



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



In the matter of:

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) ISCR Case No. 09-00505
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Applicant for Security Clearance

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel

For Applicant: *Pro Se*

October 23, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline F, Financial Considerations. Applicant's eligibility for a security clearance is denied.

On May 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the 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 in writing on May 30, 2009, and requested a hearing before an administrative judge. The case was assigned to me on July 29, 2009. DOHA issued a Notice of Hearing on August 6, 2009. I convened the hearing as scheduled on September 22, 2009. The Government offered Exhibits (GE) 1 through

27. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through N, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 30, 2009.

Procedural Issues

The Government withdrew the allegations in SOR ¶¶ 1.f, 1.g, 1.h, 1.i, 1.j, 1.m, 1.n and 1.p. The remaining allegations were renumbered and the change was made on the SOR to reflect allegations 1.a through 1.l.¹ There were no objections.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.f, 1.i, 1.k and denied SOR ¶¶ 1.g, 1.h, 1.j and 1.l. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 45 years old and has worked for a federal agency as a civilian government employee since December 1987. He also works part-time as a security officer for a federal contractor. He has worked for different companies in the same capacity since 1992. He stated he holds a security clearance for his federal employment, but his part-time employer required him to update his security clearance application for employment.²

Applicant served in the Marines from 1983 to 1987, and was honorably discharged. He married in 1990, and has a daughter who is 18 years old. He divorced in 2000. He was separated from his wife when he had a child in 1995, with a different woman. He stated he pays child support for this child, but not through a court order. At present he pays \$150 a month, but in the past he has paid \$300 a month, depending on his income. He married a different woman in 2002. He is still married, but he and his wife separated in 2007. He has no children with his wife.³

In 2000, after reading a book, Applicant made a decision that he would not file or pay his federal or state income taxes. The author of the book explained why taxes were unconstitutional and advised the reader to file an exemption form with the Internal Revenue Service (IRS). Applicant asked his friend who is a tax advisor about the validity of the author's premise. He was advised by the tax advisor that the premise of the book was "fiction" and he needed to pay his taxes. Applicant made a conscious decision to have no money withheld from his pay for taxes, not to file the proper federal tax form, and not to pay his federal income taxes. He failed to file or pay his federal

¹ SOR ¶¶ 1.a through 1.e remain the same. SOR allegation ¶ 1.k is changed to 1.f; SOR ¶1.l is changed to 1.g; SOR ¶1.o is changed to 1.h; SOR ¶1.q is changed to 1.i; SOR ¶1.r is changed to 1.j; SOR ¶1.s is changed to 1.k, and SOR ¶1.t is changed to 1.l.

² Tr. 22-31.

³ Tr. 107-108, 123-124, 133-139.

income taxes from 2000 to 2006. He explained he used the money to buy things he wanted. He paid \$15,000 in cash to purchase a foreclosed home that needed repairs. He spent \$30,000 to repair the home. He stated he did it because of “greed” and knew it was wrong, but decided to continue because the IRS was not paying attention and did not pursue him. He continued to send the IRS an affidavit stating he was exempt from paying federal income taxes. He contradicted himself during his hearing, claiming later that he believed the affidavit was legitimate and he did not have to pay taxes. I did not find his testimony credible. The IRS eventually began garnishing his federal wages. Applicant stated there was a “major crackdown on frivolous filers.”⁴

During this same period, Applicant also did not file or pay his state taxes or the property taxes on his house. He stated he also talked his wife into not filing her taxes. Applicant stated he was embarrassed that an Office of Personnel Management investigator interviewed him at his primary place of federal employment and considered it improper.⁵

In 2006, Applicant stated he went to the IRS because his wages were being garnished, and he attempted to resolve his tax issues. He believed 15% of his wages were garnished, but did not provide any supporting documentation. He stated the IRS stopped garnishing his wages at one point because he was working reduced hours at the federal agency and was not earning enough income. In July 2009, the IRS began garnishing his wages from his second job. Applicant offered no documented proof that his wages were or are being garnished. He provided pay stubs from both employers for February 2009, but could not show a deduction for tax garnishment. He stated that in 2006, he filed his overdue tax forms.⁶

Applicant explained he negotiated a payment plan with the IRS and was to pay \$500 a month beginning in February 2009. He made one payment in February 2009, and then missed March, April, May, and June 2009 payments. He stated he then sent documents to the IRS in July 2009, whereby they were to begin deducting \$1,100 a month from his pay. He stated he made three payments. He provided no documentation that this occurred or that he has been making any payments.⁷

Applicant has state tax liens against him for failing to file and pay his state taxes (SOR ¶ 1.c, \$1,380) for 1999, 2000 and 2001. He stated he did not file for these years because he was going to get a refund and he had income withheld from his pay. I did not find his testimony credible.⁸

⁴ Tr. 32-58, 61-74.

⁵ Tr. 32-58.

⁶ Tr. 40-58, 82-85, 129.

⁷ Tr. 42-44.

⁸ Tr. 75-81.

Applicant has a federal tax lien for 2002 (SOR ¶ 1.d, \$22,165).⁹ There is also a tax lien for 2003 (\$28,000) that is not alleged and he disputes the amount.¹⁰ He stated he is paying through garnishment the tax lien in SOR ¶ 1.b (\$65,040) for tax years 2004, 2005 and 2006. No documentary evidence was provided.¹¹

Applicant stated that in 2006, he changed his withholding tax on his pay. He did not provide evidence that he took this action. Even if he did have money withheld, he still owed taxes for that year (SOR ¶ 1.a, \$11,588).¹² He admitted he was aware that not enough tax was being withheld, but did not change his withholdings for 2007. He stated he filed his 2007 tax return on time, but failed to sign the forms. He did not file his 2008 income tax return on time. He again failed to sign his 2008 form. He eventually signed both 2007 and 2008 tax return forms, at the same time. It is unclear why he waited to sign his 2007 form until he signed his 2008 form.¹³

Applicant admitted he did not pay his property taxes. Judgments were entered against him by the city (SOR ¶¶ 1.f and 1.g, \$4,563 and \$3,422, from tax years 2001 and 1999, respectively).¹⁴ Applicant offered an incomplete document to show a payment plan for his property taxes. The plan called for him to pay \$384 a month beginning in November 2008. He stated he made three or four payments of \$200. He explained that he would not pay his property taxes until the city threatened to take the property. When that would happen, he would pay a certain amount so they would cease their action. Once the city ceased its action, he would not pay until it threatened again. He did this on more than one occasion. Applicant provided no proof of payments to the city for his property taxes. He stated he withdrew \$15,000 from his retirement account to make the payments. He had to pay a tax penalty for the withdrawal, along with paying the tax on the income. This increased his 2008 tax bill to approximately \$16,000. It remains unpaid. He explained he used the money from his retirement account to pay other debts. Applicant admitted that he also used \$2,000 from his retirement withdrawal to take his daughters on a vacation cruise. He has not paid his property taxes.¹⁵

⁹ GE 13.

¹⁰ GE 14.

¹¹ Tr. 40, 74-81.

¹² Tr. 83-86; GE 17.

¹³ Tr. 58-61, 85-86.

¹⁴ GE 24, 25.

¹⁵ Tr. 40, 90-100, 112-113, 132, 141-143.

Applicant did not pay the debt in SOR ¶ 1.i for phone services (\$1,622).¹⁶

The debts in SOR ¶¶ 1.j (\$644) and i.l (\$30) are credit card debts to the same credit card company for different accounts. Applicant provided a document to show a debt to the same named creditor was paid.¹⁷ However he admitted he had more than one credit card with the same creditor. The document does not verify the account. The debts alleged have different account numbers listed. He did not provide proof that the debt paid is the same as the debts alleged.¹⁸

The debt in SOR ¶ 1.k (\$13,000) is for the deficiency on a loan on a vehicle that was stolen. He stated he made arrangements with the creditor to pay one half of the debt. He stated he has \$100 a month taken automatically from his credit union account to pay the debt. He stated he has been paying this debt for two years. He provided a document to show he was setting up an automatic withdrawal beginning sometime in January 2009. It does not state the amount. He did not provide proof that he has been making payments for two years or since January 2009.¹⁹

Applicant disputes the debt in SOR ¶ 1.h (\$91) for a civil judgment for contempt of court. He stated he paid the debt and would not have been issued a hand gun permit had he not. He did not provide proof of payment.²⁰

Applicant stated in 2008 he had approximately \$7,000 to \$8,000 in savings from working two jobs. He did not use this money to pay his back taxes. He stated he paid off a credit card that was not alleged in the SOR.²¹

Applicant believes he owes the IRS approximately \$185,254 for past tax years and \$16,000 for tax year 2008. He stated the IRS has advised him he owes \$220,000.

Applicant purchased a time share at a resort in 2005. He paid \$200 a month and sold it back to the owner. He stated that in 2007, he and his wife would go to a resort city for entertainment three times a month during that year. He estimated the cost of the monthly trips was \$600.²²

¹⁶ Tr. 115.

¹⁷ AE K.

¹⁸ Tr. 115-117.

¹⁹ Tr. 117-122; GE 2, AE H.

²⁰ Tr. 87-90; AE L.

²¹ Tr. 110-111.

²² Tr. 130-132, 132-134, 139-140.

Applicant owes more than \$200,000 in federal income taxes. He owes approximately \$1,380 in state incomes taxes. He owes more than \$10,000 in property taxes. He stated he has payment plans. He did not provide proof he is paying any of these debts. I did not find Applicant's testimony credible.²³

I have considered the certificates of completion of training Applicant submitted.²⁴

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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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

²³ Tr. 127-129.

²⁴ AE M.

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. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Appellant has a significant history of not meeting his financial obligations. He intentionally did not file or pay his federal, state, and property taxes for many years. He has numerous tax liens and consumer debts that are not paid. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under 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;

(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's behavior is recent because he has many delinquent debts that remain unpaid. I find mitigating condition (a) does not apply. Applicant knowingly failed to file and evaded paying his taxes for many years. He asked a tax advisor if the information from the book he read was accurate and he was specifically told "no" and that he must pay his taxes. He chose to ignore the advice. He knew what he was doing was wrong and continued his conduct for years. He has been in contact with the IRS. He also has been in contact with state authorities. He has taken loans from his retirement account, but used the money to pay other debts and to take his daughters on a vacation cruise. He would also take his wife to a resort city several times a month for entertainment. Applicant disputes the amounts he owes to the IRS. He also disputes other debts. Applicant claims to have payment plans with the IRS and for his state taxes. However, he has failed to make the payments he promised. He failed to pay his property taxes until the city threatened foreclosure. Applicant failed to provide credible evidence that he paid any of the remaining debts alleged in the SOR. He failed to provide a reasonable basis to dispute the legitimacy of his past-due debts and to provide documented proof to substantiate his dispute. I find none of the remaining mitigating conditions apply.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served his country as a Marine and was honorably discharged. He made an intentional and deliberate decision to evade paying his taxes even though he knew it was wrong. He continued to evade paying his federal, state, and property taxes for years. Applicant has done very little to resolve his tax issues. Even when provided with a payment plan, he failed to make consistent payments and instead used some of his money for a vacation. Applicant's actions show consistently poor judgment and untrustworthy conduct. His testimony lacked candor and credibility. His conduct was extensive, serious, and repetitive, spanning many years and included not only federal income taxes, but also state income taxes, and local property taxes. Even when offered the opportunity to begin a payment plan, he failed to follow through. In addition to his tax debts, he has other consumer debts that are also unpaid. Applicant has not changed his behavior. His motivation was greed. Overall, 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 failed to mitigate the security concerns arising under the guideline for 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

Subparagraphs 1.a-1.i:

Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge