



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



In the matter of:)
)
) ISCR Case No. 09-05638
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esq., Department Counsel
For Applicant: David P. Price, Esq.

June 3, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On October 5, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 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 by the Department of Defense on September 1, 2006.

Applicant answered the SOR on November 5, 2010, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on January 18, 2011. DOHA issued a notice of hearing on January 24, 2011, scheduling the hearing for February 16, 2011. Applicant requested a continuance, and it was

granted. The case was reassigned to me on March 18, 2011. DOHA issued another notice of hearing on April 8, 2011, and the hearing was convened as scheduled on May 3, 2011. The Government offered exhibits (GE) 1 through 10, which were admitted without objection. Applicant testified and submitted exhibits (AE) A through J, which were admitted without objection. DOHA received the hearing transcript (Tr.) on May 27, 2011.

Findings of Fact

Applicant is a 52-year-old employee of a defense contractor. He seeks to retain a security clearance he has held since the 1970s. He served on active duty in the United States military from his graduation from a military service academy in 1981 until he retired with an honorable discharge in the pay grade O-5 in 2001. He has a master's degree and is attending school for a Ph.D. He is divorced and has two adult children.¹

Applicant spent much of his military career in special operations and deployed on multiple occasions. He also deployed as a government employee after his retirement. He was hired as a vice president for a prominent defense contractor upon his retirement. He later formed his own business using the knowledge, experience, and technical expertise he had obtained in the military and thereafter. Applicant intended that his company be incorporated as a Subchapter S corporation.² Through a paperwork error, the Internal Revenue Service (IRS) did not receive tax form 2553, Election by a Small Business Corporation, electing that the company be treated as an S corporation. Applicant also formed a non-profit company that would be used to benefit emergency first responders.³

Applicant's company required him to work outdoors and under sometimes rigorous conditions. In February 2006, he was involved in a life-threatening accident that broke his leg. There was significant trauma to the leg, and it nearly had to be amputated. He required five operations over the next few years and multiple transplants. The company never recovered from Applicant's injury, and it was dissolved in 2009.⁴

Applicant was not as sophisticated in the business end of his company as he was in the field work. His office manager charged personal expenses to the company. His

¹ Tr. at 21, 33, 87-88, 98-99; Applicant's response to SOR; GE 1; AE A.

² S corporations are corporations that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income. See www.irs.gov/businesses/small/article/0,,id=98263,00.html.

³ Tr. at 22-40, 56, 58, 69-73, 88; Applicant's response to SOR; GE 5, 6; AE J.

⁴ Tr. at 40-52, 66, 82, 89-92; Applicant's response to SOR; GE 5, 6; AE B, D, J.

state and local taxes were not paid. He stated that he thought he may have been subjected to double tax because his company may have paid corporate taxes. He did not file his 2005, 2006, and 2007 federal income returns until October 2008.⁵

In October 2009, the IRS determined that with interest and penalties, Applicant owed \$149,877 in taxes for tax years 2005, 2006, and 2007. Applicant's state of residence also determined that he owed in excess of \$25,000 for tax years 2006 and 2007.⁶

The IRS received payments by levy from Applicant of \$3,519 and \$358 in August 2009, and \$618 and \$96 in October 2009. Applicant wrote several letters to the IRS noting the factors leading to his unpaid taxes and seeking an offer in compromise. In October 2009, the IRS wrote to Applicant noting they received his letter and were "looking into the matter." In December 2009, the IRS filed a federal tax lien of \$137,000 against him for taxes owed from tax years 2005, 2006, and 2007. IRS documents note that Applicant was pending an installment agreement since September 2009. An installment agreement was established in July 2010, in which Applicant would pay \$100 per month. By that time, Applicant's company had been dissolved, he had liquidated most of his assets and used the proceeds to pay his other creditors, and his home had lost all its equity because of the real estate collapse. Applicant was attending school for his Ph.D. His plan was to pay the IRS \$100 per month until he completed school, at which time he would be working at a salary high enough to increase the payments. He paid his state \$500 in July 2010.⁷

Applicant recently received a substantial inheritance. He used the money to completely pay his tax debts to the IRS and his state.⁸

Applicant was highly decorated during his military career. He submitted numerous letters and other documents attesting to his outstanding performance of duties, patriotism, loyalty, honesty, trustworthiness, honor, and integrity.⁹

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, which are to be used in evaluating an applicant's eligibility for access to classified information.

⁵ Tr. at 52-56, 66-82; Applicant's response to SOR; GE 5, 6; AE C, G.

⁶ Applicant's response to SOR; GE 5, 9; AE G.

⁷ Tr. at 57-65, 82-86, 90; Applicant's response to SOR; GE 5-10; AE E, G, J.

⁸ Tr. at 60-65; Applicant's response to SOR; AE F, G, I, J.

⁹ AE A, H.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant owed state and federal taxes for several years. The evidence is sufficient to raise the above disqualifying conditions.

Four Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant just recently paid his delinquent state and federal income taxes. AG ¶ 20(a) is not yet applicable. Applicant had a traumatic leg injury requiring numerous surgeries over several years. That had a direct impact on his company's viability and eventual dissolution. It also was a distraction when it came to resolving his tax liability. However, his tax debts were not a direct result of the injury, and they were not beyond his control. AG ¶ 20(b) is not applicable.

Applicant started steps to resolve his taxes in 2009. He entered into an installment agreement with the IRS in July 2010 to pay \$100 per month. He inherited a substantial sum and used the money to completely pay his tax debts to the IRS and his state. I find that Applicant's financial problems have been resolved and are under control. I further find that he made a good-faith effort to repay his debts. AG ¶¶ 20(c) and 20(d) are applicable.

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 relevant 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. 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.

I considered Applicant's favorable character evidence. Applicant's decades of honorable service to this country outweigh the concerns raised by his now-resolved tax issues.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated 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:	FOR APPLICANT
Subparagraph 1.a;	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge