



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



In the matter of:)	
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)	ISCR Case No. 11-09158
Applicant for Security Clearance)	

Appearances

For Government: Alison O' Connell, Esq., Department Counsel
For Applicant: *Pro se*

03/15/2013

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline F (Financial Considerations). The SOR was dated October 17, 2012. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on January 4, 2013. A notice of hearing was issued on January 22, 2013, scheduling the hearing for February 26, 2013. Government Exhibits (GX) 1-4 were admitted into evidence, without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant Exhibits (AX) A-D, which were admitted without objection. The transcript (Tr.) was received on March 5, 2013. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline F (Financial Considerations), with explanations.

Applicant is a 42-year-old project manager employed by a defense contractor. He graduated from high school and started his own business. He is married and has two children. Applicant has never held a security clearance. (GX 1) He has been with his current employer since December 2010. (Tr.44)

The SOR alleges total debts in the amount of \$440,000, which includes federal and state taxes that are owed by Applicant for failure to file income tax returns from 2001 until 2005. He also has a judgment against him that was entered in 2008, and credit card debts. Applicant also admitted that he owes \$45,000 in state and federal taxes for 1999. Applicant's credit reports confirm the debts. (GX 3 and 4)

Applicant owned his own telecommunications business from 1996 until November 2010. He employed as many as 15 employees during the life of the business. Applicant relied heavily on his accountants to manage the fiscal aspect of the business, including payroll, benefits, and tax preparation. He acknowledges that he could have been more active in the process, but left the details to them. He felt he had no reason to question them. His federal and state taxes were filed each year from 1996 until 2000. (Tr. 49) However, they were not filed from 2001 until 2005 as required by law. (SOR 1.a, and 1.b) Applicant takes responsibility for the non-filing of his federal and state taxes. (Tr. 53)

In 2005, Applicant received a notice from the Internal Revenue Service (IRS) informing him that his taxes had not been filed. He received a notice for an audit regarding a payroll tax and his personal taxes. (Tr. 57)

Applicant met with a different accountant to begin addressing the tax issues. He wanted the accountant to focus on his business structure and management of his accounts moving forward so that Applicant could save his business. At the same time, he did hire someone to address the tax issues from 2001 until 2005. Applicant acknowledged that he did not make it his priority to address the early tax issues because he wanted to get his business in order and recover from other financial issues. (Tr. 68) Applicant was credible when he states that he has no idea what happened to the money for the years that the tax returns were not filed. His accountant was later investigated for fraud. Applicant was certain that he had money in the proper account to pay the taxes from 2000 until 2005, but that when he started addressing the issue firsthand the money was not there.

From 2005 until 2010, Applicant admits that he did not have the focus or energy to deal with the federal and state tax issues. He realizes that he also procrastinated. (Tr. 69) Applicant's business eventually failed in 2010. He obtained his current position and focused on his new employment. He believed he needed his energy to transition from a self-employed individual to a company employee. (Tr. 70)

In 2010, Applicant met with an IRS agent to develop a plan to address the federal tax that is due. Initially, a levy was assigned to his account until he completes the filing of all federal tax returns at issue. (GX 2) The levy on Applicant's wages is \$200 bi-monthly. (AX C) The levy began in July 2011.

Applicant explained that his tax returns for 1999 through 2005 and for 2010 returns are being re-filed, as directed by the IRS agent. He was requested to file the federal tax return for 2001 first. He did so last year. (AX D) He believes that by the filing the total amount due drops to \$13,604. At the completion and approval of the federal tax returns, the IRS will evaluate and provide a payment plan that will fit Applicant's budget. (AX A)

Applicant further explained that when the federal tax returns are filed, he will address the state tax returns. Once a final payment structure is in place for the tax returns, he will address the remaining credit card debts and the judgment. Applicant was advised about the option to file for bankruptcy, but he does not wish to take that action. To date, Applicant has started a payment plan for a medical collection of \$904. He makes a monthly payment of \$25.

Applicant explained that in trying to keep his business going with little capital and having contractors who did not always pay him, he began to have financial difficulty. In late 2005. He admits taking a higher risk by spending money to expand personnel and take a risk of buying more equipment so that he could expand the business rather than focus on the outstanding tax obligations from the earlier years. He was credible when he explained that this debt is not the result of poor self-control or improper spending, or unwillingness to abide by laws or regulations, but he now recognizes that his thinking was unclear. His duty was to pay taxes each year as they are due. He noted that he did file his taxes for 2006, 2007, 2008, and 2009. (Tr. 76) He has not filed his tax return for 2010. He claimed that he did not meet with an IRS agent until 2010 because he had to collect all the necessary documentation from the various accountants that he had employed. (Tr. 78) He also has had to pay for accounting services before anyone would help him.

The unpaid judgment of \$14,000 is from 2008. It was due to an auto accident that occurred in 2005. Applicant has not made any payments on this debt. (SOR 1.c) Applicant is disputing a credit card collection account (SOR 1.k) due to hidden charges. He was offered a settlement on the account, but he did not accept it. (Tr. 86) He believes he disputed the account one year ago. He does not want to close the account as he has had it for ten years. He wants to reestablish his credit.

Applicant's current salary is approximately \$120,000. (AX A) . His monthly net income is approximately \$6,502. He uses a budget. He has approximately \$10,000 in his 401-K. However, he has two loans against his 401(k) accounts. (Tr. 90) He is making payments on the loans. Applicant was candid when he stated he did not know how long it would take for him to complete the federal filings. (Tr. 106)

Applicant noted that he and his family tried to make adjustments to their life to curb outgoing expenses. They moved in 2005 and 2010. His rent is now smaller. He tried to be cautious with his spending. However, he wanted to provide for his family.

Applicant's employer testified that Applicant has worked for him approximately two years. He has known Applicant for about seven years both personally and professionally. Applicant disclosed his financial problems with his employer before taking the position in the company. (Tr. 14) He attests to Applicant's integrity, credibility, and ability to protect classified information. Applicant is a valued asset to the company. Applicant's employer has received many letters from clients commending Applicant for his excellent ability to solve their problems. Applicant is highly recommended by his employer for a security clearance. (Tr. 24)

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to 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, 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. 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.

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

(a) inability or unwillingness to satisfy debts;

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

(b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;

(c) a history of not meeting financial obligations;

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

(e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

(f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;

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

(h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and

(i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

Applicant admits to the debt owed to the IRS and to his creditors. The approximate amount of debt is \$440,000. He admitted that he did not file federal and state tax returns from 2001 until 2005. Consequently, the evidence is sufficient to raise disqualifying condition ¶¶ 19(a), 19(c), and 19(g).

AG ¶ 20 provides conditions that could mitigate security concerns:

(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

(f) the affluence resulted from a legal source of income.

Applicant had some financial difficulty and failed to file his required taxes as early as 1999. He has outstanding tax liability in the amount of \$45,000 for the year 1999, in addition to the allegations on the SOR. He owned his own business and left the tax responsibility to the accountants. He admits that he did not learn there was a problem until 2005. At the same time, he did not act responsibly under the circumstances. He began to address the issues somewhat in 2005, but admitted that he put his time and energy in actions to further his business. He did not make the tax issues a priority. He met with an IRS agent in 2010 and has just filed the federal return for 2001. He has a levy of \$400 a month but he still does not have a tax payment plan in place. It will take him some time to file all the required federal tax returns. In addition, he has other delinquent debts and state tax liens. Applicant did file his returns for 2006 until 2009 with the help of a new accountant. However, he has not paid the full amount owed. Part of the reason is that he diverted funds to support other business projects. He admitted that he has procrastinated in resolving the federal and tax issues. Applicant also has other delinquent debt in the form of a 2008 judgment and credit card debt. I find that the financial considerations concerns are not mitigated.

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 an applicant's conduct and all the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case as well as the whole-person factors. Applicant is a 42-year-old employee of defense contractor who has not held a security clearance. He has excellent recommendations from his employer. Applicant owned his own company from 1996 until 2010. He was candid at the hearing and is beginning to address his financial issues.

Applicant did not meet his burden of proof in this case. He has not addressed the financial issues at hand. He has just filed his 2001 federal tax return, but still has the other years (2002 until 2005) and 2010 to complete. Applicant has unresolved state tax liens as well. He has been on notice since 2005 but has procrastinated. He also has other delinquent debts and a judgment. He is not sure when the entire process will be complete. Any doubt must be resolved in favor of the government. He has not mitigated the security concerns under the financial guideline.

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-1.k:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge