



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-03740
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: *Pro se*

September 29, 2010

Decision

HOWE, Philip S., Administrative Judge:

On March 10, 2009, Applicant submitted his Security Clearance Application (SF 86). On November 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on December 7, 2009. He answered the SOR in writing on January 15, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 27, 2010, and I received the case assignment on February 18, 2010. DOHA issued a Notice of Hearing on April 9, 2010, and I convened the hearing as scheduled on May 3, 2010. The Government offered Exhibits 1 through 9, which were received without objection.

Applicant testified and submitted Exhibits A through I, without objection. DOHA received the transcript of the hearing (Tr.) on May 11, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted eight allegations (Para. 1.a and 1.b and 1.h to 1.m), and denied the remaining five allegations (Para. 1.c to 1.g). He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 53 years old. He is divorced and has two adult sons from that marriage. He has a minor child from his current relationship. He works for a defense contractor as an engineering technician. (Tr. 60, 93-96; Exhibit 1)

Applicant operated his own computer repair and sales business for 10 years, from 1993 to 2003. His place of business burned in 2000. Applicant claims a number of his business records were destroyed or damaged in that fire. (Tr. 26)

Applicant owes to his home state business sales taxes for seven years, income taxes for four years, and the tax return forms required to be filed for those years. He owes \$186,995 for sales tax revenue during the years he operated his business. Applicant admitted he used some sales tax money during certain years to keep his business open. Applicant admits he owes \$22,346 to the state, but nothing more. But he has not paid that amount or offered it to the state treasury officials. He also claims he hired several accountants and lawyers during the past seven years to correct the state revenue department's tax estimates and arrange an installment payment agreement with the state, but no one could make such an arrangement. Applicant contends the state refused to negotiate with him or his representatives. Applicant's sales tax problems started in 1994. The state filed liens against Applicant to collect the unpaid sales taxes. The state filed liens before the 2000 fire. Applicant disputes the entire amount owed beyond the \$22,346, but has no records or other documents to support his dispute. His dispute consists of his verbal declaration at the hearing. (Tr. 26-60, 65-89, 97; Exhibits 2-9, A-D, H, I)

Applicant admitted he also owes his state and federal government income taxes for the calendar years 1997, 1999, and 2003. He does not know if he filed returns for those years. He claims he used several different tax preparers and does not recall what returns, if any, were prepared and filed. Applicant also contends his income tax records were destroyed in the 2000 fire. He has no copies of any records. Applicant's Exhibit I from his state's tax collection department shows he owes income taxes for tax years 1999-2002. Applicant filed income tax returns from 2005 to the present. (Tr. 34, 35, 50, 61-66; Exhibits 2-9, H, I)

Applicant submitted as an exhibit an audit report by his state's Auditor General on the collection of delinquent taxes. He claims the report supports his position that the state has wrongfully assessed him sales tax liabilities. He failed to show a direct connection between that report and his specific tax situation. Applicant also submitted the title page, table of contents, and page 24 of the 27 page "Taxpayer Rights Handbook" from his state's tax department. He cited the statements on page 24 that improper tax liens must be withdrawn within five business days. Applicant failed to present any evidence that his tax liabilities and liens were erroneous or improper, beyond his mere declaration that he could not possibly owe \$186,955. (Tr. 38, 39; Exhibits E, F)

Appellant stated his state's tax department took his share of the proceeds of the sale of his mother's house (\$8,000), his income tax refunds, and seized his personal home and sold it, all such actions to satisfy his various tax liabilities. He does not believe he was credited properly with these amounts. Applicant contends these amounts also show he does not owe the state as much money as they claim in their liens. (Tr. 33, 60; Exhibits 2-9, B, C)

Applicant filed Chapter 13 bankruptcy petitions in 1997 and 2004. The first petition was dismissed in March 2000. Applicant had \$20,000 of debt listed in the first bankruptcy owed to a bank and credit card issuers. He paid the creditors himself and had the case dismissed. The bankruptcy court record shows one or more creditors objected to the confirmation of the bankruptcy plan. The second petition was dismissed in June 2006. Applicant explained he thought he could arrange installment payments plans for his tax liabilities using the Chapter 13 bankruptcy process. Later, he learned he could not do so and the second case was dismissed. (Tr. 23-25, 90; Exhibits 4-7)

Applicant's presentation was confusing about the basis for his objections to the sales tax liabilities. His claims of efforts to resolve his tax debts were unsubstantiated by documents from any accountant or lawyer showing they represented Applicant in any attempt to negotiate the tax liabilities he owed. He could not demonstrate any specific efforts made in the past seven years to resolve his sales tax liabilities with his state. Applicant did not file personal income tax returns for four years and the taxes remain unpaid. Applicant is not credible in his explanations. He has not resolved any of his tax debts. (Tr. 26-90; Exhibits 2-9, A-D, H, I)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, 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 clearance 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), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debts and was unable to pay his financial obligations for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. No mitigating condition is applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

(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 pay his delinquent debts is recent and continuous. His repeated failure over the past seven years to resolve these debts demonstrates a lack of reliability, trustworthiness, and good judgment by Applicant. AG ¶ 20 (a) does not apply.

AG ¶ 20 (b) does not apply because Applicant's income tax and sales tax problems were not beyond his control. He had the information necessary to file all returns and make payments. It was his business and his income that generated the tax liabilities. Additionally, he has not acted responsibly in the past seven years to resolve

these tax debts. He has not filed tax returns for three years, as alleged in the SOR. His own exhibit shows he failed to file an income tax return for a fourth year. He has had six years to get the returns filed.

Applicant testified he sought legal and accounting help on how to resolve his delinquent debts, but his claims are not supported by documentary evidence. He claims he hired various firms during the past seven years to discuss the tax situation with his state's revenue department, but produced no documents from those firms or the state to show any substantive discussions occurred. I do not find his explanations credible. Therefore, AG ¶ 20 (c) does not apply.

Applicant has not done anything to pay the state for his sales tax liability. He has not taken any action to file three or four years of income tax returns and pay the required taxes. He admitted he used sales tax money to operate his business at various times from 1993 to 2003. There is no documentary evidence of action taken to pay these tax debts. His confusing explanations of his alleged attempts to discuss the taxes with the state are not credible. Therefore, AG ¶ 20 (d) does not apply.

Applicant has not taken any action to dispute these debts in accordance with his state's procedures. He did not produce any documents or proof he or anyone on his behalf contacted the state and sought any type of agreement to resolve the debts, including an offer and compromise. He did not present a reasonable basis to dispute their legitimacy. Therefore, AG ¶ 20 (e) does not apply.

Affluence from a legal source of income is not an issue. Therefore, AG ¶ 20 (f) does not 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 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 owes a substantial amount of sales tax revenue to his home state. He failed for three or four years to file income tax returns or pay those taxes.

He claims no progress could be made for seven years to resolve the tax debt with the state. His explanation that his records burned in the 2000 fire that destroyed his business and he had no copies with which to persuade the state their tax estimates were wrong is not persuasive.

He has many years of tax liability to pay. He admitted he used sales tax revenue for his own purposes when he operated his business. He has not exerted sufficient credible efforts to resolve his substantial tax liabilities during the past seven years. Those actions show knowledgeable participation in the circumstances surrounding this entire chain of events. His actions caused his problem and his inaction resulted in a continuing tax liability.

He has a pattern of behavior regarding his taxes that demonstrates a lack of trustworthiness, good judgment, reliability, and an inability to protect classified information. Applicant could not preserve his own tax records or comply with tax filing requirements and there is no reason to expect him to be diligent on that basis to protect classified information.

The magnitude of his tax debt makes him susceptible to pressure, coercion, exploitation, or duress. He has not changed his behavior by filing the missing tax returns or resolving his substantial tax debt. These actions will continue based on his actions during the past seven years.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his financial considerations. I conclude the "whole-person" analysis against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.m:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

PHILIP S. HOWE
Administrative Judge