



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



In the matter of:)
)
) ISCR Case No. 10-09590
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: John R. Teakell, Esq.

06/18/2012

Decision

HEINY, Claude R., Administrative Judge:

Applicant had two tax liens entered against him, which totaled approximately \$30,000. He has paid one of the liens and he has offered to make voluntary payments on the other, which is no longer enforceable. Applicant has rebutted or mitigated the financial considerations security concerns. Clearance is granted.

History of the Case

Applicant contests the Department of Defense’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on July 29, 2011, detailing security concerns under Guideline F, financial considerations.

On September 20, 2011, Applicant answered the SOR and requested a hearing. On March 15, 2010 the case was originally been assigned to a different administrative

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

judge. On March 15, 2012, I was assigned the case. On April 5, 2012, DOHA issued a Notice of Hearing² for the hearing held on April 25, 2012.

The Government offered exhibits (Ex.) 1 through 8, which were admitted into evidence without objection. Applicant testified, as did one additional witness. Applicant submitted Exhibits A through C, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. Additional material was submitted, which was admitted into the record as Ex. D and E. Department Counsel had no objection to the material. On May 3, 2012, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted the allegations in the SOR. His admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 53-year-old wireless network engineer who has worked for a defense contractor since May 2010. (Tr. 28) His supervisors say Applicant is extremely important in running the mission. (Tr. 59) Applicant lives in a mobile home on his parent-in-laws' farm. (Tr. 56) His annual salary is approximately \$52,000. (Tr. 58)

Starting in 1990, Applicant owned and operated a construction and excavating business. In 1995, he was the successful bidder on a contract to install underground utilities for 173 new homes on an Air Force base. The project ended in late 1996 or early 1997. (Tr. 30) He was a subcontractor to the company (prime contractor) holding the contract to build the homes. His portion of the contract was \$1.2 million. His business expanded from 35 employees to 50 employees. (Tr. 30) Lacking sufficient capital, Applicant asked the prime contractor to cover his payroll, which the prime contractor did. At that time, Applicant stopped sending pay checks to his employees and the prime contractor started sending the checks. (Tr. 64) While Applicant was sending the checks, all taxes were properly withheld and all additional taxes submitted in a timely manner. (Tr. 65) The amount paid was recouped from Applicant's payment on the contract. (Tr. 31)

When Applicant learned the prime contractor was paying the employees' salaries, but was not submitting the required taxes, he requested the prime contractor to pay the payroll taxes. The prime contractor agreed to do this, but not for the work that was already done. Applicant owed approximately \$17,000 in unemployment tax for the first quarter of 1996 and approximately \$12,000 for the second quarter of 1996. Applicant assumed he could pay those taxes from the profits generated from his subcontract. However, there proved to be no profits.

Applicant did \$100,000 of extra work that was not specified in the original contract due to "differing site conditions." (Tr. 30, 50) He failed to have the work properly authorized by the prime contractor. (Tr. 30) He gave written quotes to the prime

² A previous Notice of Hearing had been issued on November 15, 2011. On November 18, 2011, that hearing was cancelled.

contractor related to the additional work, but failed to have the prime contractor sign off on the quotes. (Tr. 51) When Applicant presented his bill for the extra work, the prime contractor refused to pay the money. Applicant threatened the prime contractor with legal action, to which the prime contractor responded, "go ahead and get a judgment," we can hold out until you are bankrupt.

In 1997, the Applicant's business closed. (Ex. 8) In July 1997, Applicant was involved in a serious motorcycle accident that broke his back. (Tr. 34) He was unable walk and suffered damage to the use his hands. (Tr. 35) He was unable to run his business from bed. (Tr. 34) For two years, he was out of work, without income, recovering from the accident. (Tr. 34) His injuries prevented future work in the construction industry. (Tr. 36) He obtained training in the computer field and obtained work following graduation. (Tr. 36) Prior to his current job, his work was out of state and his family stayed in their home. (Tr. 38) From the summer of 2009 to the spring of 2010, he was unemployed when he was laid off because his employer lacked work. (Tr. 58)

In February 1998, Applicant filed for Chapter 7 bankruptcy protection. (Ex. 5) His debts were discharged in July 1998. The bankruptcy included approximately \$12,000 owed a doctor, a plastic surgeon, for work on Applicant's hands following the motorcycle accident. (Tr. 46) Applicant chose to reaffirm the debt from medical treatment and continued to make payments after his bankruptcy discharge. He also reaffirmed a debt to a supplier of construction material. (Tr. 46)

In March 1997, the Internal Revenue Service (IRS) issued a Notice of Federal Tax Lien Forms 940 and 941³ taxes in the amount of \$30,019. (Ex. 2) The tax lien was filed in February 1997. (Ex. 3) Applicant incorrectly believed the tax liens were discharged in the bankruptcy. In 2010, during his personal subject interview, he learned the tax liens had not been discharged. (Tr. 45)

In 2012, Applicant hired a tax attorney to assist him in addressing the tax lien. (Tr. 48) There is a 10 year statute of limitations⁴ under which a federal tax lien may become "unenforceable by reason of lapse of time," unless a tax levy is re-filed. The tax lien became unenforceable in July 2006. (Ex. 2, Tr. 77) Even though the collection statutes have expired and the lien is no longer enforceable, Applicant contacted the IRS and stated he wished to make voluntary payments on the taxes. (Ex. C) It is rare for a taxpayer to voluntarily offer to pay expired tax liens. (Tr. 74, 86) The IRS has no legal authority to collect the taxes. (Tr. 65)

In February 1997, the state issued a \$382 state tax lien (SOR 1.b) under the provision of the state unemployment compensation act. (Ex. 4) For three quarters in 1996 Applicant owed tax, interest, a late reporting penalty, and lien fee, which totaled \$409. In February 1997, he made a \$380.63 payment, which left a balance of \$27. With accrued interest the balance had increased to \$37.09. On May 17, 2012, Applicant paid the amount owed.

³ Employers are required to file Form 941, *Employer's Quarterly Federal Tax Return*, each quarter and to file Form 940, *Employer's Annual Federal Unemployment Tax Return*, yearly.

⁴ 26 U.S. C. § 6502.

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 must be considered in evaluating an applicant's eligibility for access to classified information.

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 interests of 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 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 Executive Order (EO) 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

In February 1997, the IRS and state issued tax liens against Applicant, which totaled approximately \$30,000. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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 ran a construction business. He was a subcontractor on a large project with his payment to be \$1.2 million. When he was unable to meet payroll, he asked, and the prime contractor agreed to pay Applicant's employees and withhold the money from Applicant's payment on the contract. When the prime contractor did not pay the initial federal tax to Applicant's employees, both the state and federal governments filed tax liens.

In February 1997, the state issued a \$382 state tax lien for state unemployment compensation taxes due. For 1996, he owed \$409 and in February 1997 he paid \$380, which left a balance of \$27. He has paid all that is owed on this state tax lien. In 2006, the federal tax lien became unenforceable.

Applicant believed he would be able to pay the taxes from his profits on the contract. However, there were no profits. Applicant had done \$100,000 of extra work due to changes in the work site, which the prime contractor failed to pay. His business failed in 1997. As the contract was ending, Applicant was involved in a serious motorcycle accident. He was unable to work for two years and was never able to return to the construction industry. His company went bankrupt. He assumed the tax liens were discharged along with his other debt. In 2010, he learned the tax liens had not been discharged. He paid the smaller state tax lien and the federal tax lien became unenforceable in 2006. He has offered to make payments on the unenforceable debt.

Applicant's financial problems are limited to two tax liens issued more than 15 years ago. The liens resulted from a business failure, which are debts unlikely to recur. AG ¶ 20(a) applies because 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.

Under AG ¶ 20(b), Applicant's business failed, which was an event beyond his control. Additionally, his motorcycle accident resulted in him being unable to work for two years and prevented him from returning to the construction industry. Additionally, he was unemployed from the summer of 2009 until the spring of 2010, when he obtained his current job. All of these are events beyond his control. When he learned the tax liens had not been discharged in his bankruptcy, he hired a tax attorney. He paid the smaller state tax lien and has offered to make payments on the unenforceable federal tax lien. AG ¶ 20(b) applies because his company failed and he has acted responsibly under the circumstances.

Under AG ¶ 20(c), there are clear indications the problem is being resolved. His finances are under control. The smaller state tax lien has been paid and the larger tax lien is unenforceable. Under AG ¶ 20(d), he paid the interest yet owing on the state tax lien, which is a good-faith effort to repay overdue creditors. He also reinstated to debts discharged in bankruptcy, which also show a good-faith effort to repay creditors. AG ¶ 20(c) and ¶ 20(d) apply.

Under AG ¶ 20(e), Applicant has a reasonable basis to dispute the legitimacy of the past-due debt. Even though the federal tax lien is no longer enforceable, he has offered to make payments on the debt. AG ¶ 20(e) applies.

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. The debts incurred were not the type that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Money was not spent frivolously. The debts were not incurred on luxuries, but were for taxes. Adverse business conditions prevented him from being able to pay these taxes. Applicant is not living beyond his means. He lives in a mobile home on his parent-in-laws' farm.

Good-faith requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as the statute of limitation) in order to claim the benefit of the good-faith mitigating condition.⁵ Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the administrative judge must still be

⁵ ISCR case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.⁶

The federal tax lien cannot be a source of improper pressure or duress because it is no longer enforceable. He has offered to make payments on this unenforceable debt. He also made payments on two unenforceable debts that had been discharged in bankruptcy. Having made such payments on those debts it is likely he will make some payment on the federal tax lien.

Of course, the issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2 (a)(1).) In this case, the two tax liens issued more than 15 years ago, one of which has been paid and the other unenforceable fail to indicate poor self-control, lack of judgment, or unwillingness to meet financial obligations. They do not cause concern about Applicant's ability, trustworthiness, or ability to protect classified information.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the 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, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge

⁶ ISCR Case No. 05-11366 at 4 n.9 (App. Bd. January 12, 2007)(citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

