



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



In the matter of)
)
) ISCR Case No. 10-09773
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esquire, Department Counsel

For Applicant: *Pro se*

January 12, 2012

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for financial considerations and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Following Applicant's submission of an Electronic Questionnaire for Investigations Processing (e-QIP) on February 21, 2010, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding that it is clearly consistent with the national interest

to grant Applicant's request for a security clearance.¹ On August 19, 2011, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG).² Applicant responded to the SOR on September 19, 2011, denying 13 of the 14 allegations under Guideline F, as well as the two allegations under Guideline E. He also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on October 26, 2011, and I received the case on November 4, 2011. DOHA issued a Notice of Hearing on November 14, 2011. I convened the hearing as scheduled on December 8, 2011. During the hearing, the Government offered five exhibits. I admitted Government Exhibit (GE) 1 and 3 through 5 without objection. Applicant objected to GE 2, his responses to DOHA interrogatories, and I admitted GE 2 over Applicant's objection. He testified, offered the testimony of one witness, and did not offer exhibits. DOHA received the transcript (Tr.) on December 14, 2011.

Procedural Matters

By memorandum dated October 26, 2011 (Hearing Exhibit I), Department Counsel amended the SOR to correct the amount of Applicant's 1994 tax debt alleged in subparagraph 1.b. The original amount of "\$21,746.05" is amended to read "\$37,786.15." Applicant reiterated his denial of this allegation. (Tr. 8-9)

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, who is 72 years old, has been married since 1957 and has five adult children. He served in the Air National Guard from 1956 to 1962. He completed a bachelor's degree in political science in 1970. He worked for a federal agency for 26 years, from 1957 to 1984. He held a security clearance during his federal employment. He testified that he was a security officer, with six years of information assurance experience.³ (Tr. 16) After leaving the agency, he operated his own business from 1984 to 1989. He returned to civil service in 1989. He worked at a federal agency where he assisted small businesses with

¹ See Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

² Adjudication of the case is controlled by the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

³ It is unclear whether this was an adjunct duty or another position. Applicant's security clearance application does not list a position as a security officer.

navigating the federal contracting process. He retired in 1994. Applicant has had at least two home businesses. Since 1969, he and his wife have run a product sales and distribution business. Applicant has also operated a home-based business as a sales consultant since 1994. He ran these businesses both during and after his federal employment. During his security interview in June 2010, he informed the security investigator that he has used several names for his business, he had not incorporated it, and he did not have a business license. Since February 2010, Applicant has been employed on an as-needed basis by a contractor as a trainer. His wife operates a daycare business. (GE 1, 3; Tr. 31, 33, 35-36)

The SOR alleges that Applicant owes federal income taxes for tax years 1993 through 2009, excluding 1996, 1998 to 2000, and 2006. The total federal debt alleged is \$122,600.25. Information on debts related to these tax years appear in Applicant's interrogatory response. The SOR alleges that federal tax liens were filed in July and October 2006 for debts totaling \$12,020.⁴ It also alleges an unpaid state income tax lien of \$2,314.34. Under the Personal Conduct guideline, the SOR alleges that Applicant intentionally failed to disclose the tax liens and the unpaid federal taxes when he completed his security clearance application in February 2010. (GE 2, 4)

Applicant's credit report of March 2010 lists two federal tax liens. One for \$48,548 was filed in September 2002 in his state of residence, and in October 2002 in his daughter's state of residence. The lien was on a house owned by his daughter, and the mortgage loan was co-signed by Applicant's wife. He testified that he learned about the tax lien on his daughter's house in 2002, shortly after it was filed. The second lien, for \$9,058, was filed in October 2006. The credit report lists only one other past-due debt of \$80 to a cell phone company. Applicant stated in his Answer to the SOR that he has paid the \$80 debt, but he did not provide supporting documentation. Applicant's credit report of August 2011 lists the July and October 2006 liens. Another federal lien for \$6,927 is listed as filed in December 2010, but it is not alleged in the SOR. (GE 4, 5; Tr. 45-50)

In his Answer, Applicant denied that he owes taxes for 1993, 1994 and 1995, stating that the debts are "no longer owed." He testified that he believes the IRS eliminated these tax years, and they "went over to the liens" because they did not appear on paperwork he received from IRS. However, the IRS document he provided with his interrogatory response shows total taxes due of \$22,652 for 1993 and \$28,123 for 1995.⁵ He admits owing back taxes, but denies owing the specific amounts alleged in the SOR for tax years 1997, 2001 to 2005,

⁴ The tax years for these two liens are not specified in the SOR.

⁵ Applicant submitted IRS documents with his interrogatory response of June 29, 2011. However, the IRS letters are incomplete, and it appears that single pages from several different IRS letters are included. It is therefore difficult to determine the dates of some of the correspondence, and if other relevant entries appeared on the pages that were not submitted. (GE 2)

and 2007 to 2009. He provided the amounts he believes he owes for each of these years, which total approximately \$25,000. Applicant testified at the hearing that most of the debt comprises interest and penalties, and he believes the IRS would state his total tax owed to be about \$150,000. (Answer; GE 2; Tr. 78, 86)

Applicant testified that he owes past income taxes because he completed his returns incorrectly for about 16 years. During his security interviews from April to June 2010, he stated that he needed to re-do these tax returns. He also stated that the errors arose primarily because of the changes in the type of deductions allowed for home businesses. He was audited in 1993, and some of his business deductions were disallowed. He testified that he learned how to do his returns correctly after the 1993 audit. He was audited again in 1994 and 1998. During his security interview, Applicant stated that he believed insufficient tax was withheld from his retirement income. He also said that, although he was aware of his tax problems, he was not aware that tax liens had been filed. Applicant provided a copy of a December 2010 notice of tax liens regarding tax years 2007, 2008 and 2009. (GE 2, 3; Tr. 31-34)

At the hearing, Applicant said the information he gave the investigator was incomplete because it did not include the fact that the IRS had determined Applicant and his wife were in a “non-collectible” status, meaning that they did not have the funds to pay their tax debts, and that the IRS would not seize funds from their federal retirement and Social Security annuities to pay the back taxes. Applicant did not provide documentation supporting his claim of non-collectible status. (Tr. 26, 29)

Applicant expressed concern at the hearing that the SOR was issued based on faulty information because he failed to reveal his “non-collectible” status during his security interview. However, on June 29, 2011, he was provided with an opportunity to review a summary of the interview and modify any information he believed to be inaccurate or incomplete. He did not add information about his non-collectible status. He signed a notarized statement that the information in the summary was “true and correct to the best of my knowledge and belief.” (GE 3)

Applicant has not filed his 2010 tax return, because filing the 2010 return would place his “non-collectible” status in jeopardy, and the IRS would again deduct funds from his and his wife’s Social Security and retirement checks. He testified that, “As soon as I send that return in, and report our facts, and we owe, the system cranks up and starts collecting money out of our checks again, and I don't want them to do that, so, that is why I haven't filed...” He does not want the IRS to collect funds while he is planning to negotiate the amount owed. (Tr. 82-89)

Applicant has made several efforts to resolve his ongoing disagreements with IRS about his income and tax liability since 1993. He has been in touch with

the IRS personally. He retained a tax advocate who advised him on how to complete his returns. He also hired a tax attorney. He also hired a tax advocate who represented him in the local tax court. Applicant believes that this person misrepresented the help he could provide. In about 2006, the IRS began to deduct money from Applicant's and his wife's federal pensions and Social Security payments. He objected, and provided the IRS with information that resulted in a finding that they were "non-collectible." He believes he is still required to file his tax returns. Applicant testified he is working with a certified public accountant. (GE 3; Tr. 32, 38-43, 52)

In summer 2011, Applicant contacted the IRS asking to negotiate a settlement that would remove the interest and penalties; he suggested that he pay a total of \$25,344, which he based on numbers that he believed he had received from the IRS. He intended to set up a payment plan, despite his non-collectible status. He testified that he was "moving to resolve issues while the clearance process was going on." As of the hearing date, the IRS had not responded to Applicant's request. (GE 2; Tr. 29, 53-58)

Applicant and his wife's monthly net income is \$4,321. Applicant makes three debt payments per month, totaling \$2,204. One payment of \$1,800 per month is for a personal loan from an in-law of \$300,000. After total expenses and debt payments of \$4,335, he has a negative net monthly remainder of \$14. (GE 2; Tr. 29, 71)

Applicant's security clearance application of February 2010 asked if a federal tax lien had been placed on his property in the previous seven years; it noted that obligations for which he was a co-signer should be included. He answered "No." Applicant testified that he only knew about the 2002 lien on his daughter's property, and it was not his property. The question about federal taxes asked if he failed to pay taxes, and if he failed to file tax returns. He answered "No" to the question because he had always filed his returns. He admitted at the hearing that he "mis-stated" the answer to that question. Applicant testified that he never hid the fact that he owed back taxes, because he disclosed it to the security investigator. (Tr. 49-50, 58- 63, 81-83)

Applicant's witness, a federal employee, testified that he has known Applicant for about four years and is aware that he has had issues with tax arrears. They have not worked together, and are not close friends. However, he testified that Applicant has never been dishonest with him. (Tr. 96-100)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication

policy in the AG.⁶ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (financial considerations) and Guideline E (personal conduct).

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate, or mitigate the Government’s case.

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the judgment, reliability and trustworthiness to protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁹

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern about financial considerations:

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,

⁶ Directive 6.3

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

trustworthiness and ability to protect classified information. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds.

The evidence supports application of disqualifying conditions 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*).

The SOR alleges more than \$100,000 in unpaid back taxes owed to the federal government, as well as a relatively small state tax debt. Applicant's current debts started becoming delinquent more than 15 years ago. His history demonstrates a failure to meet his financial obligations. In addition, Applicant admitted at the hearing that he deliberately failed to file his 2010 federal tax return.

Under AG ¶ 20, the following potentially mitigating factors are relevant:

(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; and

Applicant's debts have been accruing for years, but they are not in the distant past, as they remained unpaid as of the date of the hearing. His failure to come to any resolution over 18 years, despite professional assistance, indicates that his delinquencies may remain outstanding in the future, and raises questions as to his reliability and judgment. AG ¶ 20(a) does not apply.

AG ¶ 20(b) focuses on situations where events beyond an applicant's control affect his ability to meet his financial obligations. It cannot be applied because nothing in the record indicates that unforeseen events prevented Applicant from meeting his tax obligations. He has been steadily employed for more than 40 years, including federal employment totaling 31 years. His self-employment spanned from 1969 to the present.

AG ¶ 20 (c) and (d) require a good-faith effort to resolve debts. Applicant testified that he made attempts to resolve his tax debts. He testified the he contacted the IRS, and used intermediaries such as tax advocates and tax attorneys. However, he cannot receive mitigation under AG ¶ 20(c) or (d). The record shows no evidence of consistent efforts by Applicant to resolve the debts, no evidence of concrete steps taken to reduce his debt through payments or a payment plan, and his tax delinquencies are not under control.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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.

The Government alleges Applicant deliberately failed to disclose his true financial status, implicating the following disqualifying condition under 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.

Applicant failed to report any financial issues on his 2010 security clearance application. He did not report that he had unpaid income tax debts, or that he had unpaid tax liens. Applicant was well aware of his tax delinquencies, as they had been ongoing for 18 years when he completed the application. His testimony that he was responding only to the part of the question regarding filing returns is not credible. At the time he completed his application in February 2010, he had not resolved his tax debts, yet he submitted a "clean" application, giving the Government no indication that delinquent taxes were an issue requiring further investigation. AG ¶ 16(a) applies.

The following mitigating conditions are relevant under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

The record contains no indication that Applicant informed any authorized government official that he wished to correct the failure to provide truthful answers on his application. Although he discussed his debts with the investigator during his interviews, the Appeal Board has held that honesty at an interview does not negate the security implications of initial dishonesty on security clearance applications.¹⁰ AG ¶17(a) cannot be applied. Applicant's conduct cannot be considered minor because he failed to be forthright with the Government during a security clearance investigation. Applicant's conduct reflects poorly on his trustworthiness and judgment. AG ¶17(c) does not apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guideline. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole person concept. Under the

¹⁰ ISCR Case No.02-23073 at 3 (App. Bd. Mar 20, 2004).

appropriate guidelines I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant has not demonstrated reliability in handling his tax obligations. He was not an inexperienced youth when the problems began in 1993, but a mature man of 54 years. After his first audit, 18 years ago, he knew how to complete his return correctly. However, he failed to correct the errors, and was audited twice more in 1994 and 1998. In the 12 years since the third audit, Applicant still has not resolved his tax delinquencies, and does not have a plan in place to do so. His lack of diligence toward his obligations to the government for many years is a serious concern and raises doubts about his trustworthiness and judgment.

Applicant's failure to be forthright by disclosing his tax debts on his security clearance application also raises serious concerns about his trustworthiness. It is highly unlikely that, despite hiring at least three professional tax advisors, Applicant was unaware of the multiple liens filed against him. Yet he did not disclose these liens, or his unpaid taxes, on his application. Disclosing his true tax status at his security interview does not mitigate his falsification on his security clearance application.

When the IRS initiated seizure of his retirement payments in 2006, Applicant took action to prove his inability to pay. The IRS accepted Applicant's evidence, and granted him "non-collectible" status. I note, in response to Applicant's concern at the hearing, that the SOR would have been issued even if he had discussed his non-collectible status during his security interview.

Applicant is now in a better position financially than when he was determined to be non-collectible. Rather than use that improvement to deal with his delinquencies, he has deliberately failed to file his 2010 tax return, in order to avoid disclosing his current finances, jeopardizing his non-collectible status, and becoming liable for his legitimate tax obligations. His willingness to disregard rules and regulations for his own benefit is incompatible with the high standards required of those who are granted security clearances.

A fair and commonsense assessment of the available information shows that Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited guidelines.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline F:	AGAINST Applicant
Subparagraphs 1.a – 1.n:	Against Applicant
Paragraph 2, Guideline E	AGAINST Applicant
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge