



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



In the matter of:)
)
) ISCR Case No. 09-02279
)
Applicant for Security Clearance

Appearances

For Government: Julie Mende: , Esq., Department Counsel
For Applicant: *Pro se*

05/21/2012

Decision

LYNCH, Noreen, A., Administrative Judge:

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The SOR was dated January 11, 2012. 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 Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing. DOHA assigned the case to me on March 2, 2012, and the case was heard on April 19, 2012. A notice of hearing was issued on March 21, 2012. Department Counsel offered 14 exhibits (GE) 1-14, which were admitted without objection. Applicant testified and submitted 14 exhibits (AE) A-N, which were admitted without objection. DOHA received the hearing transcript on April 27, 2012. Based on a review of the pleadings, submissions, and exhibits, I find Applicant has not met his burden of proof regarding the security concerns raised. Security clearance is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline F (Financial Considerations). Applicant admitted SOR allegations 2.d through 2.f and 2.i and 2.j under Guideline E.

Applicant is a 47-year-old employee of a defense contractor. He received his undergraduate degree in 1984. He is single and has no children. Applicant has worked for his current employer since February 2008. This is his first application for a security clearance. (GE 1)

Personal Conduct

In 1984, Applicant joined the military. However, in October 1984, he was given an entry-level separation due to non-disclosure of illegal drug use. (GE 7) He claims that he fully disclosed his high school drug use to recruiters at the station. He claims that they told him to lie and not to list the drug use. He was not using drugs when he enlisted. Applicant states that he was immature and did not realize the seriousness of the situation. (TR. 81) The drug use in high school was limited to marijuana. (Tr. 114)

In 2001, Applicant admits that he used methamphetamine two to three times a day for roughly one year. He claims that the use was not constant but it was habitual. (Tr. 112) He explained that he lived in an area of the country which was the "meth capitol of the entire U.S." He further noted that he avoided the use for a long time, but he did make a mistake. Applicant was arrested for the drug use in February 2001. (GE 14) On that day, he was eating lunch in his car. Police searched his car and found a quarter gram of methamphetamine in his bag on the floor of his car. Applicant was in jail for five or six days. The charges were eventually dropped. (GE 3)

In September 2006, Applicant was arrested and formally charged with furnishing alcohol to a minor. (GE 5) He states this was a case of entrapment. He states he did not have an intent to commit a crime, but as he was going to buy some soda at a store, he was approached "and talked into breaking the law" by a man that appeared to be of age. Applicant claimed that he did not want to buy the beer for the man, but he repeatedly implored him to do so. Applicant claims that it was a case of entrapment because he said "no" more than once. The charge was dismissed. He failed to appear for the charges, and a bench warrant for his arrest was issued. (GE 3, 5) In October 2010, Applicant was fined for failure to appear.

Applicant has worked as a software engineer since 1994. He experienced unemployment in 2005 or 2006. When Applicant was working for a large company in April 2007, he was terminated for "gross misconduct." Applicant agrees that the reason given was gross misconduct, but he denies he committed any gross misconduct. He states that he was fired rather than a more experienced technician. Applicant was on a probationary period. He believes this was a wrongful termination.

When Applicant was interviewed in 2008 as part of his security clearance process, he had not yet filed his federal or state taxes for 1994 through 2007. (Tr. 88) He led the investigator to believe that it was only the past ten years that he had not filed. (Tr. 90)

On September 25, 2008, Applicant completed his security clearance application (SCA). He answered "No" to Section 23. Your Police Record, question d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" He failed to disclose his 2001 arrest and charge for possession of a controlled substance; controlled substance paraphernalia; and under the influence of a controlled substance; and DUI Alcohol/Drugs. Applicant was not credible when he explained that he did not list the 2001 arrest because he was not "charged." He stated he was arrested and released.

In that same SCA, Applicant, responded "No" to Section 27. Your Financial, question c, "In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" He did not disclose the state tax liens entered against him in February 2005 and September 2008. He did not have knowledge of the tax liens at the time of his SCA. He was credible in his statement that he did not know of the state liens until the OPM interview. He noted that his 2008 credit report did not list the state liens.

Financial Considerations

Applicant admits to failing to timely file his federal and state taxes for tax years 1994 through 2007. (GE 2) As a result of not filing the taxes, federal tax liens were entered against Applicant in 1995, 1997, and 2010. The federal tax lien entered for 1995 was \$6,961; for 1997, \$55,509; and for 2010, \$59,370. (GE 8, 9, and 10) State tax liens were filed against Applicant in 1995, 2005, and 2008. (GE 11, 12) The original amount of federal tax owed to the IRS is approximately \$120,000. The amount of state tax is approximately \$42,377. (Tr. 32)

Applicant owed about \$120,000 in federal taxes for the years 1994 through 2007, but half of the federal liability was forgiven due to statutes of limitations. The amounts expired (released) prior to his addressing the tax issue in 2009. (Tr. 106) Thus, the outstanding federal tax lien filed in 2010 covers tax years 2001 through 2007, for an amount of \$62,515. (Tr. 107)

Applicant states that his financial problems began when he was working as a contractor. His reasons for not filing his tax returns for the number of years in question vary from not having enough income to the fact that his employer forced him to be a contract worker. (Tr. 92) Applicant was unemployed a full year in 1995, eleven months in 1996, and made low wages in 1997. (Tr. 103) He states that since he did not owe taxes for those years, he did not file. (Tr. 131) Applicant also did not believe this was fair or legal and so he did not want to file until he could become a regular employee. He admits that this was not a good reason not to file his taxes. (Tr. 44) He states that it was

not a smart thing to do, and he should have handled things differently. Applicant states that he always intended to file his taxes.

Applicant has been steadily employed in his current position since 2008. (Item 6) He filed all required federal tax returns in April 2009. (GE 2; AE J) In December 2011, he filed the state taxes from the 1990's. (Tr. 110) He has remained in good standing with the IRS and the state for the past four years.

As of April 15, 2012, Applicant owed a total federal and state tax debt of \$104,893.13. He owed the IRS \$62,515.14 and the state franchise board, \$42,377. By this date, he had made cash payments of \$35,253 to the IRS in the following manner. Through the annual installment plan with the IRS, he has made monthly payments of \$1,250 for a total of \$11,250. (AE C) The IRS applied his refunds from 2008 until 2011 for a total of \$8,795. He also received a 1040x credit of \$8,795. (AE E) His current balance to the IRS is \$18,852. With his payments and credits, his current balance to the IRS is \$18,852. (AE N)

Applicant 's current balance due to the state franchise tax board is \$14,461. He reduced the balance from \$42,377 by paying \$3,231 (for tax years 2001-2008), and cash payments of \$9,273 in 2009 and 2011. His debt reduction amounted to \$27,916.06.

Applicant earns an annual salary of approximately \$112,000. After monthly expenses and debt payments, he has a monthly net remainder of approximately \$1,373. (GE 2) He notes total assets in the amount of \$59,460. His 401-(k) is approximately \$55,000. He has rebuilt his credit standing, and his credit score is 730. (AE K)

Applicant states the most recent personal conduct allegation is a dubious claim of misconduct that happened five years ago. He admits that he was fired from a large company, but not for gross misconduct. As to the 2006 incident of furnishing alcohol to a minor, he states that he had no criminal intent. He states it was a case of entrapment and the charges were dropped. As to the drug usage, Applicant points to the fact that the drug usage and related arrest were more than 10 years ago. He notes this was a low point in his life, but he has completely changed his life. The oldest incident, when he was a teenage recruit, almost 30 years ago, is the fraudulent enlistment. He states that he was immature and nothing similar to that has happened again in his life.

Recommendations

Applicant's employer for the past five years attests to Applicant's trustworthiness and dependability. He is a leader within any development team, and he demonstrates sound judgment. (AE M) During Applicant's tenure, he has received a promotion, bonus, and an award for his achievements. Applicant's senior software engineer described Applicant as person of high integrity and responsibility. He is a highly valued member of the engineering staff. Applicant served as a mentor and provided feedback to junior engineers. He recommends him for a security clearance. (AE M)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

applicant concerned.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to 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 over-extended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying:

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;
- (c) a history of not meeting financial obligations;
- (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;

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

(e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

(f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

(h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and

(i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

Applicant admits to not filing his federal and state tax returns from 1994 through 2007. As a result, he incurred federal and state tax liens. His federal tax debt was originally approximately \$120,000 and his state tax debt approximately \$43,000. The debts are confirmed in the exhibits. Applicant did not file the tax returns until 2009 and 2011. Consequently, the evidence is sufficient to raise disqualifying conditions ¶¶ 19(a), 19(c) and 19(g).

AG ¶ 20 provides conditions that could mitigate security concerns:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant's failure to file federal and state taxes continued for many years. His reasoning for failing to file varied. Granted he was unemployed for a period of time, but he did not state that was the reason he did not file. He had federal and state tax liens filed against him. He claimed he had intentions to file and pay, but he did not. After applying for a security clearance and going through the investigative process, Applicant decided to file his federal government and state tax returns in April 2009 and in 2011. He initiated payments to both the federal and state. He has reduced his tax liability through his cash payments and an installment agreement. He has filed taxes for the past four years, and he has good intentions to pay his delinquent debts. He has been gainfully employed since 2008, and he has not raised any circumstances beyond his control that would contribute to his financial problems. He still has significant tax liability. Applicant receives partial credit under AG 20(c) and 20(d). None of the other mitigating conditions apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's behavior concerning his financial responsibility and his criminal conduct shows lack of judgment, reliability and trustworthiness over a period of many years. AG ¶¶ 16(a), 16(c), 16(d) and 16(e) apply. His conduct shows a pattern of poor judgment and reliability. He made a deliberate choice not to file his taxes. He also did not set aside sufficient money to pay taxes when he was a contractor. For 15 years, Applicant ignored his legal obligation as a tax payer. He deliberately did not disclose his 2001 drug arrest on his security clearance application. He used an illegal drug as an

adult for one year. He was arrested in 2006, but claims it was entrapment. He has rationalized his behavior in every instance. Granted, he has not used illegal drugs since 2001 and his last arrest was several years ago. However, there is a clear pattern of putting himself above the law.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant admitted his criminal conduct in some cases, but he had rationalizations or excuses as to why it occurred. It is true that his last use of illegal drugs was in 2001, and he does not associate with drug users. He did not list the drug arrest on his 2008 security clearance application. He has not presented any other information to persuade me that he has mitigated personal conduct concerns. I have doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is an intelligent person. He has recommendations from his current employer. He has reduced his tax liability since he started payments in 2009. He is in good standing with the federal and state tax authorities. He admits it was a mistake to use methamphetamines in 2001. He has not used illegal drugs since that time. His last arrest was in 2006.

Applicant has a lengthy history of questionable judgment in the personal arena and the financial arena. He did not address his tax liability until after the security investigative process started in 2008. He deliberately omitted information on his 2008 security clearance application. At this point, I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under financial considerations and personal conduct. Clearance is denied.

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.e: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |

Subparagraphs 2.a-2.j:

Against Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge