



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



In the matter of:)
)
) ISCR Case: 11-02979
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

January 26, 2012

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence, eligibility for access to classified information is denied.

On October 5, 2010, Applicant submitted an Electronic Questionnaire for National Security Positions (SF 86). On July 21, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The action was taken under 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On August 23, 2011, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On September 13, 2011, Department Counsel prepared a File of Relevant Material (FORM) containing ten Items,

and mailed Applicant a complete copy on September 14, 2011. Applicant received the FORM on October 4, 2011, and had 30 days from its receipt to file objections and submit additional information. He did not submit additional documents. On December 1, 2011, DOHA assigned the case to me.

Findings of Fact

In response to the SOR, Applicant admitted the allegations in Paragraph 1. He denied that he intentionally omitted information from his SF 86 as alleged in Paragraph 2. His admissions and statements in response to DOHA interrogatories are incorporated into the following findings.

Applicant is a 37-year-old employee of a defense contractor. He served on active duty in the U.S. Army from 1994 to 2000. He was honorably discharged. He married in 1995 and divorced in 2006. He has one child from that marriage, for whom he pays child support. He began working as a field engineer for his current employer in October 2010. Prior to this position he worked for another defense contractor from September 2004 to August 2010. He was unemployed from August to October 2010. While employed by his former employer, he worked in a hostile fire zone in the Middle East from April 2007 to May 2008. (Item 5.)

In response to Question 26c on his October 5, 2010 SF 86, Applicant disclosed that he failed to file tax returns for 2005 and 2006.¹ He did not disclose that he had not filed tax returns for 2007, 2008, or 2009. In his response to the SOR, he asserted that it was “an oversight” because at the time he completed the SF 86 he was waiting for documents from the Internal Revenue Service necessary to prepare the returns. (Item 4; Item 7 at 6.)

In November 2010, a government investigator interviewed Applicant about delinquent debts, unfiled tax returns, and unpaid taxes. He was familiar with a \$398 delinquent debt owed to a cable company and a \$1,628 delinquent debt owed to a bank. (Item 8 at 8.) He acknowledged that he had not filed his 2005 and 2006 tax returns or paid the taxes. He also indicated that he could not set up a payment plan at the time because he had not filed his returns for 2007, 2008, 2009. (Item 8 at 10.)

On May 18, 2011, Applicant completed a set of Interrogatories. He noted that he paid his 2005 and 2006 taxes on May 16, 2011. He intended to contact an accountant when he returned from the Middle East to prepare the 2007, 2008, and 2009 returns. (Item 7 at 7.)

The July 21, 2011, SOR alleged that Applicant failed to file income tax returns for tax years of 2005, 2006, 2007, 2008, and 2009, and, failed to pay taxes for 2007, 2008, and 2009. Applicant filed the 2005 and 2006 returns and paid the outstanding taxes on May 16, 2011. (Item 7; FORM.) He filed the 2007, 2008, and 2009 returns on

¹The government filed tax liens for 2005 and 2006 on September 16, 2010. (Item 7 at 10.)

August 19, 2011. He owes \$3,000 for 2007, \$4,641 for 2008, and nothing for 2009. He made one payment on the 2007 taxes and applied for a payment agreement for the 2008 taxes. (Item 4.) He did not timely file the 2005 and 2006 returns because he was going through a divorce and working two jobs at the time. From April 2007 to May 2008 he was in the Middle East and unable to monitor his mail or obtain the documents he needed to prepare his taxes. (Item 7 at 2.)

The SOR also alleged that Applicant owed a cable bill for \$398, delinquent since 2008, which he recently paid. (Item 4; Item 7 at 8.) The \$1,626 delinquent debt became delinquent in 2007 and is unpaid. (*Id.*; Item 9 at 8.)

Applicant has not participated in credit counseling. He submitted no character references or other evidence tending to establish his good judgment, trustworthiness, or reliability.

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, 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 Executive Order 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.”

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for Financial Considerations are set out 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.

AG ¶ 19 describes three conditions that could raise a security concern and may be disqualifying in this case:

- a) inability or unwillingness to satisfy debts;

- (c) a history of not meeting financial obligations; and

- (g) failure to file annual , state, or local income tax returns as required or the fraudulent filing of the same.

Applicant has been unable or unwilling to satisfy two delinquent debts since 2007, and failed to timely resolve outstanding tax issues for the years 2005, 2006, 2007, 2008, and 2009. The evidence is sufficient to raise these three disqualifying conditions.

After the Government raised potential disqualifications, the burden shifted to Applicant to rebut or prove mitigation of those security concerns. The guideline includes four conditions that could mitigate security concerns arising from financial considerations in AG ¶ 20:

(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; and

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

Applicant's outstanding income tax problems started in 2005 and continued into 2009. He did not file his 2005 and 2006 returns until May 2011, and the 2007, 2008, and 2009 returns until August 2011. To date, he has not resolved the unpaid taxes for the 2007 and 2008 taxes. Because the tax issues are not isolated and have been ongoing for at least six years, the facts call into question his reliability and cannot trigger the application of AG ¶ 20(a).

Applicant attributed his financial problems to a period of unemployment, divorce, and employment in the Middle East. Those circumstances may have been beyond his control. However, he provided no evidence that he attempted to act responsibly in managing his unpaid taxes or filing overdue tax returns while they were becoming due. AG ¶ 20(b) marginally applies.

Applicant established no mitigation under AG ¶ 20(c). He failed to present evidence that he received credit counseling and that his outstanding tax liabilities and delinquent debt are under control, as required under AG ¶ 20(c). He paid the 2005 and 2006 taxes, albeit in May 2011. He applied for a repayment plan for the 2007 and 2008 taxes, and made one payment on the 2007 taxes. There is no evidence that he has entered into said plan. His dilatory actions regarding the resolution of his tax problems and repayment of a delinquent debt do not warrant the application of AG ¶ 20(d), which requires evidence of good-faith efforts to resolve debts.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concerns pertaining to 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.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying in this case:

(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.

The Government alleged in SOR ¶ 2(a) that Applicant falsified his SF 86 by failing to disclose that he had not filed his income tax returns for 2007, 2008, and 2009, or paid his taxes, thereby raising a potential disqualification under AG ¶ 16(a).

Applicant denied the allegations. He attributed the omission of those three tax years to an oversight because he was waiting for information from the IRS at the time he completed the SF 86. His explanation is not persuasive or credible. He disclosed that he had not filed his 2005 and 2006 tax returns or paid outstanding taxes. He undoubtedly knew that he had not filed the next three years of returns or paid taxes due on them at the time, and had an obligation to reveal the information. His failure to disclose the information does not appear to be the result of a negligent mistake, but rather an intentional decision.

AG ¶ 17 includes three conditions that could mitigate security concerns arising under this guideline:

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

(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; and

(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.

None of the three mitigating conditions apply. The Government learned of Applicant's tax issues for the years 2007, 2008, and 2009 during its interview with him in November 2010. He did not come forward with the information prior to the interview; hence AG ¶ 17(a) does not apply. His intentional non-disclosure is a serious offense and raises questions about his trustworthiness. The evidence does not support the application of AG ¶ 17(c). Because Applicant denied intentional wrongdoing, AG ¶ 17(d) does not 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). They include the following:

(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. Applicant is a mature individual, who honorably served in the military for six years and should be familiar with the necessity of full disclosure and candor when completing government documents. He is responsible for his voluntary choices and conduct that underlie the security concerns set out in the SOR. He demonstrated a five-year history of not meeting income tax obligations from 2005 to 2009, as well as a lack of good judgment and reliability. Despite learning of the Government's concerns in November 2010, he did not begin filing tax returns or paying unpaid taxes until May 2011. Three months later he filed the three outstanding tax returns, but has not begun a repayment plan for his 2007 and 2008 taxes. He has not addressed one large delinquent debt to date. Applicant failed to demonstrate financial rehabilitation, so the likelihood of continuation or recurrence of income tax issues remains a concern. Additionally, his explanation for not disclosing unfiled tax returns was not credible for a former soldier. The record contains insufficient other evidence about his character, trustworthiness, or responsibility to mitigate these concerns.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, he did not mitigate the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge