



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



In the matter of:)
)
) ISCR Case No. 09-05242
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

April 16, 2010

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 December 21, 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 4, 2010, and requested a hearing before an administrative judge. The case was assigned to me on March 12, 2010. Applicant requested an expedited hearing and waived the 15-day notice requirement. DOHA issued a Notice of Hearing on March 15, 2010, and I convened the hearing as scheduled on March 17, 2010. Department Counsel moved to amend the

SOR, adding two allegations. After the amendment to the SOR, as discussed below, I granted a continuance of the case until April 5, 2010. DOHA received the transcript of the first hearing (Tr. I) on March 24, 2010, and the transcript of the second hearing (Tr. II) on April 9, 2010.

Procedural and Evidentiary Rulings

At the first hearing on March 17, 2010, the Government offered Exhibits (GE) I through 4, which were admitted without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through G, which were admitted without objection.

The Government did not offer any exhibits at the second hearing. Applicant testified on his own behalf and offered AE H through Y, which were admitted without objection.

Motion to Amend SOR

Department Counsel moved to amend the SOR, adding two allegations under Guideline F. Applicant did not object and the motion was granted. After the first hearing, Department Counsel provided Hearing Exhibit (HE) I, the amendments in writing. The amended allegations are SOR ¶¶ 1.g and 1.h. The allegations are as follows:

- g. You failed to file your Federal and state income tax returns for Tax Year 2006 as required by law.
- h. You are delinquent on your Federal income taxes for Tax Year 2006.

A continuance was granted to permit Applicant time to respond to the amendment. After the second hearing was completed and the record closed, Applicant provided to Department Counsel additional exhibits. Department Counsel did not object to the exhibits being offered after the record closed or to their admission.¹ I marked them AE Z and AA and they were admitted.

Findings of Fact

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

Applicant is 57 years old. He graduated from college in 1980 and has a bachelor's degree. He married in 1989 and divorced in 2001. He has a 12-year-old son. He worked as a project manager for a defense contractor in February 2009 until March 2010. His job status is awaiting his security clearance determination.²

¹ HE II is Department Counsel's response.

² Tr. 76.

Applicant held a well-paying job in 2001. He described it as “the best job I had had.”³ The company downsized and he lost this job. This occurred during the same time he was going through a divorce. He continued to work, but was significantly underemployed on and off until he was hired by his present employer. He continued to look for better-paying jobs, but the market was difficult. He was required to continue to pay the amount of his child support payments originally awarded by the court, even though his income had been significantly reduced. He credibly testified he was barely able to pay his child support payments and provide necessities for himself. He occasionally got behind in paying his child support, but is presently current. His difficult financial situation continued for several years. In 2003, he obtained a better-paying job, but it was short-lived. At that time, he attempted a modification of his child support payments. When his income increased, the court denied the petition. A week later the company he worked for collapsed and he lost his job. His ex-wife moved to a different state. Applicant wanted to be closer to his son so he moved also. It took him about six months to find a job. From 2003 to 2006, he worked odd jobs and temporary jobs. He continued to be challenged to find work. He was unemployed from August 2006 to November 2006. He then found a job in the city where his son lived. He was doing adequately, until the economy slumped and his overtime hours were eliminated. Due to the schedule he was required to work for his employer, he could not work a second job. He was earning \$10 an hour. He continued to meet his child support payments and only his basic needs.⁴

In February 2009, when he was hired by his present employer, he began to earn a salary over \$100,000. The following is the status of the debts alleged:

The debt in SOR ¶ 1.a is a judgment from 2004 for \$32,044. It is associated with the second mortgage on his former home. The home was sold in a “short-sale” transaction, after his divorce. According to the divorce decree, Applicant was responsible for one-half of the debt, plus \$500, and his wife was responsible for one-half of the debt, minus \$500. The decree specifically prohibits the debt from being discharged in bankruptcy by one of the parties and requires that if it is discharged, the party is required to pay a lump sum alimony payment to the innocent party.⁵ Applicant stated after the divorce, and in violation of the decree, his ex-wife filed for bankruptcy and had the debt discharged. Hence, the creditor obtained the judgment against Applicant and is seeking full payment. Applicant planned to pay his half when his income increased, but was unable to do so because of his underemployment. He explained due to the complexity of the debt, he has hired an attorney. At the first hearing, he stated his attorney is presently negotiating a settlement of the debt. At his second hearing, he stated there was no further progress on resolving the debt. Applicant understands the judgment is against him and he will have to sue his ex-wife for her share of the debt. Applicant admitted he did not keep the creditor apprised of his

³ Tr. I 15.

⁴ Tr. I 15-23, 29, 77-78.

⁵ AE F.

address when he changed locations. He only recently began to address this judgment. No payments have made toward the debt. He stated he intends to pay it.⁶

The debt in SOR ¶ 1.b (\$5,491) was incurred in 2006. Applicant left his apartment when he could not pay the rent. He understood he owed one month's rent, but disputes additional charges to the claim. He contacted the landlord after he moved, but the landlord initially refused to negotiate a settlement. He has since reached an agreement to settle the debt with payments of \$915. He made two of the payments before the hearing and one final payment after the second hearing. After the record closed, he provided proof of his final payment.⁷

The debt in SOR ¶ 1 c is for a credit card (\$1,246). Applicant settled the debt for \$500. He explained that a significant amount of the debt was for penalties and interest. He defaulted on the debt in 2006. He attempted to negotiate a lower minimum payment, but was unable. He explained he was not earning enough money to pay the debt. He paid the settlement amount on February 2, 2010.⁸

The debt in SOR ¶ 1.d (\$65) was credit protection for a credit card. He incurred the debt in 2006 or 2007. He stated he paid the debt in September 2009. He did not provide documentary proof he paid the debt. After the record closed, Applicant stated in writing that he settled the debt by a phone payment and the collection agency has not provided a confirmation letter.⁹

The debt in SOR ¶ 1.e (\$144) is for telephone services. Applicant provided proof he made a payment to this creditor. There are several accounts with the same creditor. It appears this account was settled and paid.¹⁰

Applicant initially stated he did not know who the creditor was in the debt in SOR ¶ 1.f (\$2,968). He believed he was a victim of identity theft. He stated he contacted the creditor and they had no record that he owed a debt to them. He stated he disputed the debt with the credit bureaus. At his second hearing, Applicant conceded that after further research, he determined the debt belonged to him and he settled it for \$1,500 on April 1, 2010.¹¹

Applicant stated he was initially earning \$105,000 annually, which was increased to \$114,000, from the job where he was employed before his security clearance

⁶ Tr. I 24-37; Tr. II 34-35; Answer.

⁷ Tr. I 38-48; Tr. II 35; Answer, AE H, Z, AA.

⁸ Tr. I 48-56; Tr. II 14-15; Answer; AE J.

⁹ Tr. I 56-65; AE Z.

¹⁰ Tr. I 65-86; Answer.

¹¹ Tr. I 68-74; Tr. II 12-14, 37; AE I.

became an issue. That job allowed him to get his finances back on track and pay his creditors. He does not live beyond his means. He currently has \$1,600 in expendable income a month after paying his expenses.¹²

Applicant was questioned as to whether he filed and paid his past federal and state income taxes returns and taxes. He admitted he did not file or pay his 2006 federal or state income tax returns and taxes on time. He knew he owed taxes for that year. He stated he filed his 2007 federal income tax returns. At his second hearing, Applicant admitted he did not file his 2006 and 2007 federal or state income tax returns until April 1, 2010. He explained that in 2006, after completing his federal tax return form, he determined he owed taxes and did not have the money to pay his taxes. He then made a decision not to file his federal income tax returns. He did not contact the Internal Revenue Service at the time to work out a payment plan. He also completed the 2006 state income tax return form and determined he was to receive a small refund. He did not think the amount was enough to help him pay the amount owed on his federal tax returns, so he did not file the state income tax return. He took the same action on his 2007 federal and state income tax returns.¹³ He was entitled to a refund from the state for 2007. Applicant paid \$117.01 and \$1,273.13, on April 1, 2010 and April 2, 2010, respectively, for his delinquent federal tax payments.¹⁴ He also learned he owed \$73.39 for his 2001 federal income taxes, and \$141.52 for his 2002 federal income taxes. He paid all of the amounts.¹⁵

Applicant's explanations for failing to file his federal and state income tax returns, was because it was a very low point in his life and he was severely underemployed and did not have the money. Applicant stated he intended to pay his delinquent debts, but financially could not afford it until he began his latest employment.¹⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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, these guidelines are applied in conjunction with the

¹² Tr. I 74-76, 84-85, Tr. II 39.

¹³ The Government did not allege Applicant's failure to file his 2007 federal and state income tax returns. I have not considered this information for disqualifying purposes, but have considered it when analyzing the whole person.

¹⁴ AE X.

¹⁵ Tr. I 87-96; Tr. II 18-34, 35-37; AE Y.

¹⁶ Tr. II 17-20.

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 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 them and especially considered the following under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant had six delinquent debts that he failed to pay for several years. He deliberately failed to timely file his federal and state income tax returns for 2006. I find the above disqualifying conditions have been raised.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions and especially considered the following 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 still owes a large judgment and other debts remain delinquent and unresolved. I find mitigating condition AG ¶ 20(a) does not apply. Applicant experienced a lengthy period of underemployment and a period of unemployment. He also went through a divorce that impacted his finances and his child support payments were not adjusted based on his decreased income. I find these conditions were beyond Applicant's control. I find Applicant's failure to file his 2006 federal and state income tax returns was intentional, deliberate, and within his control. In order for mitigating condition AG ¶ 20(b) to be fully applicable, Applicant must have acted responsibly under the circumstances. I find to a certain extent he did act responsibly by ensuring he continued to pay his child support. Since being gainfully employed with a more significant income, he has addressed some of his delinquent debts. However, with regard to his federal and state income tax returns, he did not act responsibly. Therefore, I find AG ¶ 20(b) only partially applies. There is no evidence Applicant has received financial counseling. He has taken some action in paying some of his delinquent debts, but he still has a judgment and other debts that remain unresolved. Therefore, I find AG ¶¶ 20(c) and 20(d) only partially apply. Applicant disputes he owes the total amount of the mortgage debt in SOR ¶ 1(a). It appears his ex-wife violated the divorce decree and the creditor obtained a judgment against Applicant. The judgment was entered against Applicant, and although he disputes that he owes the total amount, that is a matter he must pursue against his ex-wife. Hence, I find mitigating condition AG ¶ 20(e) only partially applies.

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 guideline 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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG 2(a) were addressed under that guideline, but some warrant additional comment. Applicant is a

college graduate, and despite his financial problems he has attempted to stay current on his child support payments. He experienced a long series of difficult financial situations. He lost well-paying jobs and was underemployed for long periods of time. He did what was necessary so he could stay close to his son. Due to his unemployment and underemployment, he accumulated delinquent debts. He has paid some of the debts, but others remain unresolved. Applicant has a large judgment for his second mortgage. Applicant's finances are a concern, but he appears to be addressing them. However, the more serious concern is Applicant's failure to file his federal and state income tax returns for 2006 and 2007. He did not file the returns until the issue was raised at his hearing. After the hearing, he filed the returns and paid the delinquent federal taxes he owed for 2006 and 2007. He also learned he owed federal taxes for other years and paid the amounts owed. Applicant acknowledged he made a conscious decision not to file his federal income tax returns because he did not have the money to pay them. His attitude and actions raise doubts about his reliability, judgment, and trustworthiness. He consciously chose to ignore his civic and legal responsibility. It was only after the issue was brought up at his hearing, that he fulfilled his legal duty.

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 Financial Considerations security concerns.

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
Subparagraph 1.b:	For Applicant'
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge