



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



In the matter of:)
)
) ISCR Case No. 09-08573
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

November 8, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the Financial Considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations. DOHA acted 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on May 2, 2011, and initially requested an administrative determination. Subsequently, on July 20, 2011, he requested a hearing before an administrative judge. The case was assigned to me on July 27, 2011. DOHA

issued a notice of hearing on August 2, 2011, and the hearing was convened as scheduled on August 25, 2011. The Government offered exhibits (GE) 1 through 7, which were admitted without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified and submitted exhibits (AE) A and B at the hearing. The exhibits were admitted into evidence without objection. The record was held open until September 30, 2011. Applicant submitted additional evidence before the record closed. That evidence was admitted without objection as AE C. Department Counsel's transmittal memorandum was marked as HE II. DOHA received the hearing transcript (Tr.) on September 9, 2011.

Procedural Ruling

Based upon evidence adduced at hearing, Department Counsel moved to amend the SOR to add an allegation under Guideline F. The allegation would be new SOR ¶ 1.c, stated as follows: "You failed to file your 2009 and 2010 state and federal tax returns as required. As of August 25, 2011, these tax returns remain unfiled." Applicant raised no objection to the proposed amendment and did not ask for additional time to prepare for the new information. He also admitted to the factual allegation stated in the amendment. The motion was granted based upon Directive ¶ E3.1.17.¹

Findings of Fact

Applicant admitted all the factual allegations in the SOR, including the amended SOR, and those admissions are incorporated as findings of fact. After a review of the pleadings, testimony and admitted exhibits, I make the following findings of fact. Applicant is a 49-year-old owner of a business who contracts with a defense contractor. He is single, having been divorced, and has no children. He holds a bachelor's degree. He does not have any prior military service. He has held a top secret security clearance since 2004.²

The SOR alleges two delinquent federal and state tax obligations that resulted in the filing of liens against Applicant's property. Applicant also failed to file his 2009 and 2010 federal and state income tax returns, as required. The federal tax debt was listed on credit reports obtained on June 12, 2009 and October 4, 2010. He admitted to the state tax obligation and to the failure to file his tax returns.³

Applicant's initial tax issues arose in 2001 because of a business transaction. In the 1990s, Applicant worked for a commercial computer company during what was known as the "dot com boom". He worked for this company for a number of years and was very successful. As part of that success, he acquired significant stock in the company. In 2000, he decided to start his own company so he quit his employment at

¹ Tr. at 75-77.

² Tr. at 5-6, 40, 75; GE 1.

³ Tr. at 36, 60, 65.

the commercial computer company. To finance his new venture, he acquired a bank loan that was secured by his stock holdings in his former company (this stock was valued at approximately \$1.3 million). Because of several reasons, including the dot com bubble burst and a law suit by Applicant's new company against a competitor for intellectual property theft, Applicant's business failed. The bank then took and sold the stock Applicant used as collateral for his business loan. This transaction resulted in a taxable event. Applicant stated he was given conflicting advice from his company's chief financial officer and company counsel about whether he was personally responsible for the tax obligation resulting from the bank sale of the stock. The IRS considered Applicant responsible for the tax liability. From 2001 through 2005, Applicant sought advice on how to deal with this issue. There were also some uncertainties about the amount Applicant owed. In 2005, Applicant acknowledged his liability for the tax owed. The IRS determined the amount Applicant owed was \$283,367 for tax year 2001.⁴

Applicant was unemployed between January 2001 and May 2002 after his company's failure. He then worked for several commercial contractors through 2007. Since 2007, he has been self-employed, contracting work through a defense contractor. In 2006, the IRS began to levy against Applicant's assets, such as his bank account, and garnish his wages to apply against his tax liability. In June 2007, Applicant decided to use his 401K retirement funds to pay a substantial portion of his remaining 2001 tax debt. Those funds in the amount of \$233,657 were made available and applied by the IRS to the tax debt. However, because of the tax deferred nature of his 401K funds, Applicant incurred a new tax liability for this taxable event in 2007. Applicant could not pay the amount owed and the IRS filed a tax lien for tax year 2007 against Applicant's property in the amount of \$121,780. As of August 24, 2011, IRS records also show, despite the various substantial levies made against Applicant's assets over the years, he still owes over \$268,824 on his 2001 tax obligation. Applicant hired a tax attorney to work out a settlement with the IRS. Those discussions are ongoing, but no resolution has occurred. Concerning the state tax liability, Applicant acknowledges that he owes approximately \$7,000 for the 2001 tax year, but decided to resolve the federal tax issues before he addressed the state tax debt.⁵

Applicant admitted not filing either his federal or state tax returns for 2009 and 2010. He stated his reason for not filing was because he does not believe he made any taxable income for those years. He failed to present evidence that he had no obligation to file a tax return because his income was less than the amount of his personal exemptions and his standard deduction. Even though the record was left open over 30 days beyond the hearing date, Applicant failed to provide evidence concerning the status of his 2009 and 2010 federal and state tax returns.⁶

Applicant's current financial condition, aside from his tax issues, is tenuous. As of the date of the hearing, he had not generated any income for 2011. This is because he

⁴ Tr. at 30, 41-47; GE 5; AE B.

⁵ Tr. at 31-32, 35-36, 47; GE 3, 5; AE B.

⁶ Tr. at 60-61, 65-66, 75-77, 81.

is dependent on federal contracts and because of the ongoing federal budget issues, there was no money available. He does expect to make about \$70,000 by the end of the year. He is current on his mortgage, but is reliant on his savings and loans from family members to make ends meet. He currently owes his mother approximately \$48,000. He would like to offer the IRS about \$121,000 to settle all of his tax debts (2001 and 2007), but he would have to borrow the money from friends and family to make that payment.⁷

Applicant submitted two character letters from former associates. They describe Applicant as being very trustworthy and having great integrity.⁸

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 that are to be used 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, 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 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

⁷ Tr. at 64, 66-68, 70.

⁸ AE A, C.

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 about 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* Executive Order 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 as follows:

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. Three are potentially applicable in this case:

- (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.

Applicant has been unable to satisfy his federal and state tax obligations dating back to 2001. He has also failed to file his 2009 and 2010 federal and state income tax returns. The evidence is sufficient to raise the above disqualifying conditions.

Several 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.

Although Applicant has made some payments toward his large tax obligation, a large amount for two different tax years is still owed. It is unlikely Applicant will experience the tax consequences of a large stock sale in the future, however, Applicant's failure to file two years of tax returns casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not applicable.

Applicant experienced conflicting advice about his initial tax liability from the stock sale in 2001. His delayed response to the tax obligation resulted from his advice and was a condition beyond his control. However, in order for this mitigating condition to fully apply, the Applicant must also act responsibly under the circumstances. Applicant hired a tax attorney and made significant payments toward the tax debt, thus showing responsible action. However, he also generated more tax liability for himself in 2007 when he used his 401K retirement fund to partially pay his 2001 tax debt. Not all of his actions show responsible behavior. AG ¶ 20(b) is partially applicable.

Applicant sought the advice of a tax attorney to help him with his IRS debt. Although he has made strides in paying off his significant tax debt, a large amount remains unpaid. The only plan he has to pay off the remaining tax debt is to offer the IRS a settlement amount, hope they accept, and borrow the money from friends or family to pay the settlement. Additionally, he failed to file his 2009 and 2010 tax returns as required. Therefore, his finances are not being resolved and are not under control. His partial payments to the IRS and his attempt to reach a settlement with the IRS are insufficient to support a finding that he made a good-faith effort to pay or otherwise resolve his remaining debts. AG ¶¶ 20(c) and 20(d) are not applicable.

At this point, Applicant's finances remain a concern despite the presence of some mitigation.

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 relevant 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 the character letters of support for Applicant. I also considered the circumstances surrounding his failed business that led to the forced stock sale creating his tax liability in 2001. I found Applicant to be honest and candid about his finances. Despite some action on his part to pay his tax debt, a large tax liability still remains with no apparent means to pay it. Additionally, he was aware of his obligation to file his 2009 and 2010 tax returns, but failed to do so. His past financial track record dealing with his tax obligation reflects a troublesome financial history that causes me to question his ability to resolve his debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated 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

Subparagraphs 1.a - 1.c: 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.

Robert E. Coacher
Administrative Judge