



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



In the matter of:)
)
) ISCR Case No. 11-11455
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2013

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 9, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 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 by the DOD on September 1, 2006.

Applicant submitted a notarized response to the SOR on August 10, 2013, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on September 5, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 18, 2013, scheduling the hearing for October 3, 2013. The hearing was cancelled due to the government

shutdown. DOHA issued another notice of hearing on October 21, 2013, scheduling the hearing for October 31, 2013. The case was reassigned to me on October 29, 2013. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on November 8, 2013.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection.

Motion to Amend SOR

Department Counsel moved to amend SOR ¶ 1.a by changing a state tax debt to a tax debt owed to the Internal Revenue Service (IRS). The motion was granted without objection.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor. He seeks to retain his security clearance, which he first attained more than 20 years ago. He has a bachelor's degree, and he attended graduate school, but he did not earn a post-graduate degree. He is twice divorced, and he has four children.¹

Applicant is part owner of a company that is incorporated as a Subchapter S corporation.² There are at least two other owners. One of the owners had a friend who acted as bookkeeper and prepared the corporate tax returns, as well as the owners' individual tax returns. The bookkeeper did not prepare the corporation's tax returns or the owners' individual tax returns for several years. In about 2010, corporate and Applicant's individual tax returns for several tax years were prepared and filed. Applicant stated that the bookkeeper incorrectly subscribed all of the corporation's income to him, instead of dividing it among the owners. Applicant stated that he did not notice the discrepancy because he was heavily involved in a child custody battle. The IRS determined that Applicant owed taxes for several tax years. In July 2011, the IRS filed a \$42,256 tax lien against Applicant.³

¹ Tr. at 23-24, 44, 91-94; GE 1, 2.

² S corporations are corporations that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income. See www.irs.gov/businesses/small/article/0,,id=98263,00.html.

³ Tr. at 28-33, 64-65, 75-77, 86-90; Applicant's response to SOR; GE 2, 4; AE D.

Applicant submitted a Questionnaire for National Security Positions (SF 86) in September 2010. He noted his difficulty in filing his income tax returns and that he had a delinquent \$11,000 tax debt to the IRS. He wrote that “[a]ll returns have been filed and payments to rectify situation have started,” and that “[r]egular payments have been made each month.”⁴

Applicant was interviewed for his background investigation in October 2010 and December 2010. He told the investigator that he received a collection letter from the IRS, and the amount due was about \$40,000. He stated that he had hired an accountant, and he was in the process of researching and negotiating the amount owed. He stated that he did not have an official payment plan, but he was making payments to the IRS every payday. He stated that he intended to pay the total amount in installments. He hoped to have the entire amount paid off in about two years.⁵

From about 2010 through 2012, Applicant went through a contentious and costly custody battle over one of his children. He estimated that it cost him about \$45,000, but he finally obtained custody of the child. Applicant stated that the custody battle added to his financial problems and prevented him from addressing his delinquent taxes.⁶

Applicant responded to DOHA interrogatories in May 2013. In response to a question about his federal tax lien, he checked the box indicating “payments arranged.” In response to a question asking what steps he had taken to resolve his financial issues, he wrote: “Detailed budget now set in place and plan to pay debts established. Have significantly reduced monthly expenses.”⁷

Applicant testified that he paid the IRS about \$4,000 for his tax debt. He admitted that he had not made any payments since about 2011.⁸

Applicant contracted with a tax consulting company in February 2013 to represent him before the IRS. He also has a certified public accountant who is preparing documents for the tax consulting company. He paid the tax consulting company a fee of \$4,350. The company agreed to review his tax records and negotiate with the IRS. Applicant estimated his total debt to the IRS to be about \$47,000. He also indicated that the company may prepare amended tax returns that will lower his tax liability to about \$21,000. Applicant stated that the tax company is close to arriving at an agreement with the IRS. He indicated that he will pay whatever agreement is reached.⁹

⁴ GE 1.

⁵ GE 2.

⁶ Tr. at 25-26, 57-63; GE 2.

⁷ GE 2.

⁸ Tr. at 42, 50.

⁹ Tr. at 26, 37, 68-84, 107-108; AE A.

Applicant filed his 2011 federal income tax return in about September 2013.¹⁰ He stated that he did not owe the IRS anything for that tax year. He stated that he expects to file his 2012 federal income tax return within the next several days. He expects to owe the IRS about \$5,000 for tax year 2012. He indicated that he will pay the amount owed for his 2012 taxes when he files the return.¹¹

Applicant's state tax situation is dubious. He has not filed state income tax returns in the state where he spends the vast amount of his time because he indicated that his "permanent residence" is in another state. He admitted that he likely owes state income taxes. He stated that he will address any delinquent state taxes after he resolves his federal taxes.¹²

A judgment against Applicant of \$1,090 was awarded to a homeowners' association in about May 2012 (SOR ¶ 1.b). Applicant stated this was a business debt. Applicant satisfied the judgment in May 2012. Applicant successfully disputed owing the debts alleged in SOR ¶¶ 1.c and 1.d.¹³

Applicant took a financial course by a nationally-known financial expert through his church. He stated that he is in the process of dissolving the S corporation because he no longer wants to be self-employed or do business with his two co-owners. He has two potential job opportunities that will pay him a lucrative salary.¹⁴

A witness verified Applicant's description of the tax problems caused by his corporation and his corporation's bookkeeper. She praised Applicant's job performance, technical skill, reliability, responsibility, judgment, trustworthiness, and integrity.¹⁵

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 to be used in evaluating an applicant's eligibility for access to classified information.

¹⁰ Any tax issues that were not alleged in the SOR will not be used for disqualification purposes. They may be considered in assessing Applicant's overall financial situation, in the application of mitigating conditions, and in analyzing the "whole person."

¹¹ Tr. at 36-40, 50.

¹² Tr. at 45-49, 68-69, 84-86.

¹³ Tr. at 51-56; Applicant's response to SOR; GE 2-4; AE B-D.

¹⁴ Tr. at 28, 35-36, 41-43, 78-80; AE E.

¹⁵ Tr. at 97-109.

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."

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 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 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 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* 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 under AG ¶ 19. Two are potentially applicable in this case:

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

Applicant has a large tax debt covering a number of tax years. The evidence is sufficient to raise the above disqualifying conditions.

Applicant paid a judgment owed to a homeowner's association, and he successfully disputed two debts. Those issues do not raise security concerns. SOR ¶¶ 1.b, 1.c, and 1.d are concluded for Applicant.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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 relied on his corporation's bookkeeper to prepare his tax returns, and the bookkeeper did not fulfill his responsibilities in a timely manner. However, the responsibility to file his tax returns and pay his taxes ultimately rests on Applicant. Applicant went through a contentious and costly custody battle over one of his children, which cost him about \$45,000. Applicant's tax debt was not caused by conditions that were beyond his control. However, the expensive custody battle, which was beyond his control, impacted his ability to repay the IRS for his back taxes. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances.

Applicant has known since at least 2010 that he had tax problems, and that they were of interest to the DOD. In 2010, he told a background investigator that he did not have an official payment plan, but he was making payments to the IRS every payday. He stated that he hoped to have the entire amount paid off in about two years. He

testified that he had not paid anything toward his delinquent taxes since 2011. He did not file his 2011 federal tax return until recently; he has not filed his 2012 federal tax return; he expects to owe the IRS an additional \$5,000 for 2012; and his state tax situation is at best dubious.

Applicant contracted with a tax consulting company in February 2013 to represent him before the IRS. He stated that the tax company is close to arriving at an agreement with the IRS, and that he will pay whatever agreement is reached. The Appeal Board has held that “intentions to pay off debts in the future are not a substitute for a track record of debt repayment or other responsible approaches.” See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013) (quoting ISCR Case No. 08-08440 at 2 (App. Bd. Sep. 11, 2009)).

There is insufficient evidence for a determination that Applicant’s financial problems will be resolved within a reasonable period. I do not find that he acted responsibly under the circumstances or that he made a good-faith effort to resolve all his financial problems. His financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(d) are not applicable. AG ¶ 20(b) is partially applicable. The first section of AG ¶ 20(c) is applicable; the second section is not. I find that financial concerns remain despite the presence of some mitigation.

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 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 considered Applicant's favorable character evidence. However, his significant unresolved tax problems are inconsistent with the holding of a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated 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:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.d:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge