



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



In the matter of: )  
)  
) ISCR Case No. 11-03908  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro se*

06/08/2012

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Financial Considerations security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

On January 13, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on January 31, 2012, and initially requested a decision without a hearing. He later submitted a written request for a hearing.<sup>1</sup> The case

<sup>1</sup> See Hearing Exhibit (HE) I.

was assigned to me on April 3, 2012. DOHA issued a notice of hearing on April 6, 2012, setting the hearing for April 24, 2012. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence. Applicant objected to GE 2, which was overruled. No other objections were raised. Department Counsel's exhibit index is marked as HE II. Applicant testified and offered exhibits (AE) A through F, which were admitted into evidence without objection. The record was held open for Applicant to submit additional information. Applicant submitted AE G through J, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on May 3, 2012.

### **Findings of Fact**

Applicant is 49 years old and is seeking a security clearance for the first time. He works in the areas of marketing, procurement, and management for his company. He has a bachelor's degree. He has been married for 25 years. He has four children, three that currently live at home and one who is attending college at a service academy. He currently makes about \$60,000, and his wife makes about \$100,000 from their respective employment.<sup>2</sup>

The SOR alleges a single allegation concerning a September 2011 tax lien filed by the IRS against Applicant in the amount of \$147,000. The lien was listed on a credit report dated November 22, 2011. Applicant denied the overall Guideline F concern, but admitted that he had an unresolved tax issue with the IRS.<sup>3</sup>

The lien was placed on Applicant's property for delinquent payroll taxes for the tax period ending September 30, 2000, that were not paid by the company for whom he previously worked. From 1987 to 1998, Applicant worked for a building maintenance company. He was the vice president whose duties included contract management, procurement, and marketing. The owner and president of the company (Mr. TS) retained control over financial matters. Applicant had no authority to bind the company to any liabilities without the president's approval. Mr. TS supplied an affidavit attesting to that fact. Although Applicant could write checks for the company, those checks had to be cleared by the president before disbursement.<sup>4</sup>

While Applicant was still working for his former employer, he sought approval from Mr. TS to pay the payroll taxes the company owed. Mr. TS directed that the money be used for other purposes. As a result, the payroll taxes were not paid for several months, thus incurring a tax liability to the IRS of over \$100,000. Mr. TS was going through a divorce at the same time, and ultimately his wife was awarded half the business assets. In the divorce action, the court pierced the corporate veil and treated the company as a sole proprietorship owned by Mr. TS, thereby justifying the award to his wife. Because the business was essentially dissolved by the divorce order, the

---

<sup>2</sup> Tr. at 6, 52, 53; GE 1.

<sup>3</sup> Answer to SOR; GE 5.

<sup>4</sup> Tr. at 31-33; GE 4; AE G.

business had no funds to pay the taxes. Consequently, Mr. TS, his ex-wife, and Applicant were all assessed liability by the IRS for the payroll tax debt. The lien was first filed against Applicant's property in 2003. The lien was re-filed in November 2011. Additionally, Applicant has had his personal income tax refunds withheld by the IRS for payment towards the payroll tax debt. Applicant believes those amounts approximate \$20,000. Shortly after the 2003 lien was placed on his property, he hired an attorney to contest the matter with the IRS. He has always maintained the position that he was not responsible for the payroll tax liability because he had no control over the company's finances and even though he was a corporate officer, the president and owner held all the authority and he was merely an employee. He believes the divorce court's ruling piercing the corporate veil and treating the company as a sole proprietorship owned by Mr. TS supports his position. Applicant, through counsel, offered to settle the dispute for \$10,000 in January 2008. It was apparently rejected by the IRS because they failed to respond. In a further attempt to resolve the issue with the IRS, in October 2011, he offered an "offer in compromise" based upon doubt as to liability. Applicant has offered to pay \$12,000 through the October 2011 offer in compromise. As of April 2012, the IRS is still considering this offer.<sup>5</sup>

Applicant is current on all his other financial obligations. He does not owe the IRS any amount based upon his personal tax returns. He is active in his community and is an elder in his church.<sup>6</sup>

### **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 that 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

---

<sup>5</sup> Tr. at 27-28, 34-37, 41-44; GE 3-4; AE C, H, I.

<sup>6</sup> AE C, F.

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 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 about 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* Executive Order 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 concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
  
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant had a \$147,000 lien placed upon his property for a tax debt that the IRS has assessed against him for unpaid payroll taxes from 2000. The evidence is sufficient to raise the disqualifying condition stated in AG ¶ 19(a), but since the type of taxes in dispute are federal payroll taxes rather than “annual Federal, state, or local tax returns”, AG ¶ 19(g) is not applicable.

Several 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 experienced financial difficulty because of his position as vice-president in a company that failed to pay federal payroll taxes for a period of time in 1999-2000. He was not the owner of the company and had no control over financial matters unless the owner approved. Applicant no longer works for this company and it is unlikely that this payroll tax situation will recur. Nothing about the inception of the potential tax liability casts doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) is applicable.

Applicant’s tax lien assessment was caused by his former company’s owner/president’s failure to allocate funds to pay the required payroll taxes of the business. Although Applicant could write checks for the company, only the owner could approve the payment of the checks. When the owner failed to pay the payroll taxes owed, this created a condition beyond Applicant’s control. Additionally, Applicant acted reasonably by hiring an attorney to dispute his assessed liability by the IRS and alternatively, to attempt a compromise with them. AG ¶ 20(b) is applicable.

Applicant received legal counseling for the tax issue and he has been working to resolve or settle the issue with the IRS since 2008. He recently sent the IRS a formal offer in compromise to resolve this matter. AG ¶ 20(c) and ¶ 20(d) apply.

Applicant has a reasonable basis to dispute the tax assessment made by the IRS. He provided appropriate documentation to support that dispute. He was not the person in control of the resources to be able to pay the payroll taxes against the wishes of the owner/president of his former company. The company's former owner/president supplied an affidavit corroborating this position. Additionally, Applicant provided evidence that a state court treated his former company as a sole proprietorship for the purposes of a divorce allocation of property, which would relieve Applicant of any tax liability as an officer of the company. AG ¶ 20(e) applies. Applicant met his burden to establish sufficient mitigation evidence under AG ¶ 20 on the lien listed in the SOR.

### **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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I found Applicant to be honest and candid about his former employment situation that led to the IRS lien liability. He has legitimate arguments as to why he is not responsible for the payroll tax liability of his former company. Despite these legitimate arguments, he sought a settlement with the IRS to get this matter resolved. There is also no evidence that Applicant's personal finances have ever been in question. I found nothing to indicate a likelihood that Applicant would find himself in a similar future situation.

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, Guideline F: FOR APPLICANT

Subparagraph 1.a: For Applicant

### **Conclusion**

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

---

Robert E. Coacher  
Administrative Judge