



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 10-02593 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Raashid Williams, Esq., Department Counsel
For Applicant: *Pro se*

06/01/2012

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the financial considerations and personal conduct security concerns generated by his history of financial delinquencies and his failure to disclose required information about his finances on his security clearance application. Clearance is denied.

Statement of the Case

On November 17, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, financial considerations, and E, personal conduct. 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on December 15, 2011, admitting subparagraphs 1.b, 1.c, 1.e, and 1.f, and denying the remainder. He requested a hearing, and the case was assigned to me on March 2, 2012. A notice of hearing was issued on March 22, 2012, scheduling the case for April 12, 2012. I held the hearing as scheduled and received seven Government exhibits, marked as Government Exhibits (GE) 1 through 7, and four Applicant Exhibits (AE) marked as AE A through D. Also, I considered the testimony of Applicant. DOHA received the transcript (Tr.) on April 20, 2012.

Findings of Fact

Applicant is a 57-year-old married man with four children, ages 21, 19, 17, and 6. The three oldest children are from a previous marriage. Applicant graduated from college in 1976, majoring in communications. In 1981, he earned a master's degree in economics. He has spent the majority of his career working as a self-employed information technology consultant. For the past two and a half years, he has been employed by a defense contractor as a systems engineer. (Tr. 19)

Applicant is active in his community. He serves on a local zoning commission and is part of a civic organization that promotes historic preservation. (Tr. 92)

Applicant did not file his state income tax returns for tax years 1998 to 2003 until 2011, as alleged in subparagraph 1.c. (Tr. 64) He attributes part of the delay to water damage to his home that destroyed his bookkeeping records. (Tr. 46) Also, he attributes the delay to procrastination and being busy with his new family. (Tr. 42)

Applicant's failure to file his state income tax returns led to a lien in the amount of \$121,000 being issued against his property in 2005, as alleged in subparagraph 1.a. (GE 7) When Applicant filed his back tax returns in 2011, he contested the lien, arguing that the state tax authority miscalculated the profit earned from the sale of a skating rink that he owned and operated. The state tax authority recalculated Applicant's tax assessment after he filed his income taxes, and concluded that he owed nothing from 1998 to 2003. (AE A, C)

In 2009, Applicant received notice from the U.S. Internal Revenue Service that he owed approximately \$5,261 more than he had paid for tax year 2008. He was instructed to re-file his 2008 income tax return. (Tr. 34) Applicant has not yet re-filed the 2008 tax return. (Tr. 36) In May 2010, the IRS issued a lien against his property for the delinquent amount, as listed in subparagraph 1.b. Applicant contends that his 2011 refund, totaling approximately \$600, was applied to the 2008 balance. Applicant contests the balance alleging that the state's readjustment was incorrect by approximately \$3,500. (Tr. 36) He provided no evidence supporting this assertion.

Applicant owned the building that housed the skating rink. When he sold the skating rink business in 2005, he retained ownership of the building, and the buyer paid him rent. (Tr. 47, 72) For three consecutive years, from 2005 to 2007, Applicant mistakenly filed the rent received from this property in the wrong column on his tax

returns. The record is unclear whether he made this mistake on his federal or state tax returns. Nevertheless, Applicant has to re-file his income tax returns for those years. (Tr. 72) He has not yet re-filed, but contends that he will not owe any additional money. (Tr. 73)

The SOR alleges five miscellaneous debts totaling approximately \$500, as listed in subparagraphs 1.d through 1.h. Subparagraphs 1.d and 1.h are utility bills from the skating rink that accrued after it changed ownership. (Tr. 64)¹

Subparagraphs 1.e and 1.f are medical bills related to the birth of Applicant's daughter. He paid them shortly after he identified them. (AE B) Applicant does not recognize the creditor listed in subparagraph 1.g. His efforts at identifying it have been unsuccessful. (Tr. 25) The bill totals \$70.

Applicant has not consulted with a credit counselor. (Tr. 72) He maintains a budget and has approximately \$3,000 of monthly discretionary income. (Tr. 70)

Applicant completed a security clearance application in November 2009. He answered "no" to the following questions under Section 26:

c. Have you failed to pay Federal, state, or other taxes, or to file a tax return, when required by law or ordinance?

d. Have you had a lien placed against your property for failing to pay taxes or other debts?

Applicant contends that he did not intend to omit his failure to file his state income taxes from 1998 to 2003. (Answer at 2) Rather, he omitted it because he was in a hurry to "get through" the security clearance application. (Tr. 70)

Applicant contends he was aware that the state taxing issued a property tax assessment on his business property in 2005, but did not know a lien had been issued until he met with a security clearance investigator in January 2010. (Tr. 69)

Policies

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, they are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The

¹The Government relies upon a December 2009 credit report (GE 2 at 4, 8) to support subparagraphs 1.d and 1.h. The credit report indicates that both accounts were opened after Applicant sold the skating rink.

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.”

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 for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, “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.” (AG ¶ 18) Applicant satisfied the medical bills listed in subparagraphs 1.e and 1.f. Subparagraphs 1.d and 1., utility expenses related to the skating rink business, accrued after Applicant sold the business. I conclude they are not Applicant’s responsibility. Given the minimal amount of subparagraph 1.g, I did not draw any negative security inference from Applicant’s inability to identify the creditor. I resolve all of these miscellaneous delinquencies for Applicant.

Conversely, Applicant’s history of either failing to file his income tax returns on time or of filing them incorrectly, triggers the application of AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” 19(c), “a history of not meeting financial obligations,” and 19(g), “failure to file annual Federal, state, or local income tax returns as required or fraudulent filing of the same.”

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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 attributes his failure to file his income tax returns between 1999 to 2003, in part, to destruction of his business records caused by water damage to his home. However, Applicant acknowledges that procrastination and preoccupation with starting a new family also played a role. Moreover, he just filed these tax returns less than two years ago. AG ¶ 20(b) does not apply.

There is no evidence that Applicant filed any other tax returns late; however, he filed his 2004 through 2008 tax returns incorrectly. In the case of the 2008 return, he owes approximately \$5,251, and has neither satisfied it, nor re-filed the return as the IRS instructed.

Applicant deserves some credit for satisfying the miscellaneous bills. Given their minuscule amount and the significance of his recurrent, unresolved tax problems, I conclude that neither AG ¶¶ 20(b), nor 20(c) apply.

Guideline E, Personal Conduct

Under this guideline, “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information.” Moreover, “of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” (AG ¶ 15)

Applicant’s omission of relevant and material information about his income tax filings from his security clearance application raises the issue of whether AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” applies. Given that Applicant did not file his taxes from 1999 to 2003 until 2011, his contention that he was unaware of any related tax lien until he was confronted by an investigator, is disingenuous. His credibility is further undermined by the fact that he also did not disclose the failure to file these tax returns, as required, on his security clearance application. I conclude that AG ¶ 16(a) applies without 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 the 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.

Applicant is a pillar of his community and a successful businessman. However, he has a legal responsibility to file his income taxes timely and correctly, and has repeatedly done neither. The nature and seriousness of his recurrent income tax problems are compounded by his failure to address them truthfully on his 2009 security clearance application. Consequently, upon considering this case in the context of the whole-person concept, I conclude Applicant has failed to mitigate the 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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a - 1.c: | Against Applicant |
| Subparagraph 1.d-1.h: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a - 2.b: | 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.

MARC E. CURRY
Administrative Judge