



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 10-02780 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

January 20, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

On September 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 9, 2010, and requested a hearing before an administrative judge. The case was assigned to me on November 8, 2010. DOHA issued a Notice of Hearing on November 16, 2010. I convened the hearing as scheduled on December 8, 2010. The Government offered Exhibits (GE) 1 through 4. Applicant did not object and they were admitted. Applicant testified on his own behalf

and offered Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on December 14, 2010.

Procedural Matters

At the conclusion of the hearing, Department Counsel amended the SOR and added allegation ¶ 1.k. It is marked as HE I. Applicant admitted the allegation and exercised his right to continue the hearing. The hearing was postponed until January 5, 2011. At the second hearing, Applicant explained that he did not have the documents he intended to offer because he had difficulty printing them due to a computer glitch. He requested to submit the documents after the hearing. I granted his request. Upon receipt, I marked the documents as AE B. They are copies of federal income tax return forms for tax years 2000, 2001, 2002, 2003, and 2004. Also included was a mail receipt to show the tax return was mailed on January 6, 2011. Department Counsel provided a written response that was marked as HE II. She did not object to AE B, and the documents were admitted. DOHA received the supplemental transcript (Tr. II) on January 11, 2011.

Findings of Fact

Applicant admitted all of the allegations in the SOR and amended SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 53 years old. He graduated from college in 1982 and earned a bachelor's degree. He has pursued other studies, but did not earn a degree. He married in 2003, and divorced in 2005. He has no children. He worked for a federal agency for 15 years before his employment was terminated. He was told he could resign or be terminated. He chose to resign. He explained he was never given a written document with an explanation for why he was terminated. He stated he received a performance appraisal that he refused to sign. He concluded this action was a mistake. He stated he left the agency because he had a personality conflict with his supervisor and chose to resign before he was dismissed. He explained he always wanted to be in the private sector working in international commerce and trade and decided it was a good time to explore this new line of work.¹

Applicant left federal employment in July 2002. From July 2002 to February 2005, he was intentionally unemployed with no source of income. He spent the time studying for licensing examinations in the insurance field. His wife worked part-time. He did not seek other employment. In 2003, he withdrew all of his savings from his Thrift Savings Plan (TSP) account. The amount was \$169,335. He used the TSP money, other savings, and money from a home equity loan he acquired when he refinanced his home to live on. He estimated he had about \$200,000 in liquid assets at that time. When he withdrew the money from his TSP, it created a tax consequence. The IRS

¹ Tr. 22-37.

withheld \$33,000 for partial payment of the taxes. Applicant still owed approximately \$16,000 in additional taxes and withdrawal penalties. He failed to file his 2002 and 2003 federal income tax returns and has not made any payments toward this debt since its withdrawal eight years ago. Applicant also failed to file his state income tax returns for tax years 2002 and 2003. He did not file his 2003 income tax returns because he was unsure of how much money he would need in the future. He was aware he still owed for the TSP withdrawal. He has not prepared the state tax returns for these years. The federal tax debt has increased to \$45,434, due to interest and penalties, and remains unpaid. Applicant hired a tax service firm in 2005, and contacted them again about a week before his hearing. He has not taken action on resolving his tax debt because he does not have the money.²

At the second hearing, Applicant provided copies of his 2000 to 2004 tax returns that he prepared after his initial hearing. He admitted he owes money to the IRS, but has not paid it. He admitted that he knew he had income in 2002 and 2003, and was required to file returns and pay his taxes, but he did not. Although some of the taxes he owed for withdrawing his TSP savings were withheld by the IRS, Applicant knew he owed additional tax, but did not pay it. He estimated that he spent around \$50,000 to renovate his home during this time period. He admitted it was poor judgment the way he handled his finances during this period. He also used the TSP money and savings for living expenses. He explained he did not file returns and pay his taxes because he believed that his business would become successful and then it would be easier to pay the debts.³

Applicant attributes his financial problems to a failed personal business. Applicant began working in the private sector insurance industry in 2005. He received commission-based compensation and failed to meet the threshold requirement for the business. He worked for four different companies during this period, but could not meet their minimum requirement for sales. He stated that from 2004 to 2009 his earnings were below the poverty line. He estimated he earned about \$9,000 to \$10,000 annually.⁴

While he was married, his wife was working as a part-time nanny. Beginning in 2002, Applicant lived off the money he withdrew from his TSP, savings, and the home equity loan. It is now depleted. He estimated he presently has about \$200-\$300 in cash. He now works for a federal contractor on a part-time basis, which is somewhat sporadic. He has not been offered a full-time job. He attempts to work odd jobs to supplement his income. He does not have sufficient income to pay his delinquent debts.⁵

² Tr. 17, 37-56.

³ *Id.*

⁴ Tr. 17, 21, 68-73.

⁵ Tr. 18, 27-29, 56.

The debts in SOR ¶¶ 1.a, 1.b, and 1.c are judgments. He admitted the debt in SOR ¶ 1.c and provided documented proof that it was satisfied.⁶ The judgments in SOR ¶¶ 1.a (debt to homeowners association for \$537) and 1.b (credit card debt for \$2,646) are not paid.⁷

The debts in SOR ¶¶ 1.e (electric company for \$569), 1.f (medical for \$88), 1.g (credit card for \$1,451), 1.h (telephone services for \$158), 1.i (credit card for \$3,382), and 1.j (cable services for \$235) are unpaid. Applicant stated that some of the debts were for services at his house before it was foreclosed. The others are for credit cards he used to pay for necessities.⁸

Applicant believes he has a solid financial record of paying his bills prior to leaving employment with the federal government. It has only been since he left federal employment in 2002 that he began experiencing financial problems. He stated he attempted to pay all of his monthly bills on time and live frugally. He admitted he is not presently in a position to pay his outstanding debts. Applicant included, as part of the supplemental information and documents, copies of federal income tax return forms for 2000 and 2001. Applicant was working for a federal agency during these years. He did not file or pay his taxes for these years. His failure to file his 2000 and 2001 federal income tax returns when he was working full-time for a federal agency contradicts his testimony that he did not file due to his issues with his business. He has not had any financial counseling.⁹

Applicant provided information that, in 1996, he was part of a group that received a meritorious unit citation from the government agency where he worked. Applicant noted that he maintains confidentiality agreements with his prior employer and he has never violated them.¹⁰

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 used in evaluating an applicant's eligibility for access to classified information.

⁶ AE B.

⁷ Tr. 59-60.

⁸ Tr. 61-66.

⁹ Tr. II; 4-17, 67. I have not considered Applicant's failure to file returns and pay his 2000 and 2001 federal income taxes and his failure to file returns and pay his 2000 to 2004 state income taxes, for disqualifying purposes. I have considered these matters when analyzing Applicant's credibility, overall financial history, mitigation, and in my "whole-person" analysis.

¹⁰ Tr. 21-22.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 Executive Order 10865 provides that 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. I have considered all of the disqualifying conditions under AG ¶ 19 and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant has at least \$54,500 in delinquent debts that are unpaid or unresolved. He admitted he failed to file his federal and state income tax returns for 2002 and 2003. I find there is sufficient evidence to raise these disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under AG ¶ 20:

- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (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 provided documentation to show he paid the judgment in SOR ¶ 1.c. I find AG ¶ 20(e) applies to this debt. Applicant has other delinquent judgments, debts, and a large tax lien that he has not paid or resolved. Applicant failed to file his federal income tax returns for 2002 and 2003, until January 6, 2011, after his hearing. He has not filed his state income tax returns for 2002 and 2003. Applicant repeatedly used poor judgment in managing his finances. He was aware that he was required to file his income tax returns, but did not address them until after his hearing. The taxes remain unpaid, as are his other delinquent debts. I find that AG ¶ 20(a) is not established because Applicant's delinquent debts are numerous, ongoing, and not the result of circumstances making them unlikely to recur.

Applicant chose to withdraw all of his TSP money; he chose to obtain a home equity loan and renovate his house while he was not earning an income; he chose not to work during a more than two-year period. He made poor financial decisions. He incurred a significant tax debt when he withdrew all of his TSP savings. All of these circumstances were within his control. Applicant had difficulty working in a business where earnings were based on commissions. Despite his repeated inability to earn an income to meet his expenses, he failed to take responsible action. His testimony was not credible or believable regarding his financial mishaps and tax problems. Applicant failed to file his federal and state income tax returns during years he was fully employed by a federal agency. He continued this pattern for years and it was not until after his security clearance hearing that he actually submitted the required income tax forms for his federal income taxes. He has not done so for his state income tax returns. He has not paid any of his other delinquent judgments or debts. Applicant's financial problems were caused by his actions and he did not act responsibly. AG ¶ 20(b) does not apply. There is no evidence Applicant has received financial counseling, that the problem is being resolved, or that Applicant has initiated a good-faith effort to repay overdue creditors. I find AG ¶¶ 20(c) and 20(d) do not apply.

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 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. Applicant worked for a federal agency for 15 years. He decided to use all of his financial resources to live on while he studied for more than two years to obtain licenses. He claimed he paid all of his bills while he was employed by the federal agency. That is not accurate because he failed to file returns or pay his federal and state income taxes when he was working. Applicant failed to address the tax consequences of withdrawing money from his TSP. He chose not to work during this time period. He used a home equity loan to renovate his house. Applicant's testimony was not credible. Applicant repeatedly made poor decisions which raises serious questions about his judgment, reliability, and trustworthiness. 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 failed to mitigate the security concerns arising under the guideline for Financial Considerations.

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.b: | Against Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraphs 1.d-1.k: | 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge