



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



In the matter of:)
)
) ISCR Case No. 11-02476
)
Applicant for Security Clearance)
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Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

02/27/2013

Decision

MASON, Paul J., Administrative Judge:

Applicant co-founded a company in July 2002. After assuming responsibility for corporate and payroll taxes in 2007, he incurred payroll tax problems that resulted in State A and State B filing significant tax liens against his company and Applicant in April 2010 and July 2012. Without documented payments to resolve the tax liens and delinquent company credit cards that he guaranteed he would repay, Applicant's evidence in mitigation is insufficient to overcome the security concerns of his financial delinquencies. The personal conduct guideline is found in his favor. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP), identified as Government Exhibit (GE) 1 on June 15, 2010. He was interviewed by an investigator from the Office of Personnel Management (OPM) on July 8, 2010. The interview summary appears in GE 6, Applicant's interrogatory answers, dated May 14, 2012. In response to question 3, Applicant indicated that the interview summary did not accurately reflect the information he provided to the investigator.

Under question 4, Applicant provided additional information about his biological father and that he guaranteed the credit card debt because his company (corporation C) could not pay them. (GE 6 at 196)¹ Applicant indicated in response to question 6 that with his additional information provided under question 4, he agreed with the interview summary and that it could be used at a hearing to determine his security suitability.

On October 2, 2012, the Department of Defense issued (DOD) issued a Statement of Reasons (SOR) detailing security concerns under financial considerations (Guideline F) and personal conduct (Guideline E). The action was taken pursuant to Executive Order 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) implemented by the Department of Defense on September 1, 2006.

Applicant submitted his notarized answer to the SOR on November 1, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 7, 2012, for a hearing on January 4, 2013. The hearing was held as scheduled. Seven Government exhibits (GE 1 through GE 7) were admitted in evidence.² Applicant's objection to GE 3 and GE 5 will be addressed in Rulings on Procedure. Applicant testified. His 17 exhibits (AE A through AE Q) were admitted into evidence without objection. After the hearing, Applicant submitted six additional exhibits (AE R through AE W) that were admitted into evidence without objection. The transcript was received on January 11, 2013. The record closed on January 28, 2013.

Rulings on Procedure

On November 27, 2012, Department Counsel moved to amend the SOR by adding two allegations set forth in GE 7. SOR 1.g alleges a tax lien of \$146,000 entered against Applicant in July 2012 by State A. SOR 1.h alleges a tax lien entered against Applicant by State B in July 2012. On December 17, 2017, Applicant denied both allegations indicating the tax liens were business debts transferred to him as an officer of the company. (GE 7) Department Counsel also moved to strike SOR 1.f. and the reference to SOR 1.f in SOR 2.a. The motion to amend the SOR by adding SOR 1.g and 1.h was granted. The motion to strike SOR 1.f and its reference in SOR 2.a was granted (Tr. 7-9, 14)

Applicant objected to the introduction of GE 3 and GE 5 as representing one lien. Because of the difference in filing numbers, filing dates, and different lien amounts, Department Counsel argued that the basis for Applicant's objection applied to the

¹ Page numbers are located in the lower right-hand corner of the exhibit.

² The seventh exhibit is the Government's motion to amend the SOR dated November 27, 2012.

weight to be assigned these exhibits and not the exhibits' admissibility. The objection was overruled. (Tr. 18-21; GE 2, GE 3, and GE 5)

Findings of Fact

The first paragraph of the SOR contains five allegations under the financial considerations guideline. Applicant denied SOR 1.a, 1.b, 1.c, and 1.f with explanation. He admitted SOR 1.d and 1.e. The second paragraph of the SOR contains three allegations of falsification under the personal conduct guideline. Applicant denied all allegations based on his claim the judgment (SOR 2.a) and the lien (SOR 2.c) were debts of his company. SOR 2.b is resolved in Applicant's favor because SOR 1.c, 1.d, and 1.e were not delinquent when he certified his e-QIP on June 15, 2010. See GE 2.

Applicant is 44 years old. He has been married since August 1992 and has four children. He received a bachelor's degree in computer information systems in March 1999, a master's degree in management information in May 2003, and a PhD in information systems management through the Internet in May 2006. (GE 6 at 199, AE B) He served in the U.S. Army from August 1986 until his honorable discharge in May 1991. He testified he served in the U.S. Army National Guard from 1991 to 2004. (Tr. 63-64) His e-QIP reflects that his Army National Guard service was from 2000 to 2004. (GE 1 at 26) After working for two defense contractors, Applicant co-founded corporation C in July 2002. The projects and accomplishments of corporation C are set forth in AE B.

Financial Problems-Background

Applicant co-founded corporation C with another individual who no longer has any interest in the company.³ Applicant has always been the president and chief executive officer (CEO). He has been the facility security officer (FSO) since 2005. Corporation C was a technology consulting firm providing technology for government, defense and commercial entities. Corporation C was converted to a limited liability company (LLC) in September 2011 with the same business objectives. (Tr. 66; GE 6 at 199, AE B)

From July 2002 until 2007, Applicant testified an in-house accountant handled the corporate taxes for corporation C. In 2007, the accountant was fired after discrepancies were discovered. Applicant took over the responsibility for corporate and payroll taxes. An outside firm began managing the payroll taxes in September 2011, when corporation C was converted to a LLC, and would be receiving assistance from Applicant's wife, a certified public accountant (CPA). Later in his testimony, Applicant indicated that the same outside firm will do the corporate taxes for 2013. (Tr. 81-82, 112, 120)

³ The cofounder operated corporation C's business from July 2002 until his departure in July 2010.

Applicant indicated his current financial difficulties arose in 2008 after corporation C's bank was acquired by a new bank who decided to cancel 80% of their small business credit lines. Being a small business, Corporation C had used approximately \$2 million of a \$3 million dollar credit line. When the credit line was canceled, corporation C lost about \$6 million in contracts. Applicant indicated he put about \$800,000 into corporation C to keep the corporation in business. He claimed he advised the Internal Revenue Service (IRS) and State A (location of Applicant's corporation C) about corporation C's financial problems. Applicant converted corporation C to an LLC so he would be protected from the business taxes of the corporation. (Tr. 58-60; AE F, AE G)

SOR 1.a. In June 2010, a staffing agency filed a \$77,660 judgment against corporation C, the cofounder, and Applicant. Even though Applicant denied the basis of the complaint, he and the cofounder of corporation C paid the judgment in December 2010 under terms set forth in settlement agreement. (GE 2, GE 6 at 207-212, 221-235, AE M; Tr. 41-42, 68-70) SOR 1.a is found in Applicant's favor.

SOR 1.b (State B tax lien - \$30,312) and **SOR 1.h** (State B tax lien - \$35,098) are two separate tax liens filed against Applicant by State B. In April 2010, State B filed a tax lien of approximately \$30,312 against Applicant. (GE 2, GE 3)⁴ Applicant explained that the lien involved withholding taxes of an employee who was working in State A (location of Applicant's corporation C), and was living in State B. For several years, the employee had his State B income taxes withheld from his payroll check. The withholding taxes were never paid to State B. Applicant knows he owes State B at least \$53,000, and contended that when a payment plan is established, the accrued penalties and interest of the lien will be removed. Applicant indicated he was attempting to have the tax lien paid through his restructured LLC. (GE 6 at 200, AE D, AE Q; Tr. 45) He claimed he made some payments on the lien, but did not know how much. (Tr. 78-80) No additional information was provided.

SOR 1.h (State B tax lien - \$35,098). In February 2012, State B entered a tax lien against Applicant. (GE 2, GE 5) As noted in the foregoing paragraph, Applicant knows he owes at least \$53,000 based on his documentation. (AE D) He claimed that once payment arrangements are established, the penalties and interest accrued on the fine will be removed. (Tr. 78-80) No additional information was provided.

SOR 1.c. a delinquent credit card debt in the amount of \$582 was transferred for collection in February 2011. Applicant was not aware the debt was on his credit report, but was working with a debt identification and consolidation law firm to set up a payment plan. The firm did not try to contact the collection agency until they received information

⁴ On February 28, 2012, State B advised Applicant (in an updated tax lien filing) that he was an individual with direct control over the fiscal management of corporation C. Under State B's statute at Section 10-906(d), he was personally responsible for the delinquent taxes of corporation C. (GE 6 at 183)

about the debt from DOHA. (GE 6 at 202; Tr. 70-72) No additional documentary information was provided to show action taken by the firm.

SOR 1.d (\$19,789) and **SOR 1.e.** (\$43, 915) The two allegations are two credit cards supplied by the same creditor. Applicant acknowledged he became the guarantor of the two credit cards (SOR 1.d and 1.e) when business declined and corporation C was unable to pay the credit card bills. The accounts became delinquent in December 2011. The first documented effort to negotiate a settlement occurred in April 2012 when Applicant's debt firm prematurely predicted a settlement would be reached in a few weeks. In October 2012, the debt firm restated their prediction "that the negotiations will be finalized in the next few weeks with a requirement that [Applicant] satisfy the alleged debt via monthly payments." (AE P) On January 17, 2013, the law firm for the creditor's collection agency sent Applicant's debt firm the conditions for settling SOR 1.d and 1.e. (GE 2, GE 5 at 196, GE 6 at 196, 204, 248-249; AE P, AE S) No additional information was provided about whether Applicant accepted the terms of the offer or tendered any payments.

SOR 1.f. The Government moved to strike this allegation from the SOR because the debt was paid and no longer outstanding. This allegation, which involved an earnings claim by a former employee, is resolved in Applicant's favor. (Tr. 7-9, 14; GE 6 at 201)

SOR 1.g (State A tax lien - \$146,000). State A filed a tax lien against Applicant in July 2012. (GE 4) The tax lien was for withholding taxes and applied to tax years 2009, 2010. and 2011. (AE C) Applicant testified that he had not begun to address the tax lien to State A because his initial dispute of the lien was denied and he intended to go through State A's tax agent for assistance in filing an appeal. Applicant surmised the tax rate would be much lower once the correct payroll tax information is uncovered. Applicant observed he would have to resubmit the information. (Tr. 87)

AE C also indicates that State A conducted an additional consumer audit for the tax period of 2004 to 2009 and assessed in 2010. The audit disclosed an additional balance due.⁵ Applicant disputed the audit, but his dispute was denied. He and his current accountant found discrepancies in State A's offer of compromise and were working with State A's tax agent to correct the inaccuracies. (AE C, AE T, AE U; Tr. 83-86) Though Applicant disputed the audit, he provided documentation of a payment plan that he and State A established in February 2011. Under the repayment plan, Applicant was scheduled to make 13 payments, with his first payment of \$2,000 due later in February 2011. Applicant averred he made payments until he could not afford to make additional payments. (AE T, AE W) No evidence of payments was provided.

⁵ The \$111,000 audit balance due is not alleged in SOR 1.g.

Personal Conduct

On June 15, 2010, Applicant certified and signed an e-QIP. He answered “no” to the following financial record questions under section 26 of the form:

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SOR 2.a. Section 26e. “Have you ever had a judgment against you?” Applicant answered “no” to the question because he believed the judgment, which had been entered against him and his corporation C in June 2010, was a debt against corporation C, not Applicant personally. He believed his name appeared on the judgment because he was an officer and registered agent. (Tr. 100; GE 6 at 200)

SOR 2.b. The allegation is found in Applicant’s favor because the three debts were not delinquent when Applicant submitted his e-QIP in June 2010.

SOR 2.c. Section 26e. “Have you had a lien placed against your property for failing to pay taxes or other debts?” Applicant viewed the financial questions on the e-QIP from a business point of view. He considered the tax lien (filed in April 2010) to be a liability of corporation C, and not against him personally. (GE 6 at 200, 283; Tr. 101)

AE J describes the status of Applicant’s Government contract activity as of January 2013. The chart shows the status of funding and payment for each contract. Applicant opined that he would have more contracts and earnings in 2013 because 2012 was a restructuring year. AE L is a profit and loss statement for 2012. Because of the accrual method of accounting, Applicant explained that the \$541,000 of net income has not been completely received from the Government. Once the funds are received, Applicant’s LLC will pay the tax liens and other debts. (Tr. 88-97, 98-100)

On February 7, 2012, the Internal Revenue Service (IRS) advised Applicant by letter that the IRS had received his application for the discharge of a federal tax lien of \$10,755, filed against Applicant and his LLC. The letter identifies the conditions under which Applicant was to receive his discharge. The exhibit contains no certificate of discharge. (AE R)

Character Evidence

On January 4, 2013, the CEO of an LLC authored a character reference for Applicant. Based on 13 years of professional contact, the CEO commended Applicant’s leadership abilities, his researching and documenting practices, and his communication skills. (AE A)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying

conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The disqualifying and mitigating conditions should also be evaluated in the context of nine general factors known as the whole-person concept to bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision for security clearance eligibility. 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 the potential, rather than actual, risk of compromise of classified information.

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 of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Financial Considerations

The security concern for financial considerations is set forth 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

The two pertinent disqualifying conditions under AG ¶ 19 are:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations).

Applicant's history of delinquent debt is substantiated by the credit report, the state tax lien exhibits, State A and B tax documents, and the transcript. Applicant owes State B approximately \$65,000 in state withholding taxes. Applicant owes State A

\$146,000 in withholding taxes. He owes at least \$63,000 in credit card debt. He owes a total of approximately \$274,000 for the delinquent debt identified in SOR 1.b, 1.c, 1.d, 1.e, 1.g, and 1.h. AE ¶¶ 19 (a) and (c) apply.

Four 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 reliability, trustworthiness, and good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control 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.

SOR 1.a and 1.f are mitigated because the judgments have been paid. However, the six other debts have not been resolved. The three state tax liens are less than four years old. The three credit card debts are less than two years delinquent. Applicant's current financial delinquencies preclude a finding that they are unlikely to recur, and continue to cast doubt on his judgment, reliability and trustworthiness. AG ¶ 20(a) does not apply. AG ¶ 20(d) is inapplicable because Applicant has not made a good-faith effort to repay the overdue creditors.

Applicant claims that the problems of corporation C began when they lost their credit line in 2008 causing him to apply approximately \$800,000 of his money to keep the corporation in business. Though he did not specifically discuss the consequences of the lost credit line, it is reasonable to conclude that his business had difficulty paying debts. The business downturn was beyond Applicant's control.

However, the withholding tax issues were a condition within his control because he had been responsible for payroll taxes since 2007. AG ¶ 20(b) is only partially applicable because I conclude he has not acted responsibly under the circumstances to resolve the tax liens and the credit card debts.

Applicant receives limited mitigation under the first prong of AG ¶ 20(c) based on his decision in September 2011 to hire an outside firm to conduct his payroll and withholding taxes, to hire a debt firm, and to obtain the help of his wife. However, even

with the help from three sources, there are six delinquent debts still outstanding. The record does not contain clear evidence the debts are being resolved or under control.

Personal Conduct

The security concern for personal conduct is set forth 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 contains one pertinent disqualifying condition that is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . to . . . determine security clearance eligibility or trustworthiness)

On June 15, 2010, Applicant submitted an e-QIP, but omitted certain information. Under SOR 2.a, he omitted a judgment that was entered against him in June 2010. Under SOR 2.c, he omitted the lien filed against him in April 2010. Having weighed and balanced all the evidence, I find that he did not deliberately fail to disclose the judgment and the tax lien on his e-QIP. I have considered that he had been CEO of corporation C for nearly eight years when he filled out the e-QIP. He had been the FSO since 2005. He knew or should have known that the primary issue of the judgment had been a recurring problem for corporation C. He knew corporation C was experiencing financial problems. However, without more information, I am unable to conclude that he intentionally concealed the judgment on his e-QIP.

I am unable to conclude that Applicant deliberately omitted the State B tax lien that was filed against him two months before he completed his e-QIP. He did not receive State B's legal position concerning his personal tax liability until February 2012, more than 1 ½ years after he submitted his e-QIP. AG ¶ 16(a) does not apply to either SOR 2.a or 2.c.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the financial considerations and personal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following 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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

There is positive evidence supporting Applicant's application for a security clearance. Applicant is 44 years old and is highly educated. He was in the U.S. Army from 1986 until his honorable discharge in 1991. He served in the U.S. Army National Guard for at least four years, ending his service in 2004. He has been married since 1992 and has four children. After working for several defense contractors, he co-founded corporation C in July 2002 and became the CEO. In 2005, he became the FSO. A CEO of an LLC, who has known Applicant professionally for 13 years, praised Applicant's leadership and communications skills.

The foregoing positive evidence does not overcome the negative evidence presented under SOR 1.b, 1.c, 1.d, 1.e, 1.g, and 1.h. Applicant failed to mitigate three tax debts and three credit card debts. The withholding tax issues emerged after Applicant took over the corporation financial responsibility in 2007. When State B filed a tax lien in April 2010 based on withholding tax issues, Applicant knew or should have known that corporation C could not pay the lien. They could also not pay the corporate credit card debt. The withholding tax problem continued to manifest itself in July 2012 when State A and B filed tax liens based on withholding tax issues.

Applicant provided testimony and documentation claiming that he was addressing the corporate and payroll problem. He exercised good judgment in September 2011 when he hired an outside firm to handle his corporate and payroll taxes. However, the hire is also an implied admission that Applicant knew he was not handling the corporate payroll issues properly.

Though Applicant' claimed he made a few small payments on State B's tax lien (SOR 1.b), he provided no documentary evidence to support his payment claim. Though he claimed he made some payments on the tax lien to State A under their February 2011 payment plan, he provided no supporting documentation of payments. Concerning the three delinquent credit cards, Applicant presented no documentary evidence to prove he has taken any action to resolve delinquent credit card debt in SOR 1.c. The documentation presented by Applicant's debt firm and the creditors's collection agency

has negligible probative value because there is no documentation confirming that Applicant made any payments. Having evaluated the evidence under the disqualifying and mitigating conditions, and in the context of the nine general factors of the whole-person concept, I conclude that Applicant has mitigated the security concerns associated with personal conduct, but not the security concerns related to financial considerations.

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

 Subparagraphs 1.a and 1.f: For Applicant

 Subparagraphs 1.b-1.e, 1.g, 1.h: Against Applicant

Paragraph 2: FOR APPLICANT

 Subparagraphs 2.a through 2.c: For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge