



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



In the matter of:)
)
) ISCR Case No. 10-04060
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

02/01/2012

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Although the events causing his financial problems were beyond his control, Applicant has over \$197,000 in unresolved federal tax liens. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order (EO) and DoD Directive,¹ on July 6, 2011, the Defense Office of Hearings and Appeals (the Agency) issued a Statement of

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

Reasons (SOR) explaining that it was not clearly consistent with the national interest to continue Applicant's access to classified information. The SOR detailed the factual basis for the action under the security guideline known as Guideline F (financial considerations).

Applicant, through counsel, answered the SOR and requested a hearing. The case was assigned to me on October 28, 2011. The hearing proceeded as scheduled on December 7, 2011. Department Counsel offered Government's Exhibits (GE) 1 through 7, which were admitted without objection. Applicant's Exhibits (AE) A through L were also admitted without objection. I received the transcript on December 14, 2011.

I left the record open until January 6, 2011, to allow Applicant to submit additional documentation about his finances. He timely submitted AE L through X, which were also admitted without objection.²

Findings of Fact

Applicant is a 59-year-old employee of a federal contractor. He is a veteran of the United States Army, honorably discharged after two years of service in the late 1970s. From approximately 1982 to 2009, he operated a sole proprietorship in State 1. When the economic downturn hit his region of the country, Applicant was forced to close his business. Upon dissolving his company, Applicant had approximately \$200,000 in uncollectible accounts receivable. Half of his outstanding receivables became uncollectible because his clients filed for bankruptcy. He attempted, unsuccessfully, to collect the other half of his outstanding receivables by filing liens against his clients' assets. In the end, he spent more money trying to enforce the liens than he was able to collect.³

In September 2009, he accepted his current position with a federal contractor in State 2, which required him to relocate. Upon leaving State 1, he attempted to sell his home and surrounding land. Despite having dropped the sales price three times, the home has been on the market for over two years. Applicant continues to pay the mortgage on this home. He has also tried to sell his remaining business equipment on a popular internet website. Applicant's wife, does not work, but divides her time between State 1 and State 2 to look after the couple's property interests in State 1.⁴

As Applicant's business began experiencing problems, he began to accumulate delinquent debt. Although Applicant was aware that he had some unpaid accounts, he did not become fully aware of the extent of the problem until the present security

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

² I have appended to the record as Hearing Exhibit (HE 1) the Government's post-hearing submission memorandum. The Applicant's exhibit list is appended as HE A.

³ Tr. 49-50, 109, 117, 121-125.

⁴ Tr. 105 – 106, 109 – 113, 125 – 126.

clearance adjudication. According to the SOR, Applicant is indebted to 11 creditors for approximately \$257,000, \$197,861 of the total amount owed is for unpaid federal taxes. Applicant, who relied on an accountant to file his federal taxes between 1999 and 2009, claims that he did not learn of the federal tax liens until he received a set of interrogatories from DOHA in the fall of 2010.⁵

In December 2010, Applicant retained a Certified Public Accountant (CPA) to help him investigate and resolve his tax issues. In November and December 2011, the Internal Revenue Service (IRS) garnished Applicant's wages, collecting \$9,500 toward his federal tax debt. In addition to the garnishments, Applicant made four payments totaling \$1,600 to the IRS.⁶ Applicant's CPA provided a letter, dated December 29, 2011, indicating he is working with the IRS to settle Applicant's outstanding tax debt and planned to file an Offer in Compromise in early 2012.⁷

In addition to the unresolved federal tax debt, the delinquent accounts alleged in SOR ¶¶ 1.a., 1.l., 1.m., and 1.n. remain unresolved. The debt in SOR ¶ 1.l. is secured by a lien on Applicant's home in State 1. Applicant resolved the delinquent account alleged in ¶¶ 1.b. in May 2011. After the hearing, Applicant resolved SOR ¶¶ 1.d. and 1.i. through 1.k. He also successfully disputed the account alleged in ¶ 1.c. In January 2012, he participated in an online financial counseling class and contacted a debt repayment program. However, he did not provide any documentation showing that he actually enrolled.⁸

A review of Applicant's credit reports show that prior to the decline of his business in 2005, Applicant paid his creditors timely. Applicant maintained a long and positive payment history with the majority of his creditors. Since January 2009, Applicant has not accumulated any new consumer credit accounts. Applicant's earns a base salary of \$65,000 with the ability to work overtime. As of the most recent December 2011 paystub submitted by Applicant, he earned almost \$46,000 in overtime pay.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.

⁵ Tr. 79-83.

⁶ Because of the poor quality of AE V, I cannot determine when Applicant made the four payments.

⁷ Tr. 84-87; GE 2-3; AE H, AE U-V.

⁸ AE N-U.

⁹ GE 4-6; AE W.

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 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.

The dissolution of Applicant's business, which eventually closed its doors in 2009, caused Applicant to accumulate debt he could not pay, including approximately \$197,000 in unpaid federal tax liens, which remain unresolved.

Of the mitigating conditions available under AG ¶ 20, four are partially applicable to this case:

- (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.

The events that caused Applicant's financial problems, the economic downturn that led to the failure of his almost 30-year-old business and his inability to collect over \$200,000 in receivables, were beyond Applicant's control. Before the decline of his business, it appears he paid his creditors timely and maintained a positive credit history. This combination of incidents seems unlikely to recur in the future. As a result, the sources of his financial problems do not cast doubt on his current security worthiness. Therefore, AG ¶ 20(a) applies.

While the events that led to Applicant's financial problems were caused by events beyond his control, Applicant receives only partial mitigation under AG ¶ 20(b). Applicant has failed to show that he has taken timely, reasonable steps toward the resolution of his delinquent debts. Applicant has worked for his employer since December 2009. In the two years preceding the hearing in this case, Applicant

voluntarily resolved only one debt, SOR ¶ 1.b. This inaction extends to Applicant's handling of his four outstanding federal tax liens. Applicant claims that he did not learn of the liens until he received the DOHA interrogatories in late 2010. However, Applicant appears to have made no payment on these tax liens until the IRS garnished his wages in November and December of 2011. Despite having worked with a CPA for over a year, Applicant appears to be no closer to the resolution of his tax liens. Although he has earned a stable income, well in excess of his base salary, Applicant did not provide any explanation regarding his lack of progress on his outstanding debts.

Applicant receives minimal credit under AG ¶ 20(c). Applicant has retained a CPA to help him resolve his outstanding federal tax liens. After the hearing, Applicant completed an online financial counseling course. He also contacted a debt repayment program. However, none of these actions have helped Applicant gain control over his delinquent accounts.

Based on Applicant's actions, I cannot find that Applicant has initiated a good-faith effort to resolve his delinquent debts. Applicant waited until after the hearing to resolve the delinquent accounts alleged in SOR ¶¶ 1.d., 1.i., 1.j., and 1.k. The timing of Applicant's payments is relevant to a finding of mitigation under AG ¶ 20(d). Applicant failed to demonstrate a positive track record of repayment. In absence of such, it cannot reasonably be suggested that Applicant has initiated a good-faith effort to repay his creditors or otherwise resolve his debts, as is required for application of AG ¶ 20(d).¹⁰ While Applicant receives some credit for the almost \$1,600 in voluntary payments he made to the IRS, he does not receive any such credit for the \$9,500 the IRS garnished from his wages. Payments of a debt through involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor as contemplated under AG ¶ 20(d).¹¹

Viewed in totality, Applicant has failed to mitigate the Guideline F concern raised by his delinquent debt. In reaching this conclusion, I gave due consideration to the whole-person concept. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. Applicant is in a difficult situation. Events beyond his control caused him to lose the business he successfully operated for almost 30 years. Although he has taken steps to repair his finances, his unresolved federal tax debt is too large to be overlooked.

An applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by concomitant conduct, that is, actions which evidence a serious intent to effectuate the plan.¹² Ultimately, Applicant failed to present sufficient evidence that he

¹⁰ See, e.g., ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008); ISCR Case No. 01-21386 at 3 (App. Bd. Jun 11, 2003).

¹¹ See ISCR Case No. 08-06058 at 6.

¹² See, e.g., ISCR Case No. 08-06567 at 3 (App. Bd. Oct 29, 2009).

has a plan for resolving his federal tax liens. While his intention to file an Offer in Compromise with the IRS is a reasonable option – it is not a concrete plan as yet. The IRS does not have to accept the offer and Applicant did not offer any plan in the alternative. Furthermore, he has not demonstrated a track record of repayment of his sizeable federal tax debt to support a finding of mitigation.

This decision should not be construed as a determination that Applicant cannot or will not attain the type of financial stability necessary to justify the granting of a security clearance. The award of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. A clearance is not recommended with the Applicant's current circumstances, but should he be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

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
Subparagraph 1.a.:	Against Applicant
Subparagraphs 1.b. – 1.d.:	For Applicant
Subparagraphs 1.e – 1.h.:	Against Applicant
Subparagraphs 1.i. – 1.k.:	For Applicant
Subparagraphs 1.l. – 1.n.:	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.

Nichole L. Noel
Administrative Judge