



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



In the matter of:)
)
) ISCR Case No. 10-00027
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Mark Gordon, Personal Representative

March 31, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 9, 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 October 4, 2010, and requested a hearing before an administrative judge. The case was assigned to me on December 14, 2010. DOHA issued a notice of hearing on January 11, 2011, and the hearing was convened

as scheduled on February 2, 2011. DOHA received the hearing transcript (Tr.) on February 10, 2011.

Procedural and Evidentiary Rulings

Notice

Applicant affirmatively waived his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing.

Motion to Amend SOR

Department Counsel moved to amend the SOR by correcting the date of the SOR from “September 9, 2001,” to “September 9, 2010.” Applicant did not object to the amendment, and it was granted.

Evidence

The Government offered exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified and submitted exhibits (AE) A through T, which were admitted without objection. The record was held open for Applicant to submit additional information. Applicant submitted documents that were marked AE U through Y and admitted without objection. Department Counsel’s memorandum forwarding Applicant’s exhibits is marked Hearing Exhibit (HE) I.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He has worked for his current employer since September 2009. He is applying for a security clearance. He is a high school graduate. He has been married since 1974, and he has an adult child.¹

Applicant’s wife had a business that was solely in her name. Applicant worked for the company from about 1989 to 2008. He was not paid a formal hourly wage or a salary. His wife paid all the family expenses and gave him spending money when he needed it. She also gave him a credit card, which she paid. He listed on his Questionnaire for National Security Positions (SF 86) that he was a full-time employee of the company. Applicant did not file federal and state income tax returns for the entire time he worked for his wife’s company. He stated that he was told by an accountant in about 1990 that he did not have to file tax returns because he did not receive a salary. Applicant never verified through the Internal Revenue Service (IRS) whether the IRS considered the value of what his wife provided him as income, requiring him to file income tax returns and pay taxes. Applicant admitted at the hearing that he still does not know if he had to file income tax returns while he was working for his wife’s company.²

¹ Tr. at 57-59; GE 1.

² Tr. at 38-45, 50, 61-62, 77-78; Applicant’s response to SOR; GE 1, 3. AE O.

Applicant's wife filed an income tax return in about 1990, but then did not file income tax returns again through 2008. In December 2009, the IRS filed a tax lien of \$404,437 against her. In December 2010, the IRS filed a tax lien of \$993 against Applicant and his wife. He stated that his wife's tax preparers have told them that they expect her actual tax liability to be about \$100,000. He submitted copies of her federal income tax returns from 2000 to 2007, which were prepared as "Married Filing Separately." The returns listed the taxes owed from those years to be in excess of \$120,000. Applicant was unsure if his wife's tax returns from 2000 to 2007 have actually been filed with the IRS. He responded to DOHA interrogatories in July 2010. He submitted copies of IRS documents from 2008 and 2009 that calculated his wife's debt to the IRS for tax years 2000 to 2004 and 2006, including interest and penalties, as more than \$400,000.³

Applicant started working for companies other than his wife's business in about July 2008. He did not timely file his 2008 and 2009 state and federal income tax returns. He stated that he and his wife were working with their tax attorney and attempting to figure out the best way to address their tax issues. He was not granted an extension. In September 2010, he and his wife filed their 2008 and 2009 state and federal income tax returns jointly. The 2008 federal income tax return showed that they were due a refund of \$1,890. The IRS seized the refund for his wife's delinquent taxes. The 2009 federal income tax return showed that they owed \$767. Applicant has not filed tax returns from 1989 to 2007. He stated that he did not file tax returns, and he did not pay taxes for the years he worked for his wife's company, because he did not have any income. Applicant stated that he intends to pay his wife's tax liability, which he believes is about \$100,000, at the rate of about 5% of the amount owed each year.⁴

Applicant's wife's business started to fail in about 2006. He stated that he stopped working full-time for the company in the same year. Applicant stated that his attitude about the business became bad in the late 1990s, when he discovered that his wife did not have a business license, she was not filing tax returns, and she was not paying her taxes. He stated that his poor attitude was at least partially responsible for the failure. The company is no longer in business. Applicant was unable to pay all his bills, and number of debts became delinquent.⁵

The SOR alleges Applicant's six delinquent debts totaling about \$13,726 and Applicant's failure to file his state and federal income tax returns from "at least tax years 2005 to 2008." Applicant denied all the allegations. The debts are established through credit reports and Applicant's admissions.⁶

³ Tr. at 39-48; GE 3, 5; AE C-G, S, T.

⁴ Tr. at 45-53, 62, 76-79; GE 1, 3; AE C-G, N-Q.

⁵ Tr. at 61-69, 86-91.

⁶ Applicant's response to SOR; GE 1-4.

Last year, Applicant withdrew about \$3,000 from his 401(k) retirement account and sold about \$4,000 in stock in order to pay his delinquent debts. Applicant had three delinquent accounts with the same bank. Those debts are alleged in SOR ¶¶ 1.a (judgment for \$1,786), 1.b (\$1,058), and 1.e (\$3,252 to collection company on behalf of bank). In October 2010, he settled the \$1,786 judgment alleged in SOR ¶ 1.a for \$1,144, the \$1,058 debt alleged in SOR ¶ 1.b for \$550, and the \$1,217 debt alleged in SOR ¶ 1.d for \$490. In November 2010, Applicant settled the \$3,541 debt alleged in SOR ¶ 1.c for \$1,418.⁷

Applicant stated that he and the law firm handling the \$3,252 debt alleged in SOR ¶ 1.e have reached an agreement in which Applicant will pay the debt with 18 monthly payments of \$160. The same law firm handled the judgment alleged in SOR ¶ 1.a. Applicant stated that he would begin making the payments in April 2011, after he pays the loan on his pick-up truck. Applicant has agreed to pay the \$2,872 debt alleged in SOR ¶ 1.f, but has not yet started making payments toward this debt.⁸

Applicant submitted several character letters attesting to his outstanding job performance, loyalty, trustworthiness, dedication, honesty, patriotism, competence, work ethic, reliability, professionalism, and high moral character. The authors recommend him for a security clearance.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.

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

⁷ Tr. at 53-54; Applicant's response to SOR; GE 1-4; AE A, H-K, U, W, Y.

⁸ Tr. at 32-33; Applicant's response to SOR; GE 1-4; AE B, L, M, R, U. Post-hearing, Applicant apparently confused the debts alleged in SOR ¶¶ 1.a and 1.e. He stated the SOR ¶ 1.e debt was paid and he had a payment plan for the SOR ¶ 1.a debt. I am satisfied that the opposite is true. My ultimate decision would be the same no matter which debt was paid.

⁹ AE Q.

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. 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 tax returns as required or the fraudulent filing of the same.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his obligations for a period. He did not file his state and federal tax returns as required. 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 worked for his wife's company from 1989 to sometime in 2008. He did not file tax returns because he was not paid a salary or an hourly wage. Despite Applicant's belief's, he was legally obligated to file income tax returns and pay taxes while he worked for his wife. The IRS considers the value of what he received from his wife to be income. See IRS Publication 525, Taxable and Nontaxable Income:

You can receive income in the form of money, property, or services.

* * *

Generally, an amount included in your income is taxable unless it is specifically exempted by law. Income that is taxable must be reported on your return and is subject to tax. Income that is nontaxable may have to be shown on your tax return but is not taxable.

* * *

Generally, you must include in gross income everything you receive in payment for personal services. In addition to wages, salaries,

commissions, fees, and tips, this includes other forms of compensation such as fringe benefits and stock options.

* * *

Fringe benefits received in connection with the performance of your services are included in your income as compensation unless you pay fair market value for them or they are specifically excluded by law.

* * *

Recipient of fringe benefit. You are the recipient of a fringe benefit if you perform the services for which the fringe benefit is provided.

Applicant filed his tax returns for 2008 and 2009. He has not filed his tax returns from 1989 to 2007. No mitigating conditions are applicable to Applicant's failure to file his state and federal income tax returns.

Applicant attributes his financial problems to the failure of his wife's company. That might qualify as a condition that was outside his control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant did not file his state and federal income tax returns as required. He did not pay taxes on the income he earned while working for his wife's company. Applicant may have honestly believed he was not required to file income tax returns and pay his taxes. That could provide a defense to a criminal prosecution, but it does not represent responsible conduct. The IRS filed a \$404,437 tax lien against his wife and a \$993 tax lien against Applicant and his wife. The IRS calculated his wife's federal tax debt for tax years 2000 to 2004 and 2006, as more than \$400,000. Applicant stated that after her tax liability is recalculated, she will owe the IRS about \$100,000. He stated that he will pay his wife's taxes at the rate of 5% per year, or about \$5,000 a year. Applicant's estimate of his wife's tax liability does not appear to be realistic. Her federal income tax returns from 2000 to 2007 listed the taxes owed from those years to be in excess of \$120,000. That figure does not include interest and penalties, her tax liability for other tax years, or her state taxes. It also does not include Applicant's unresolved tax liability.

The SOR alleges Applicant's six delinquent debts totaling about \$13,726. Applicant paid four of the SOR debts. I find he made a good-faith effort to pay those debts, and AG ¶ 20(d) is applicable to those debts. Applicant has a plan to address the two remaining debts in the SOR. Even if he pays those debts, it will be many years before he resolves his tax issues. I find that Applicant has not acted responsibly under the circumstances. His ongoing financial and tax problems cast doubt on his current reliability, trustworthiness, and good judgment. There are no mitigating conditions currently applicable to the two unpaid delinquent debts.

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. I also considered the efforts he made to pay four of the SOR debts. However, he still has two unpaid delinquent debts, and it will be many years before his tax problems will be resolved.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Subparagraphs 1.e-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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge