



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



In the matter of:)
)
) ISCR Case No. 09-05664
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel

For Applicant: *Pro se*

May 26, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, I conclude that Applicant has mitigated the security concerns raised under the guideline for financial considerations. Accordingly, his request for a security clearance is granted.

On February 26, 2009, Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) to request a security clearance (Item 3). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On December 28 2009, DOHA issued to Applicant a Statement of Reasons (SOR) (Item 1), that specified the basis for its decision: security concerns addressed in

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

the Directive under Guideline F (Financial Considerations) of the Adjudicative Guidelines (AG).

Applicant responded to the SOR on February 2, 2010, in which he denied both SOR allegations 1.a. and 1.b.² He requested a decision without a hearing. (Item 2) On March 11, 2010, DOHA Department Counsel submitted the Government's written case, in a file of relevant materials (FORM).³ In addition to the documents already identified, the FORM contained Applicant's response to DOHA interrogatories (Item 4), two credit bureau reports (Items 5 and 6), and Lexis printouts related to two state liens. (Items 7 and 8) Applicant was given 30 days from the date he received the FORM to file a response, and submitted a timely response dated April 15, 2010. (Response) The case was assigned to me on April 30, 2010, for an administrative decision based on the record.

Findings of Fact

Applicant's admissions in response to the SOR are admitted herein as findings of fact. After a thorough review of the pleadings, the FORM, and Applicant's response to the SOR and the FORM, I make the following additional findings of fact.

Applicant, 59 years old, is employed by a defense contractor. He earned college credits, but did not complete a degree. He was first married from April 1976 to February 1989. He married his current wife in September 1989. Applicant has two daughters, 31 and 34 years old. He also has three stepchildren, 31, 34, and 36 years old. Since the late 1990s, Applicant has been employed primarily as a design engineer for aircraft manufacturers. He was unemployed from August 2002 to March 2003, after which he worked as a truck driver for eight months. He then returned to work as a design engineer in November 2003. Since June 2008, he has worked in that position for a defense contractor. (Items 3, 4)

In August 2002, Applicant lost his job, and he and his wife moved from State B to State A to be near her family. (Item 3) During his unemployment, Applicant used savings as well as his pension and IRA funds to pay bills. From March to November 2003, he decided to work as a truck driver to keep the family afloat. In November 2003, he obtained a job in his profession. Within a month, he began a payment program with a credit counseling company. In January 2004, he made his initial payment of \$1,817. He continued the payments of \$1,817 through early 2006. His payments decreased to \$1,556 from mid-2006 through August 2007. (Item 4 at 108-115) His plan enabled him to pay off numerous debts that had accumulated during his period of unemployment. Applicant also paid several remaining debts between January and August 2008. (Item 4

² Applicant included with his Answer seven documents identified as Attachments 1 through 7. Attachments 1, 3, 5, and 7 relate to allegation 1.a.; attachments 1, 2, 4, and 6 relate to allegation 1.b.

³ See Directive, Enclosure 3, Section E3.1.7. The FORM included eight documents (Items 1 - 8) proffered in support of the government's case.

at 100) Other than the tax liens, his credit bureau report of October 2009 shows 13 open accounts, with one past-due debt of \$491⁴ and 12 accounts in good standing. (Item 4 at 120-121; see also Item 5) He notes that "We have been caught in a web of debt due to credit cards in the past, but thanks to credit counseling and hard work, we have resolved that debt and now we don't rely on credit cards." (Response)

When Applicant returned to working in his field, he was required to move to State B. From January 2004 to April 2005, he rented an apartment in State B. He then moved to a different city in State B for employment. He bought a house, where he lived until April 2007. He then moved to State C for employment. (Item 2, Attachment 1) In May 2008, he accepted a job in State D. Applicant's wife, who is disabled, remained in their house in State A throughout Applicant's job-related moves. (Item 3, p. 190; Item 4, p. 105)

To save money, Applicant and his wife decided to do their 2004 through 2006 taxes without professional assistance. (Item 2, Attachment 1) Applicant's wife filed federal income tax returns for these three years, but did not file a State A income tax return. They believed that because she was not earning income at the time, and Applicant earned income only in State B, they did not owe income taxes to State A. They filed a State A income tax return in 2003, when Applicant was living and working in that state.

In 2007, State A notified Applicant that he owed \$35,000 for unpaid income tax, including penalties. Applicant contacted the state tax office in 2007 two times and disputed that he owed back taxes. He explained that he lived and worked in State B during tax years 2004, 2005, and 2006. He contacted utility companies in the State B town in which he lived to prove his residence there. The State A tax office also referred him to an online form, but when he searched, he could not locate the form. (Item 4 at 99)

By notice dated March 5, 2009, State A informed Applicant that he owed back income taxes for 2005 and 2006 (Item 2, Attachments 2, 3) The state filed tax liens against Applicant in July 2009 for \$13,659 for tax year 2005, and \$15,737 for tax year 2006, for a total of \$29,396. (Items 7, 8; Item 4 at 105) Applicant hired a tax preparation firm in 2009. The preparer located the appropriate State A state tax forms for Applicant to submit. (Item 4 at 99) Applicant noted that he succeeded in establishing his claim of State B residence and employment as to tax years 2004 and 2005, but could not obtain adequate proof as to 2006. He was informed that the state tax office would reevaluate his tax debt. (Item 4 at 105)⁵

⁴ It is unclear from the record whether the debt of \$491 listed in the credit bureau report is the same debt paid by Applicant on October 7, 2009. His check for that amount appears in Item 4 at 106.

⁵ Applicant worked with the state tax office in 2007 and in 2009, but the dates when specific contacts occurred are unclear from the record.

State A amended its estimate of Applicant's debt. In October 2009, it notified Applicant that he owed \$29 for tax year 2005, and \$60 for tax year 2006. (Item 2, Attachments 4, 5) Applicant paid the latter on September 30, 2009, and the former on October 29, 2009. (Item 4 at 107). In November 2009, the state released both tax liens. (Item 2, Attachments 6, 7) The State A tax office explained to Applicant that he must file a non-resident tax return because, although he does not live there, he owns property there. He has met this requirement. (Response)

Applicant's personal financial statement (PFS) of October 2009 shows a monthly income, including his spouse's net income, of \$8,790. After expenses of \$2,719, and mortgage and transportation loan payments of \$3,799, his net monthly remainder is \$2,272. His assets total \$117,000. (Item 4 at 102)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁶ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (financial considerations).

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁹

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

The evidence contained in the FORM shows that Applicant has owed two state tax liens since 2007. Applicant disputed the debt, and it was unpaid for two years. AG ¶19 (a) (inability or unwillingness to satisfy debts) and AG ¶ 19 (c) (a history of not meeting financial obligations) apply.

Under AG ¶ 20, the following conditions that can potentially mitigate security concerns are relevant:

- (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;

⁹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(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

(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 state tax debts, which became delinquent in 2007, are recent, as they remained unpaid until seven months ago. However, they resulted from his misunderstanding of the state's income tax requirements. It is clear that he did not act from a wish to avoid his obligations, because when he lived and worked in State A, in 2003, he did file his income tax return, as required. It was only when he moved to State B that he and his wife believed they were no longer liable to pay state income tax, as their income was earned in State B. Moreover, he now understands the obligations of non-resident property owners, and he has filed a non-resident tax return with State A. It is unlikely that Applicant will be in a similar situation in the future. AG ¶ 20 (a) applies.

AG ¶ 20 (b) and (c) also apply. Applicant was unemployed from August 2002 to March 2003, the time period when his bills began to become delinquent. Once he was employed again in his profession, he immediately contracted with a credit counselling agency. He made large monthly payments of between \$1,500 and \$1,850 between 2004 and 2007. His adherence to the payment plan resolved most of his debts. He also paid off several additional debts on his own in 2008.

While making payments on his debt-resolution plan, Applicant was informed that he owed a significant amount of back taxes to State A. He disputed the liability, and was in touch with the State A tax office in 2007. He gathered documents to support his claim that he did not reside or work in State A in the subject tax years. Although he should have followed through more persistently on his dispute in 2007 and 2008, he was not being irresponsible, because at the time he was paying on his payment plan, and then paying the remaining debts he owed. Finally in 2009, he worked with a professional tax preparer, and was able to prove that he did not owe the amount listed in the original State A notice. Applicant provided documentation showing that State A reassessed his liability to be \$90, which he paid. AG ¶ 20 (e) applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guideline. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

Applicant had delinquent debts that started accruing during his unemployment. He kept himself afloat by using 401k and IRA funds, and then by working as a truck driver. After procuring employment in his profession, he demonstrated trustworthiness and reliability by immediately contracting with a credit counseling agency to resolve his debts. He paid on his plan from 2004 to 2007. At that point, he learned he should have been paying state income tax in the state where he owned a house in which his disabled wife lived. He mistakenly thought that because he lived in another state, earned his income there, and his wife did not earn income in State A, he did not owe income taxes to State A. His claim of mistake is credible, especially since he did file an income tax return in State A when he lived and worked there in 2003. Applicant disputed State A's assessment of \$29,000 in back taxes, and provided documents showing what years he lived and worked in another state. State A reassessed and determined his liability to be \$90. He provided documentation showing that he paid the debt. Applicant's conduct demonstrates trustworthiness and maturity. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has satisfied the doubts about his ability or willingness to protect the Government's interests.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraph 1.a. – 1.b. For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge