



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



In the matter of:)
)
) ISCR Case No. 10-07602
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

December 8, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant developed financial problems resulting from two failed businesses. He is responsibly addressing his debts and seems to be in control of his financial situation. Notwithstanding, he deliberately falsified his April 2010 security clearance application when he failed to disclose his IRS debt and three tax liens. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 1, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On July 20, 2011, DOHA issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant answered the SOR on August 17, 2011, and requested a hearing before an administrative judge. The case was assigned to me on September 27, 2011. DOHA issued a notice of hearing on September 29, 2011, convening a hearing on October 20, 2011. At the hearing, the Government offered exhibits (GE) 1 through 12. Applicant testified and presented exhibits (AE) 1 through 9. AE 9 was received post-hearing. DOHA received the hearing transcript (Tr.) on October 26, 2011.

Findings of Fact

Applicant admitted the SOR allegations under ¶¶ 1.a through 1.c, and 1.f, with explanations. He denied the SOR allegations under ¶¶ 1.d, 1.e, 2.a, and 2.b. His admissions are incorporated as findings of fact. After a thorough review of the evidence, and having considered Applicant's demeanor and testimony, I make the following findings of fact.

Applicant is a 49-year-old electronic security specialist who is being sponsored for a security clearance by a defense contractor. He served in the U.S. Navy from 1981 until 1985, and was honorably discharged as a seaman (pay grade E-3). His service was characterized as honorable. Applicant stated that he possessed a secret security clearance while he was in the Navy. He completed his associate's degree in 1985. Applicant has never been married and he has no children.

From January 1993 until April 2010, Applicant was self-employed. In 1993, he started his own company and worked full-time as a systems contractor for private companies, government contractors, and other government agencies. For many years, Applicant's company was successful and he did not have any financial problems. Around 2005-2006, Applicant used some of the profits he made with his company to purchase a coffee shop business. He invested a substantial amount of money to refurbish the coffee shop and its building. In about 2007, he was forced to close his coffee shop because of the lack of business. Additionally, Applicant's systems service contracts began to dwindle because of the downturn of the U.S. economy, and he closed his company in April 2010.

In April 2010, Applicant started working for a government contractor. Shortly thereafter, he was issued an interim secret security clearance. His access to classified information was withdrawn in July 2010, because of the security concerns alleged in the SOR. Applicant was laid-off two weeks before his hearing because he lost his security clearance and he is currently unemployed. His last employer is sponsoring Applicant's

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

security clearance application. Additionally, a second government contractor is willing to hire Applicant provided he receives a security clearance. (Tr. 13-17)

Applicant's financial problems are related, in part, to his two failed businesses, the bad tax advice he received from an accountant who help him file his income tax returns, and his failure to pay payroll taxes. Concerning his \$193,000 Internal Revenue Service (IRS) tax lien (SOR ¶ 1.a), Applicant explained that when he retrofitted his coffee shop building, he followed his accountant's advice and took a one-time, lump sum deduction of the building refurbishing expenses. In 2007, the IRS conducted an audit of his prior income tax returns and disallowed the one-time deduction.

Applicant contested the disallowance of the deduction with the assistance of two different accountants. Since October 2007, he maintained contact with the IRS, and made some small sporadic payments on his IRS debt. Because of his poor financial situation, the IRS placed this debt in un-collectable status in 2008. In April 2011, the IRS applied Applicant's 2010 \$6,800 income tax return to the debt. In July 2011, Applicant signed an IRS Form 911 (Request for Taxpayer Advocate Service Assistance) requesting to establish a payment plan. The IRS has yet to approve a payment plan. (AE 9) Applicant intends to establish a payment plan with the IRS as soon as he has steady employment.

The two liens alleged in SOR ¶¶ 1.b and 1.c were the result of Applicant's failure to pay his coffee shop's payroll taxes. He claimed that his accountant failed to pay the IRS the business' payroll taxes and embezzled the money. In July 2010, Applicant established a payment agreement with the IRS to pay both debts. Since then, he made 19 payments to the IRS for a total of around \$6,000. Concerning SOR ¶ 1.d, Applicant presented documentary evidence showing that the state tax lien was filed erroneously and has been released. (AE9)

Applicant disputes the 2011 judgment for \$958 alleged in SOR ¶ 1.e. He testified he returned the merchandise when his coffee shop business collapsed. The creditor sued him for breach of contract and secured a lien against him in February 2011. Applicant presented evidence showing others have filed fraud complaints against the same creditor. Applicant believes he owes nothing to the creditor, but in October 2011, he sent a letter to the creditor requesting to establish a payment plan. As of the day of his hearing, he had not received a response. Concerning SOR ¶ 1.f, Applicant's documentary evidence shows that in the past he was late on his loan payments. However, as of October 2011, he was current on his loan and his next payment is not due until January 2012. (AE 9)

In April 2010, Applicant submitted the pending SCA. In response to Section 26(c) (Financial Record), asking whether he had failed to pay Federal, state, or other taxes, or to file a tax return, Applicant answered "No." He failed to disclose that he had failed to pay federal taxes as alleged in SOR ¶¶ 1.a through 1.c. Applicant testified he did not fail to pay federal taxes, but that his payment was considered erroneous by the IRS. He explained that when he retrofitted his coffee shop building, he followed his accountant's

mistaken advice and took a one-time, lump sum deduction of the building's refurbishing expenses. In 2007, the IRS conducted an audit of his prior income tax returns, disallowed the one-time deduction, and Applicant acquired the \$193,000 debt.

SCA Section 26(d) asked Applicant whether he had a lien placed against his property for failing to pay taxes or other debts. Applicant answered "No," and he failed to disclose that in 2007, the IRS placed a lien against his property as alleged in SOR ¶ 1(a). When asked why he failed to disclose in his SCA his IRS debts and the 2007 and 2008 IRS liens filed against his house, Applicant explained that when he filed the SCA he owed everybody money and he could not keep track of all his debts. He was living off food people gave him. At the time, he was in a different state of mind. There were too many things going on his life, and he could not really explain what happened. He expressed remorse for his omissions.

Applicant averred that the circumstances that led to his financial problems are no longer present. He no longer runs his own business, and now works a steady, full-time job that provides him with a regular income. Since he started working for his employer in April 2010, he has been contacting his creditors and paying his debts one at a time. He wants to pay all his debts, except for the debt alleged in SOR ¶ 1.e. In addition to the debts alleged in the SOR, Applicant owes approximately \$36,000 to three vendors who provided him with supplies for his now defunct businesses. He established payment plans with the three vendors and is paying approximately \$900 a month to the three vendors. Additionally, he owes family members around \$50,000 and is paying them as his income allows.

Concerning his current financial situation, Applicant explained he is basically unemployed. Although he has been offered two jobs, he cannot work because he does not have a security clearance. He has been living off his unemployment benefits and \$500 he receives for the rental of his coffee shop. Before getting laid-off in September 2011, he was earning approximately \$7,400 a month and was able to pay most of his creditors.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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. AG ¶ 18.

Applicant is indebted to the IRS for approximately \$199,000 as a result of him taking an improper business deduction and for his failure to pay payroll taxes. He owes a \$958 judgment filed against him in 2011, and in the past he was late paying his mortgage. AG ¶ 19(a): "inability or unwillingness to satisfy debts;" AG ¶ 19(c): "a history of not meeting financial obligations," and AG ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;" apply.

AG ¶ 20 lists conditions that could mitigate the financial considerations security concerns. AG ¶ 20(a) does not fully apply because Applicant's financial problems are ongoing. AG ¶ 20(b) applies in part. Applicant's financial problems are, to some extent, the result of circumstances beyond his control. For many years, he did well running his company. He did not develop financial problems until around 2007-2008, when as a result of the downturn of the U.S. economy he lost most of his business' contracts and his ability to earn an income.

Considering the evidence as a whole, it does not show that Applicant was irresponsible in the handling of his finances. His financial problems seem to be, in part, the result of a downturn on his business because of the slowdown of the U.S. economy. He followed his accountant's advice and took an improper business deduction, and his coffee shop accountant failed to pay his payroll taxes. Because of the lack of business, he did not have the means to address his delinquent taxes and other debts in a timely manner.

Applicant maintained contact with the IRS and four months after he started his job he established a payment plan for two of his small tax debts (SOR ¶¶ 1.b and 1.c). He has been consistently making payments on these debts since July 2010. In July 2011, Applicant signed an IRS Form 911 seeking to establish a payment plan for his largest IRS debt (SOR ¶ 1.a). He initially disputed the debt alleged in SOR ¶ 1.e because he believed it is fraudulent. However, he recently made contact with the creditor trying to establish a payment plan. He is current on his mortgage loan (SOR ¶ 1.f). Applicant's credit reports show that has been paying other business-related and personal debts not alleged in the SOR. On balance, and considering the evidence as a whole, Applicant's financial situation does not cast doubt on his current reliability and judgment.

AG ¶¶ 20(c) and (d) apply. Applicant has not received financial counseling, but he used the services of two accountants to help him resolve his financial problems. He established payment plans with the IRS and is paying other debts not alleged in the SOR. He also appears to have a valid reason to dispute the debt alleged in SOR ¶ 1.e. I find that there are indications that his financial problems are under control. AG ¶ 20(f) is not raised by the evidence in this case.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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. 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.

Applicant failed to disclose in his April 2010 SCA that he owed approximately \$199,000 to the IRS for taking an improper deduction and failing to pay payroll taxes. Additionally, he failed to disclose that the IRS filed three liens against his home in 2007-2008. He also failed to disclose in his SCA that he was delinquent on his home loan and other debts.

Applicant claimed that he made a mistake when he failed to disclose the above information. At the time he submitted the SCA, he did not know what he owed, or to whom, because all the debts were coming in at the same time. He was barely surviving on food handouts, he had a lot going on his life that he cannot explain, and he tried to answer the questions to the best of his ability. Considering the evidence as a whole, Applicant's explanations do not mitigate his failure to disclose the above information. In 2007, Applicant hired two accountants to help him dispute the IRS denial of the business deduction. He was aware of the three IRS tax liens filed against him and that he owed the IRS a substantial sum of money. He deliberately failed to disclose his IRS debt and the three IRS tax liens in his SCA.

Applicant's deliberate falsification of his 2010 SCA triggers the applicability of disqualifying condition 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."

After considering all the AG ¶ 17 mitigating conditions, I find none apply. Applicant's falsifications are recent, serious offenses (felony-level).³ At this time, his favorable evidence is not sufficient to mitigate his falsifications of the SCA.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant receives credit for his naval service. He acknowledged his mistakes

³ See 18 U.S.C. 1001.

and expressed sincere remorse for his actions. He has shown responsibility in addressing his financial problems and appears to be in path to establishing full financial responsibility. Notwithstanding, Applicant deliberately falsified his 2010 SCA. The record evidence fails to convince me of Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations, but failed to mitigate personal conduct security concerns.

Formal Finding

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:	FOR APPLICANT
Subparagraphs 1.a - 1.f:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2b:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge