



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



In the matter of:)
)
) ISCR Case No. 11-13291
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq. Department Counsel
For Applicant:

07/23/2013

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 March 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. 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 April 30, 2013, and requested a hearing before an administrative judge. The case was assigned to me on June 3, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 11, 2013. I

convened the hearing as scheduled by video teleconference on July 10, 2013. The Government offered Exhibits (GE) 1 through 6, and they were admitted into evidence without objection. Applicant testified, and he offered Exhibits (AE) A through C, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on July 18, 2013.

Findings of Fact

Applicant admitted the SOR allegations in ¶ 1. He admitted the allegations in ¶ 2 with explanations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 65 years old. He is twice married. He has been married to his current wife for 43 years. He completed the eighth grade and began working. He has been a heavy equipment operator and truck driver most of his life. His wife works with him.¹

Applicant completed a security clearance application (SCA) and signed it on June 20, 2011. Section 22e: Police Record, asked: "Have you EVER been charged with any offense(s) related to alcohol or drugs?" Applicant answered "no" and failed to disclose his previous charges for driving under the influence of alcohol in 1980, 1991, and 1992. Applicant stated he did not list his prior alcohol arrests because he thought he only had to go back seven years.²

Section 26c asked: "Have you failed to pay Federal, state, or other taxes, or to file a tax return when required by law or ordinance?" Section 26d asked: "Have you had a lien placed against your property for failing to pay taxes or other debts?" Section 26m asked: "Have you been over 180 days delinquent on any debt(s)?" Section 26p asked: "Are you currently delinquent on any Federal debt?" Applicant answered "no" to all of the inquiries above. Applicant denied he intentionally failed to disclose information on this SCA.

In the comment section under Section 26, Applicant wrote the following:

None of these answers currently apply to me as of now, however I did want to disclose that I previously had a debt to the IRS. It was about 12 years ago, and I was negotiating a payment plan when the agent in charge of my case was transferred. My Tax Attorney and I tried to get information, and could not. After all this time I have not received any notices, or had liens put on my property. We assumed they deemed the debt uncollectible. They do hold my refund every year, but nothing shows up on my credit report.³

¹ Tr. 28-31.

² Tr. 22, 24, 34-35.

³ GE 1.

Applicant stated he did not remember writing the above comment under Section 26 of his SCA. He stated he made a mistake. He stated his mistake was not intentional. He did not articulate what his mistake was.⁴

Applicant admitted he failed to file his federal and state income tax returns on time for tax years 2002, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011. He has five federal tax liens totaling approximately \$42,400. He has another five state tax liens totaling approximately \$3,151.⁵

Applicant explained that he had a tax debt approximately 12 years ago that he was unable to pay. He attempted to work out a plan with an IRS agent. The agent was transferred and he had difficulty contacting the agent or someone new to resolve the matter. He stated he never received any correspondence from the IRS so he assumed the debt was not collectable. He stated there were no current tax liens on his credit report. He stated he failed to disclose that he did not file or pay his federal taxes for tax years 2002 to 2011 because he thought he only had to go back seven years. He was unable to explain why he did not disclose the derogatory financial information occurring within the seven-year period.⁶

In Applicant's background interview conducted on August 9, 2011, and which he certified as accurate on January 8, 2013, he told the government investigator that in April 2001 he could not afford to pay the lump sum owed on his federal and state income taxes.⁷ He met with an IRS agent and they worked out a payment plan. The IRS agent was transferred before the payment plan was finalized. Applicant hired two tax attorneys in an effort to locate the agreement or work out a new agreement. They have not been able to do so yet. He admitted to the investigator that he had not filed his federal or state tax returns since 2001 and did not intend to do so until an agreement is reached with the IRS. At the time of his interview, he indicated he had not attempted any other solution to resolve his tax problems. He stated he did not receive any notices from the IRS or the state and any refunds he was entitled to were applied to his debt. Applicant has lived at his current address since 1990.⁸

I did not find Applicant's testimony credible. Applicant deliberately failed to disclose his past alcohol incidents. Applicant deliberately failed to disclose his failure to

⁴ Tr. 36, 38.

⁵ Tr. 24-25-49.

⁶ Tr. 24-25, 36-38, 50-51.

⁷ A review of GE 4 shows tax liens filed as early as 1992, 1993, 1995, and 1997, along with those filed after 2002. GE 4 also shows certain tax liens were released. Applicant stated he does not recall these liens.

⁸ Tr. 40-43; GE 2.

file and pay his taxes. He deliberately provided false and misleading comments on his SCA.

Applicant stated his tax attorney has now filed all of his federal tax returns except 2012. He was unsure if his state tax returns have been filed yet, but he has a tax attorney preparing them. He provided a letter from his tax attorney stating he was retained by Applicant to negotiate settlements regarding his alleged tax debts for both federal and state taxes. The attorney has retained an accountant to prepare Applicant's income tax returns. Once the returns are processed, Applicant's attorney hopes to negotiate a resolution by filing an Offer to Compromise or paying through an installment agreement.⁹

Applicant provided character letters stating he is caring, loving, fair, sharing, peaceful, friendly, polite, loyal, trustworthy, hardworking, and strong. He is considered honest, dependable, and has great respect for his family. He was described as a good worker who does a good job. Applicant and his wife have about \$700 in the bank. He does not have any money withheld from his paycheck for tax purposes.¹⁰

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.

⁹ Tr. 25-26, 39-40, 45; AE B.

¹⁰ Tr. 46-48, 56-58; AE A.

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 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 intentionally failed to file his federal and state tax returns from 2002 through 2011 and failed to pay his federal and state income taxes. I find there is sufficient evidence to raise the above disqualifying conditions.

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;
- (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.

AG ¶ 20(a) is not established because Applicant's debts are numerous, recent, unresolved, and cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 20(b) does not apply. The circumstances of Applicant's financial problems were through his intentional actions in failing to file and pay his federal and state income taxes. He has hired a tax attorney to help him negotiate with the IRS. I find AG ¶ 20(c) is partially applicable. He has not paid any of the delinquent debts and has limited resources. I find AG ¶ 20(d) does not apply. AG ¶ 20(e) does not apply because Applicant did not dispute any of the debts.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern 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 conditions that could raise a security concern and may be disqualifying. I have specifically considered the following:

(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.

Applicant deliberately failed to disclose his alcohol arrests and his failure to file and pay his federal and state income taxes from 2002-2011. I find disqualifying condition (a) applies.

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

(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;

(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's deliberately lied on his SCA and provided misleading comments. I did not find his testimony credible. He did not take timely action to correct his falsification. The offenses are serious and cast doubt on his reliability, trustworthiness, and good judgment. Applicant has not fully and credibly acknowledged his behavior. I find none of the mitigating conditions 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):

(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 that guideline, but some warrant additional comment.

Applicant is 65 years old. He failed to file and pay his federal and state income tax returns from 2002 to 2011. He deliberately failed to disclose his past alcohol offenses, his failure to file his tax returns, and his delinquent debts on his SCA. Overall, the record evidence leaves me with questions and 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.k:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	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