his daily work and also received reports from others concerning Applicant's work. She is aware of Applicant's tax problems since he informed her that he had Federal income tax issues. She has no reason to doubt his loyalty to the United States or his work ethic. She has never observed any actions by Applicant that would compromise his integrity or honesty. He has never given her any indication that he would intentionally or consciously compromise classified information. She believes he is reliable, trustworthy, and has the ability to protect classified information. She would currently trust him with classified information (Tr. 40-62).

The government employee who oversaw Applicant's work as a government contractor testified that he has a bachelor's degree in computer science and has worked as a government contractor and government employee. He has held a security clearance for many years. Applicant was a government contractor supporting his office and operation. He saw Applicant on a daily basis. Applicant is loyal, has an excellent work ethic, is knowledgeable about his work, and follows security rules and regulations. It is his opinion that Applicant is honest, trustworthy, and reliable. He has not observed Applicant exhibit any actions that raise questions concerning his access to classified information. He is aware that Applicant has financial problems relating to payment of taxes. He does not believe Applicant would intentionally or consciously compromise classified information. He would recommend Applicant for access to classified information (Tr. 62-82).

The project manager for Applicant's former employer testified that he has been with the company working on the same project for over 30 years. He has a bachelor's degree in electrical engineering and served on active duty with the Air Force. He has held a security clearance from his active duty service in the Air Force through his employment with the government contractor. Applicant worked on the project for him from 2000 until December 2007. He saw Applicant frequently and also received reports on his work performance. Applicant was always dedicated to the project. He never had any reason to question Applicant's work ethic. He never saw Applicant exhibit any behavior which would cause him to question Applicant's honesty or integrity. Applicant exercised good judgment and demonstrates a willingness to abide by rules and regulations concerning security matters. He is aware of Applicant's financial problems relating to the payment of taxes. He would trust Applicant with classified information (Tr. 82-103).

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 required 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. 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.

Analysis

Financial Considerations

Under 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 (AG ¶ 18). Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving responsibly or 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 repay 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. Applicant's failure to file tax returns for 1999 and 2000, as well as a history of tax debts as listed on the credit reports and in IRS documents are a security concern raising financial consideration disqualifying conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), FC DC AG ¶ 19(c) (a history of not meeting financial obligations), and FC DC AG ¶ 19(g) (failure to file annual federal, state, or local income

tax returns as required or the fraudulent filing of the same). Applicant had tax payment issues as early as 1992. These tax filing and payment issues in the SOR started in 1999. Applicant's federal taxes are still being paid under an installment agreement with the IRS. These facts show Applicant has a history of an inability or unwillingness to pay his federal tax obligations.

I considered the financial considerations mitigating conditions (FC MC) that were raised by Applicant's testimony. FC MC 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) does not apply. Applicant has had continuous issues with filing and paying his federal taxes. There have been two installment agreements with the IRS for payment of taxes. His present agreement still has a debt of over \$38,000 and covers tax years from 1999 to 2003. Applicant's history of tax debt as well as his present finances indicates that his tax debt issues could recur. His long standing failure (until at least 2003) to restructure his finances to enable him to meet his federal tax obligations each tax year casts doubt on this reliability, trustworthiness, and good judgment.

I considered FC MC AG ¶ 20(b) (the conditions that resulted in the financial problems 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). Applicant attributes his tax problems to his failure to consider the tax consequences of a withdrawal from his retirement account, his failure to find the necessary information on his wife's business to file his returns, and a medical problem affecting his ability to concentrate and focus. Taxes are inevitable and something every financially responsible person knows is required to be paid. Applicant started experiencing his present tax issues in 1999 and they continue today with his installment agreement still at a balance owed of over \$38,000. The problems cited by Applicant were not largely beyond his control but well within his ability to manage. He should have inquired about or known, as a reasonable person, about the tax consequences of the early withdrawal of his retirement account. With due diligence, he could have determined the tax consequences of his wife's business. There is no indication that his medical problems were so severe that it affected his ability to file his tax return. Once he had federal tax issues, Applicant did not take responsible and reasonable actions to adjust his finances to provide for payment of his taxes. He tried to increase his income as a means of paying his taxes. Higher income means higher taxes. When his income increased, he still encountered federal tax issues. This mitigating condition does not apply.

I considered FC MC AG ¶ 20(d) "the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts". For FC MC AG ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. A systematic, concrete method of handling debts is needed. The applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. The entirety of an

applicant's financial situation and his actions in response can reasonably be considered in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. Applicant should demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan.

Applicant owed federal taxes from 1999 and 2003. In 2005, he entered an installment agreement with the IRS to pay his past due taxes. This agreement was not based on the good-faith action of Applicant but an action required by the IRS to collect federal taxes. In fact, when Applicant continued to incur federal taxes that he could not pay, the IRS terminated the initial installment agreement seeking immediate payment of the tax debt. Applicant's Offer in Compromise was rejected. Applicant and the IRS agreed to a new installment agreement and Applicant is paying that agreement now. This latest installment agreement is not based on Applicant's good-faith but the tax enforcement and collection requirements of the IRS. Applicant has not presented sufficient information to indicate a good-faith effort to pay the IRS and resolve the tax debt. Accordingly, Applicant has not presented sufficient information to mitigate security concerns for financial considerations.

Whole Person Analysis

Under the whole person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall commonsense 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. I considered Applicant's active duty and reserve Air Force service, and his good reputation for honesty, integrity, and reliability. I considered his supervisor's evaluation of his work performance and their opinions that he be granted access to classified information. I also considered that Applicant has held a security clearance since 1974 and there are no indications of any

security violations. In fact, all indications are that he has correctly managed classified information.

To overcome financial considerations security concerns, an applicant must show a "meaningful track record" of financial management. Reliable information about the Applicant, past and present, favorable and unfavorable, should be considered in reaching a determination. Applicant must demonstrate that he has a plan to resolve his financial problems and has taken significant actions to implement that plan. The entirety of Applicant's financial situation and actions must establish that Applicant's plan for the reduction of his outstanding indebtedness and management of his finances are credible and realistic.

Applicant has established that he is paying his past due federal tax debt under an installment agreement with the IRS. However, he has not shown that he has responsibly and reasonably managed his finances. His finances are in disarray and he is "chasing his tail" financially. For a number of years, he has failed to take into account his federal tax burden thus incurring a federal tax debt. He has been gainfully employed since 1974 except for a 15 month period. Even while gainfully employed, he has incurred federal tax debt because of his unwillingness or inability to manage his finances to account for his tax responsibilities. His continued inability to manage his finances to have sufficient funds to pay his federal taxes when due does not instill confidence that his finances are under control and he will manage to pay his future federal taxes when due. He not only failed to reasonably manage his taxes responsibly, he has not been reasonable and responsible in managing his entire financial obligations. His annual income is \$122,500 but he still manages to live on the edge financially. He just received a "whopping" pay raise but he still is living day to day financially. In fact, his expenses are more than his income and he often resorts many times to high interest loans to pay his bills. He has not established that he is living within his means. The evidence indicates that he is financially overextended.

Applicant is irresponsible in managing his finances. His finances are not sound in that he does not live within his means, is overextended financially, and does not responsibly manage his high income to meet his current financial obligations. This information indicates poor self-control, a lack of good judgment, and unwillingness to abide by rules and regulations, resulting in questions concerning Applicant's reliability, trustworthiness, and ability to protect classified information, Applicant has not established he is suitable for a security clearance because he has been irresponsible toward his finances indicating he will be irresponsible towards the safeguarding of classified information. He has not established he is reliable, trustworthy, and exercises good judgment. I reach these conclusions even though Applicant had access to classified information since 1974 and there have been no indications of any security violations or concerns. Overall, on balance 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 has not mitigated the security concerns arising from financial considerations.

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

Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge