



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



In the matter of:)
)
) ISCR Case No. 11-00779
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

October 19, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated Financial Considerations or Personal Conduct security concerns caused by his long history of inaction on his delinquent tax debts. Eligibility for access to classified information is denied.

Statement of the Case

On May 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, Financial Considerations, and E, Personal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective after September 1, 2006.

Applicant answered the SOR on May 23, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 5, 2011. DOHA issued a

notice of hearing on July 14, 2011, and the hearing was convened as scheduled on August 10, 2011. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. The Applicant offered Exhibits (AE) A through C, which were admitted without objection, and testified on his own behalf. The record was held open for Applicant to submit additional information. On August 15, 2011, Applicant submitted an email with five scanned attachments totaling 19 pages, marked collectively as AE D, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 16, 2011.

Findings of Fact

Applicant is a 45-year-old employee of a defense contractor. He has worked for his current employer since 2004. He is married and has two children, ages 8 and 13. (GE 1; Tr. 29-31, 42.)

Applicant was the owner and president of three businesses. His managers “. . . kept hiring employees. So the business had more employees than it could afford to have, which accumulated the payroll tax.” As a result, Applicant incurred tax debts and credit card debts trying to keep his businesses operational. However, by 2002 Applicant closed each of his businesses. He filed Chapter 13 bankruptcy in 1998. Applicant estimates his liabilities listed in his Chapter 13 totaled \$200,000 and included delinquent payroll tax debt owed to both the Federal government and to his state. Applicant made monthly payments ranging between \$2,000 to \$2,500 on his Chapter 13 for approximately two years. In May 2003 Applicant converted the Chapter 13 into a Chapter 7, when he could no longer afford his payments to the trustee because he was still self-employed and he was not earning enough income to pay his bankruptcy obligation and support his family. His Chapter 7 bankruptcy was discharged in August 2003 (SOR allegation 1.a). His delinquent tax debts were not discharged through the Chapter 7 bankruptcy. (GE 2; GE 3; Tr. 21-22, 31-35.)

Applicant was indebted to his state for both delinquent sales tax payments and for payroll tax obligations. In 2002 several liens were filed against him for these delinquent state taxes from the period October 1, 1997 through March 31, 2002 (SOR allegations 1.b, 1.c, 1.d, and 1.e.). Applicant testified that in 2003 or 2004 he satisfied his state sales tax debt. He indicated that he hired several attorneys to help him negotiate his tax debt, but they failed to secure an offer in compromise with the state. The last time he worked with an attorney to try to settle any of his delinquent tax debts was in 2007. In 2010, Applicant made the state an offer to settle this debt, but it was declined. As of May 11, 2011, Applicant owed the state \$14,292.66 in delinquent taxes. Applicant reached an installment agreement with the state in May 2011. On May 16, 2011, he made his first payment of \$1,207.83. He presented copies of his bank statement showing monthly payments of \$1,207.83 in May through July 2011, and additional payments of \$800 in June 2011 and \$598.73 in August 2011. His July 2011 statement reflects a balance of \$11,148 still due. Applicant plans to fully satisfy this debt in 2012. (GEs 2-6; AEs A-D; Tr. 23-24, 27-28, 35-36, 42.)

Applicant is also indebted to the IRS for payroll taxes. A Federal tax lien was filed by the IRS in August 2002 for \$13,570 (SOR allegation 1.f). A recent credit report reflects that the lien was refiled in 2005 for the same amount. Applicant testified that his Federal tax debts were incurred from 1996 to 2001 by his businesses and that as president of the businesses he accepted personal liability for this debt. He indicated that the attorneys he hired to help with his tax debts tried to negotiate with the IRS, but no offer in compromise was established. In 2010 through 2011 Applicant attempted to learn how to submit an offer in compromise to the IRS by himself without the help of an attorney. However, he never submitted a package to the IRS on his own because he felt it was too complicated. Applicant testified he has not communicated with the IRS in the past six months. However, in his Answers to Interrogatories he indicated, "I called the IRS on February 23, 2011, and spoke to [IRS representative] who provided me my actual balance as of 2/2011 is \$75,087.31." He provided Account Transcripts from the IRS establishing the balances from 1996 through 2001. He intends to start making payments on this debt once his state tax debt is satisfied. This debt remains unpaid. (GE 2; GE 3; AE C; Tr. 22-25, 34-37, 46-48.)

Applicant testified that he currently lives within his means. He claims he is able to afford to pay his bills, including car payments of \$600 per month of a 2007 BMW X5 that he purchased in November 2010. He also indicated that he has a savings of \$10,000 for his children's education. He claims no other assets, but noted his wife has retirement savings of \$140,000 and an additional \$9,000 in savings for their children's education. Applicant is current on his consumer obligations listed on his credit report. (GE 4; GE 5; GE 6; Tr. 42-45.)

Applicant testified he operates a non-profit organization, in addition to his full-time employment with the government contractor. The non-profit organization promotes education and conducts multi-cultural activities in high school campuses. He presented no character reference letters or work performance evaluations. (Tr. 26.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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, as follows:

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 concern 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 accumulated delinquent tax debt from 1996 through 2002. He has only recently begun to repay his state tax payroll obligations and has not begun to repay his Federal payroll tax obligations incurred during the same time period. His history of inaction on these debts evidences an unwillingness to pay his delinquent obligations and raises significant security concerns. The evidence is sufficient to raise the above disqualifying conditions.

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's SOR-listed liens have been unsatisfied since they were filed in 2002. He only recently began making payments to the state and has not made any payments on his Federal tax debts. These debts are current and on-going. Further, Applicant has not established that he makes wise financial choices, as he chose to purchase a vehicle and save money instead of using those funds to fulfill his tax obligations.

Applicant failed to show that his delinquent tax debts were due to conditions beyond his control or occurred under such circumstances that further debt is unlikely to recur. He testified that the debts were incurred through poor hiring choices of his managers who failed to satisfy the payroll debts. However, Applicant was president of these companies and knew of the debts since at least his filing of Chapter 13 bankruptcy in 1998. It appears that Applicant took little action on these financial obligations from at least 2007 until 2011. While his recent actions to repay his state tax

debts are noteworthy, given his history of delinquencies it is unclear whether Applicant will follow through with his promises to repay them and his remaining outstanding Federal tax debts. His actions with respect to his debts fail to establish a pattern of responsibility. There is no showing he has initiated a good-faith effort to repay his overdue creditors or otherwise resolve his unpaid debts. AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e) are not mitigating.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant is significantly indebted to the state and Federal government on delinquent tax obligations. He estimated that his Federal tax obligation was approximately \$13,500, but the documentation indicates he owes approximately \$75,087.31. He has done little since 2007 to satisfy this obligation and only began to repay his state tax obligation in May 2011. However, during the same time he was unable to make payments to either the state or the Federal government, he was able to buy a BMW and save money for his children. His choices with respect to his debts and his inability to pay indicate he is potentially vulnerable to exploitation, manipulation, or duress and shows that he has questionable judgment. AG ¶¶ 16(c) and 16(e) apply.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's conduct raises questions about his trustworthiness, judgment and reliability. He has failed to present any character evidence establishing that he is reliable or has rehabilitated himself in any manner. He still is indebted to the IRS for a significant amount and has failed to take action to satisfy that debt thereby reducing his vulnerability to exploitation, manipulation, or duress. I find none of the above mitigating conditions apply.

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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is active in his non-profit organization. However, despite this contribution, he has failed to demonstrate good judgment when it comes to satisfying his financial delinquencies to the state and Federal governments. His choices, with respect to his debts, do not demonstrate the judgment, reliability, or trustworthiness needed to hold a security clearance. There are significant unresolved concerns about Applicant's finances and judgment.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations or Personal Conduct 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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.

Jennifer I. Goldstein
Administrative Judge