



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



In the matter of:)
)
) ISCR Case No. 10-02845
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2013

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

The Department of Defense (DOD) issued an undated 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant submitted a notarized response to the SOR on June 3, 2013, and requested a hearing before an administrative judge. The case was assigned to me on August 22, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 27, 2013, scheduling the hearing for September 23, 2013. The

hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on September 30, 2013.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 6 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) 1 through 12, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted documents that were marked AE 13 through 27 and admitted without objection. Correspondence about the additional exhibits is marked Hearing Exhibit (HE) I.

Motion to Amend SOR

Department Counsel moved to amend the SOR by withdrawing the allegations under SOR ¶¶ 1.a and 1.b. The motion was granted without objection.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. He is applying for a security clearance. He served in the U.S. military from 1982 until he was honorably discharged in 1988. He attended college for several years, but he did not earn a degree. He married in 1981 and divorced in 2007. He has three adult children from the marriage. He remarried in 2007. He has two children from this marriage, and his wife is pregnant expecting a third child.¹

Applicant has worked for the same company since about 1988. He worked in foreign countries from about 1994 to 2006. His employer paid many of his expenses for living overseas, including at times taxes owed to the foreign country. Applicant's U.S. tax situation was complicated by issues such as foreign taxes, income earned overseas, and employer-paid expenses being treated as earned income.² Applicant's Social Security and Medicare earnings record showed the following earnings:

1994	\$60,400	2001	\$447,427
1995	\$184,158	2002	\$213,325
1996	\$132,663	2003	\$289,923
1997	\$257,445	2004	\$188,418
1998	\$280,764	2005	\$123,277
1999	\$435,909	2006	\$165,037
2000	\$249,041	2007	\$107,080 ³

¹ Tr. at 28-32, 74, 118; GE 1, 2.

² Tr. at 45-58, 105-106; Applicant's response to SOR; GE 1-3; AE 1-8, 10-26.

³ AE 9.

Applicant's company provided an accounting firm to assist their employees living overseas in filing their U.S. federal income tax returns. Applicant moved from one foreign country to another in 2001. That same year, his employer changed accounting firms. Applicant did not file his federal income tax returns for tax years 2000 through 2006 when they were due. He stated that numerous problems, such as frequent moves and difficulties in contacting the new accounting firm, prevented him from filing the returns on time. The 2000 to 2005 tax returns were completed in late 2006. Applicant testified that he filed the returns in early 2007, but they were mailed to the wrong Internal Revenue Service (IRS) division. IRS documents state that the 2000 to 2006 returns were not filed until July to September 2008. His 2007 federal income tax return was filed in October 2008.⁴

The SOR alleged unpaid federal taxes for tax years 2000 through 2007 (SOR ¶¶ 1.c - 1.j), totaling about \$258,000. Applicant denied owing the IRS for tax years 2000 to 2002, stating those taxes have been resolved. He admits owing the IRS for tax years 2003 through 2007. The below table lists Applicant's tax liability, before adding interest and penalties, for tax years 2000 to 2007 and the amount withheld from his paycheck for federal taxes during the pertinent tax years:

<u>Tax year</u>	<u>Tax liability</u>	<u>Amount withheld</u>
2000	\$38,199	\$0
2001	\$49,880	\$0
2002	\$9,370	\$769
2003	\$32,565	\$0
2004	\$14,314	\$0 ⁵
2005	\$6,096	\$0
2006	\$20,629	\$15,561
2007	\$38,418	\$36,252 ⁶

Applicant moved back to the United States in 2006. With the exception of the amount withheld from his pay check, he made no additional payments toward his tax debt until the IRS began levying his pay in 2008. In January 2009, Applicant and the IRS reached an installment agreement. Applicant paid \$250 per week through January 2011, at which time a new installment agreement was entered for monthly payments of \$1,512. Applicant made the monthly \$1,512 payments through January 2013. His tax refunds have also been seized by the IRS and applied to his tax debt. He testified that he has continued to make the monthly payments, and that he has paid about \$200,000 to the IRS for his delinquent taxes. He stated that he believes he owes the IRS about \$180,000. IRS documents from May 2013 establish that taxes for years 2000 to 2002

⁴ Tr. at 45-88, 98-108; Applicant's response to SOR; GE 1, 2; AE 1-8, 10-26.

⁵ There was nothing withheld from Applicant's pay in 2004 for federal income taxes, but he was credited with \$763 for excess Social Security and "tier 1 RRTA tax withheld."

⁶ AE 1-8, 10-12.

have been paid, and that Applicant owes about \$109,000,⁷ including penalties and interest, for tax years 2003 through 2007.⁸

In 2011, a state (State A) filed a tax lien of about \$6,800 against Applicant for tax year 2007. Applicant denied owing taxes to State A, stating that he did not live or work in the state during 2007. He indicated that he lived in another state (State B), and that he owes State B more than \$10,000.⁹ He has not filed a tax return for State B for tax year 2007. His company withheld \$2,071 from his 2007 pay for his tax obligation to State A. Applicant stated that after he files a tax return with State B, State A will acknowledge that he does not owe taxes to State A, and it will release the lien. It is unclear whether State A would refund the \$2,071 that was withheld for state tax purposes. Applicant stated that he was waiting until he has the financial ability to pay State B before he files the required tax return. He acknowledged that he has an independent obligation to file the return even if he does not have the money to pay the taxes. In his post-hearing document, he stated that he has requested the IRS to provide him with a copy of his 2007 federal tax return, with changes made by the IRS. He stated that he plans to file the state return as soon as receives the federal return.¹⁰

Applicant has not received formal financial counseling. He stated that he is living frugally. He drives an older-model truck with 250,000 miles on it. His wife has a used car with 135,000 miles. He has an extreme commute in order to live in a less expensive area. He plans on continuing his efforts to pay his tax debt.¹¹

Applicant's supervisor verified Applicant's description of the tax problems encountered by the company's overseas employees. She believes the company failed Applicant and other employees who were in similar situations. She described Applicant as her top performer, extremely responsible, dedicated, and dependable.¹²

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.

⁷ I am accepting the IRS amount of \$109,000 as more accurate than Applicant's estimate of \$180,000.

⁸ Tr. at 76-78, 88-90, 116, 121-124; Applicant's response to SOR; GE 1-3; AE 1-8, 10-12.

⁹ The tax debt to State B was not alleged in the SOR, and the tax lien by State A is no longer alleged in the SOR. Any financial issues that were not alleged in the SOR will not be used for disqualification purposes. They may be considered in assessing Applicant's overall financial situation, in the application of mitigating conditions, and in analyzing the "whole person."

¹⁰ Tr. at 37-40, 90, 93-96, 113-114; Applicant's response to SOR; GE 3; AE 13, 27.

¹¹ Tr. at 36, 41-44; GE 3.

¹² Tr. at 126-132.

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."

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a large tax debt covering a number of tax years. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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 in foreign countries from about 1994 to 2006. His tax situation was complicated, and it was exacerbated by frequent moves and his company's switching accounting firms. I accept that Applicant relied on his company for assistance, and the company may have failed him in some regard. However, the responsibility to file his tax returns and pay his taxes ultimately rests on Applicant. AG ¶ 20(b) is not applicable.

Applicant's tax liability for tax years 2000 through 2005 was in excess of \$150,000, yet he had only \$769 withheld from his pay for those tax years. He made no additional payments for those tax years until the IRS began levying his pay in 2008. He has been paying the IRS through an installment agreement since January 2009. His tax refunds have also been seized by the IRS and applied to his tax debt. Applicant's delinquent taxes for tax years 2000 through 2002 have been paid. As of May 2013, he owed about \$109,000 for tax years 2003 through 2007. In addition to his federal tax debt, Applicant has unresolved state tax problems. He owes State B more than \$10,000, and he still has not filed a state tax return.

Applicant is living frugally, and he has made strides in paying his tax debt. However, I am unable to find that his financial problems are under control when he still has not filed his 2007 state income tax return. I do not find that he acted responsibly under the circumstances or that he made a good-faith effort to resolve all his financial problems. His financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(d) are not applicable. AG ¶ 20(c) is applicable to the 2000 to 2002 taxes. It is not applicable to the other tax years. I find that financial concerns remain 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 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 honorable military service, his favorable character evidence, and his long and stable work history. However, he has significant unresolved tax problems. If he files his state tax return, makes payment arrangements with the state, and continues his current course of addressing his federal taxes, he should arrive at a position of financial stability consistent with the holding of a security clearance. However, he is not there yet.

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.b:	Withdrawn
Subparagraphs 1.c-1.e:	For Applicant
Subparagraphs 1.f-1.j:	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