



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



In the matter of:)
)
) ISCR Case No. 11-09118
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Todd Conormon, Esq.

12/17/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On April 8, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. 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 DOD on September 1, 2006.

Applicant answered the SOR on September 8, 2014, and requested a hearing before an administrative judge. The case was assigned to me on October 30, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October

31, 2014. I convened the hearing as scheduled on November 20, 2014. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant and three witnesses testified. He offered Applicant Exhibit (AE) A, which was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 3, 2014.

Procedural Issues

Department Counsel moved to withdraw SOR ¶ 1.f. The motion was granted.¹

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b, with explanations. He denied the remaining allegations. His admissions were incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 59 years old. He retired from the military in the paygrade of E-8 after 21 years of service. He married in 1978. He has three grown children. He has worked for a federal contractor since 1996. He held a security clearance while serving on active duty and, except for one year, while working as a contractor.²

Applicant failed to timely file his federal income tax returns for tax years 2001 through 2011. He also failed to file his state income tax returns for the same years. He testified that for the first couple years he did not think he owed money, so he put it off. In about 2002, he received a notice from the Internal Revenue Service (IRS) indicating it was going to file a return on his behalf. He contacted the IRS and was told that he needed to file his tax returns. Sometime in 2002, he enlisted the assistance of a tax service. They sent him forms to complete. He stated he went back and forth with the tax service in an attempt to complete them. He called the tax service for assistance numerous times, but they stopped returning his calls in 2004. Applicant did not file his tax returns at this time.³

In 2007, Applicant sought the assistance of another tax service to help him resolve his tax issues. They sent him forms to complete. He testified they did not help him. He stated they filled out his return, told him that he owed between \$20,000 and \$30,000, said to sign the tax return, and send it in. He asked for their help, but eventually they stopped returning his calls. He did not believe they had done the proper work so he did not file the tax return. He testified he paid them approximately \$8,000. He stated a couple of years later, around 2010, he sent the second tax services some more money to update his information, but nothing was filed. He did not receive his

¹ Tr. 13.

² Tr. 12, 26-33.

³ Tr. 46-51, 63.

completed tax returns from this company until 2010. He did not file them. At some point he learned tax liens were filed against him.⁴

In 2011, Applicant sought help from another tax service. This service assisted Applicant in filing all of his delinquent tax returns. He did not owe money for his federal or state income taxes. With their assistance, he filed a request with the IRS to receive refunds for tax years beyond the three years limitation, due to hardship. He was granted the waiver and received refunds.⁵

Applicant had federal income tax liens filed in November 2011 for tax years 1999, 2001, 2002, 2003, 2004, 2005, and 2006 totaling \$110,501. The federal tax liens were released in January 2014. He had state income tax liens filed in January 2010 for \$11,722, and in October 2009 for \$30,594. Both were canceled in September 2013.⁶

Applicant testified he believed he filed his income tax returns on time from 1995 to 2000. He believed he completed the tax return forms himself. He knew he had a legal obligation to file his income tax returns on time. He testified that other than contacting the IRS in 2002, when he was advised that it would file for him and telling him that he needed to file, he has not contacted the IRS. He did not contact his state regarding his delinquent taxes because it required his federal income tax returns to be completed first. He does not recall if he ever contacted the military legal assistance office.⁷

Applicant was having funds withheld from his pay for taxes throughout the years he was not filing his income tax returns. Applicant never determined each year he did not file his income tax returns whether he would have a tax liability. Applicant testified that he received written notices from the IRS about his failure to file his tax returns in other tax years. Based on the notices, in about 2006, he decreased his exemptions so more money would be withheld, so he would not owe too much for his taxes. Also at some point, he noticed his pay was lower, which he later learned was due to an involuntary garnishment for taxes owed, but he does not know if it was for his federal income taxes or his state income taxes; he assumed it was due to a tax lien.⁸

Applicant's explanation for failing to file his income tax returns was the result of his poor judgment. He stated the first couple of years he was dealing with family issues and did not think he owed money, so he put it off. The other years he did not file were because he "had a lot going on" at home. He was overwhelmed and stated, "I let it get

⁴ Tr. 51-53, 63-67.

⁵ Tr. 52-56, 68.

⁶ Tr. 64, 83; Answer to SOR with attachments.

⁷ Tr. 46, 60-63, 69-73.

⁸ Tr. 46, 78-83, 85-88; GE 2.

the best of me.”⁹ He stated he is embarrassed and humiliated about his failure to file income tax returns. He now has a plan in place and has filed his 2012 and 2013 federal and state income tax returns on time.¹⁰

In Applicant’s answer to the SOR, he stated the reason he failed to file his federal and state income tax returns was because “this was largely due to a series of dishonest and misleading tax attorneys and was further delayed by a number of serious family illnesses and deaths.”

Applicant has faced significant personal challenges in the past. When his wife was 28 years old she was diagnosed with paranoid schizophrenia. He had to make certain that she did not handle the finances because she hid bills. He admitted that the situation was difficult, but he adjusted to it. She is stable with medication, but occasionally has psychotic episodes.¹¹

Applicant’s eldest child, a daughter, is a recovering cocaine addict and suffers from manic depression. She has three children who occasionally live with him when she has problems. Their father is not involved in the children’s lives. Applicant maintains a presence in his grandchildren’s lives to provide a strong father figure.¹²

Applicant’s middle child, a daughter, was also diagnosed as paranoid schizophrenic about three years ago. She takes medication and is stable. She has a three-year-old child. The father was arrested and is in jail. Applicant’s daughter and granddaughter live with him. She was involved in a serious car accident in 2011. She has a job and is hoping to enroll in school. His son is married with a child and is doing well.¹³

Applicant’s mother passed away in 2011, and his father passed away in 2012. His parents lived in another state. As they aged they both had medical issues. He took his grandchildren to visit his parents several times a year because he thought it was important for them.¹⁴

Three witnesses testified on behalf of Applicant. They consider him a dedicated, trustworthy, and honorable man. He possesses a high degree of integrity. He is a family man. Despite all of the problems his family has experienced, he has always been there

⁹ Tr. 91.

¹⁰ Tr. 46, 56-57, 83, 90-91.

¹¹ Tr. 33-38.

¹² Tr. 38-40.

¹³ Tr. 40-43.

¹⁴ Tr. 43-45.

for them. He is an excellent worker who is focused and needs little direction or supervision.¹⁵

Applicant provided numerous character letters. They describe him as an exemplary team member, well-respected, hard-working, honest, focused, trustworthy, reliable, conscientious, professional, dependable, and dedicated.¹⁶ Applicant volunteers extensively at his grandchildren's schools and is involved in their activities.¹⁷

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, which are 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must 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 applicant or proven by Department Counsel and 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

¹⁵ Tr. 94-128.

¹⁶ AE A.

¹⁷ Tr. 39.

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 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.” 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:

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. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file his federal and state income tax returns from 2001 through 2011 on time. State and federal tax liens were filed against him and they remained unresolved until 2014. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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; and

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

Applicant's family has had many serious medical issues, and he has taken care of his wife, children, and grandchildren admirably. He filed his income tax returns on time before 2001. Even if Applicant was overwhelmed by his personal responsibilities, he was evidently aware there were tax services available to assist him. It appears he hired two that were disreputable. Despite his experiences, he was repeatedly reminded of his obligation to file his income tax returns when he received notices from the IRS to do so. Although he had the federal and state tax liens released or canceled, it does not negate the ten years of failing to comply with the law. He only recently resolved these issues. His conduct casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant's testimony that his family' medical and personal issues were overwhelming, and these conditions were beyond his control. In order to fully apply AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. He sought assistance from tax services, but two were disreputable. Applicant gets some credit for seeking their services, but he repeatedly failed to follow through and file his tax returns for ten years. It was not until 2011 that he began to resolve his tax issues, and they were not completely resolved until 2014. I find AG ¶ 20(b) only partially applies.

Applicant filed his 2012 and 2013 federal and state income tax returns on time, and he now has a plan in place. His tax liens were released or canceled. AG ¶¶ 20(c) and 20(d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 conditions that could raise a security concern and may be disqualifying. I find the following one potentially applicable:

(e) personal conduct, 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 knowingly failed to file federal and state income tax returns from 2001 through 2011. That conduct, if known by the public, could affect his community standing. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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 was aware that he was required by law to file federal and state income tax returns. He was repeatedly reminded by the IRS of his obligation, but failed to comply for ten tax years. Although he attempted to complete that obligation by hiring tax services for assistance, he never followed through until 2011, and then did not resolve all tax issues until 2014 when the IRS released their tax lien. Applicant's behavior was not minor or infrequent. He may have had family issues that distracted him, but his failures occurred over a ten-year period. Due to the length of time he ignored his legal obligations, I cannot find this behavior is unlikely to recur. His actions cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply.

Applicant timely filed his tax returns for the past two years and stated he now has a plan in place. He acknowledged his poor judgment. Unfortunately, his past history

causes me to question if he will comply with filing on time in the future. AG ¶ 17(d) does not apply. Applicant has resolved the tax liens, thereby reducing vulnerability to exploitation, manipulation, or duress. AG ¶ 17(e) applies.

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 59 years old. He retired from the military after 21 years of service. He had a successful career working for a federal contractor for the past 18 years and is respected by his supervisors and coworkers. Applicant's failure to file federal and state tax returns for ten years demonstrates a history of consistent non-compliance with one's civic and legal responsibility. While his family's problems contributed to his delinquent behavior, they were not a valid excuse. He consciously and repeatedly chose to ignore his obligations. Although he sought assistance, which was a positive step, he did not follow through with the resolution of his delinquent tax filings when difficulties arose. Despite being reminded by the IRS of his responsibility, he failed to comply. I am not unsympathetic to Applicant's family issues, but they do not absolve him of his personal conduct and raise questions about his reliability and judgment. Overall, the record evidence leaves me with significant questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the financial considerations and personal conduct guidelines.

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.b: | Against Applicant |
| Subparagraphs 1.c-1.e: | For Applicant |
| Subparagraph 1.f: | Withdrawn |
| 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge