



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



In the matter of:)
)
) ISCR Case No. 12-00410
)
Applicant for Security Clearance)

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

12/09/2013

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On July 23, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken 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 on September 1, 2006.

On August 16, 2013, Applicant answered the SOR and requested a hearing. The case was assigned to me on September 25, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 28, 2013, and the hearing was convened as scheduled on November 20, 2013. At the hearing, Department Counsel

offered Government's Exhibits (GE) 1 through 4. Applicant testified and offered Applicant's Exhibits (AE) A through G. The record was left open until November 27, 2013, for Applicant to submit additional matters. He timely submitted documents that were marked as AE H through BB. All offered exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 2, 2013.

Amendment to the SOR

At the hearing, I amended Paragraph 1 of the SOR to add the following allegation:

- j. You failed to report your income on your 2010 federal income tax return as required by law.

The basis for this amendment is set forth below. Neither party objected to that amendment.¹

Findings of Fact

Applicant is a 35-year-old employee of a defense contractor. He has been working for his current employer since May 2011. He graduated from high school in 1997. He served on active duty in the U.S. Army from May 1997 to December 2003, attained the grade of specialist (E-4), and received an honorable discharge. He married in 2010. His wife is unemployed. He and his wife have a one-year-old child. He thought that he may have held a security clearance in the Army, but was not sure whether he had one.²

The SOR alleged that Applicant failed to file his federal income tax returns for tax years 2009 and 2010 in violation of 26 U.S. Code § 7203 (SOR ¶¶ 1.a and 1.b) and that he had seven delinquent debts, totaling \$15,921. In his answer to the SOR, Applicant admitted four of the alleged debts (SOR ¶¶ 1.d, 1.e, 1.f, and 1.g), totaling \$14,935, and denied the remaining allegations. His admissions are incorporated as findings of fact.³

Applicant attributed his financial problems to a period of underemployment from October 2009 to March 2010. At that time, he had irregular employment and mostly worked part-time performing home repairs. At the hearing, Applicant also acknowledged that he was fiscally irresponsible before his child was born.⁴

SOR ¶¶ 1.a and 1.b – failure to file 2009 and 2010 federal income tax returns. In his answer to the SOR, Applicant provided copies of his federal income tax returns for

¹ Tr. at 70-74.

² Tr. at 5-6, 53-54, 66-68; GE 1.

³ SOR; Applicant's answer to the SOR.

⁴ Tr. at 54-56, 62-63; GE 1.

tax years 2009 and 2010. Those tax returns were signed and dated August 13, 2013. His 2009 federal income tax return reflected that his adjusted gross income was \$19,625 and that he was entitled to a tax refund of \$711. He filed a joint income tax return for 2010 that reflected his and his wife's adjusted gross income was \$2,500 and that they were entitled to a tax refund of \$1,250.⁵

At the hearing, Applicant explained that he worked in Canada for about three months in 2009. He went to tax preparers for assistance in filing his 2009 federal income tax return, but they were not familiar with the rules for reporting foreign earned income. They declined to prepare his income tax return for that year. He testified that he never thought of calling the Internal Revenue Service (IRS) for guidance or assistance.⁶

In about August or September 2011, Applicant again went to a tax preparer for assistance in filing his 2009 federal income tax return. He provided the tax preparer with paperwork for preparing that tax return. He then periodically contacted the tax preparer about the status of that tax return. The tax preparer repeatedly told him that they would get back in touch with him when it was ready, but they failed to do so. In July 2013, the SOR was issued, and he again contacted the tax preparer. At that time, the tax preparer informed him that they lost his paperwork and advised him to contact the IRS to obtain copies of the lost documents. He contacted the IRS, obtained the lost documents, and filed his 2009 federal income tax return on August 13, 2013.⁷

The facts surrounding Applicant's filing of his 2010 federal income tax return are confusing. In responding to interrogatories in April 2013, Applicant was asked if he filed that income tax return, he checked the block "no", but attached a copy of a 2010 Form 1040EZ that was prepared for him and his wife. It was signed by the tax preparer on March 3, 2011, which was within the allotted period for submitting that tax return. Applicant also provided a 2010 IRS *e-file* Signature Authorization form that was also dated and signed by the tax preparer, but was not signed by Applicant or his wife. The 2010 Form 1040EZ reflected that he and his wife had \$10,066 in income. In responding to the interrogatories, he also stated:

2010 I have not turned in because I worked under the table by [named company]. I only made approximately \$3,000.00 total that year. . . . I did jointly file 2010 taxes with my wife, but I did not claim anything due to only making approximately \$3,000 that year.⁸

There is no indication that DOD security clearance adjudicators ever questioned Applicant further about this inconsistency in the interrogatories about whether he filed

⁵ Applicant's answer to the SOR.

⁶ Tr. at 28-34, 63-64; Applicant's answer to the SOR; GE 1, 2, 3.

⁷ Tr. at 28-34, 63-64; Applicant's answer to the SOR; GE 3.

⁸ GE 3. At the hearing, Applicant was not questioned about the Form 1040EZ.

his federal income tax return for 2010. The SOR was issued in July 2013 and, as noted above, alleged that Applicant failed to file his federal income tax return for 2010.⁹

When Applicant sought his 2009 tax documentation from the IRS in July 2013, he also requested his 2010 tax documentation. For 2010, he received from the IRS a document showing that he was paid \$2,500 for a stop-loss reimbursement that pertained to his military service. In August 2013, he filed a joint Form 1040 reporting just the \$2,500 stop-loss reimbursement as their income for 2010. He provided that 2010 Form 1040 in his answer to the SOR.¹⁰

In discussing tax year 2010 at the hearing, Applicant indicated that he did not make much money that year and stated that “most of the money I made was working under the table” for a company. He acknowledged that he did not receive a W-2 Statement or 1099 Form reporting that income and did not include that income on his federal income tax return for 2010. Based on his testimony, I amended the SOR to add the allegation quoted above as SOR ¶ 1.j. When asked whether he was attempting to evade paying his taxes by not reporting that income, Applicant looked shocked. He indicated that he had no intent to violate the law and thought he did not have to report that income. He indicated that the amount he received “under the table” was about \$3,000. He asked if he could redo his income tax return and was advised there is a process for amending federal tax returns. In his post-hearing submission, he provided a Form 1040X that amended his 2010 Form 1040. The amended tax return reported that he and his wife had \$2,788 of income that they had not previously reported. This amendment reflected their total income for 2010 was \$5,288.¹¹ According to IRS Publication 17 for 2010, a married couple filing jointly who were both less than 65 years old did not need to file a 2010 federal income tax return if their gross income was less than \$18,700. The total income that Applicant and his wife reported on their Form 1040EZ and Form 1040X was only \$15,354. Nevertheless, Applicant may still have been required to file for 2010, because Social Security and Medicare taxes most likely were not deducted from his “under the table” pay.¹²

At the hearing, he testified that he had filed his federal income tax returns for 2011 and 2012. In responding to interrogatories, he provided a copy of his 2011 federal income tax return.¹³

⁹ GE 3. At the hearing, Applicant also was not questioned about the Form 1040EZ.

¹⁰ Tr. at 28-34; Applicant’s answer to the SOR; GE 2, 3.

¹¹ The Form 1040X does not appear to have been prepared properly because it did not include his wife’s income of \$10,066 initially reported in the 2010 Form 1040EZ. This error was apparently due to a misunderstanding of the requirements. The transcript indicated that Applicant stated he received \$2,000 “under the table” in 2010. See Tr. at 73. However, I distinctly remember him saying \$3,000 at the hearing. My hearing notes also indicated he said \$3,000.

¹² Tr. at 28- 34, 64-66, 70-74, 82-85; AE V-BB. See <http://www.irs.gov/pub/irs-prior/p17--2010.pdf> at Tables 1-1 and 1-3 for federal income tax filing requirements.

¹³ Tr. at 34; GE 3.

SOR ¶ 1.c – collection account for \$308. This debt was a cellphone account that had a date of last activity of April 2011. In his post-hearing submission, he provided a letter from the collection company showing this debt was paid in full on August 9, 2013.¹⁴

SOR ¶ 1.d – charged-off account for \$5,152. This debt was a motorcycle loan that Applicant acquired in about 2006. His monthly loan payments were about \$300. The date of last activity on this account was December 2007. He still retains possession of the motorcycle, but it is no longer a registered vehicle. He has not yet contacted the creditor to resolve this debt because he intended to address other debts first. He provided bank records showing that he has saved \$1,345 that he intends to use in settling this debt.¹⁵

SOR ¶ 1.e – charged-off account for \$1,449. This allegation is a duplicate of the debt in SOR ¶ 1.f, below.¹⁶

SOR ¶ 1.f – charged-off account for \$850. This debt was a credit card account that was opened in September 2005 and had a date of last activity of October 2008. At the hearing, Applicant provided a letter from a collection agency reflecting that this account was settled in full on October 11, 2013. He testified that he made two payments of \$438 to resolve this debt.¹⁷

SOR ¶ 1.g – charged-off account for \$7,484. This was a debt consolidation loan that was opened in August 2007 and had a date of last activity of November 2011. Applicant indicated that he had not yet contacted this creditor to resolve this debt.¹⁸

SOR ¶ 1.h – collection account for \$483. This was a debt owed to a city for a traffic violation. This account had a date of last activity of December 2008. At the hearing, he provided a document from the collection agency showing that he made two payments in August 2013 to satisfy this debt.¹⁹

¹⁴ Tr. at 34-37; GE 2, 3, 4, 5; AE A, P.

¹⁵ Tr. at 37-41, 60; GE 2, 3, 4, 5; AE D, R.

¹⁶ Tr. at 39-48; GE 2, 3, 4, 5; AE C, O. Of note, AE C reflected that a settled debt had an original account number that matched the debt alleged in SOR ¶ 1.e and had a collection account number that matched the debt alleged in SOR ¶ 1.f.

¹⁷ Tr. at 39-48, 61-62; GE 2, 3, 4; AE C, O.

¹⁸ Tr. at 48-50; GE 2, 3, 4, 5; AE P.

¹⁹ Tr. at 50-51; GE 2, 3, 4; AE B, M. It is noted that AE M indicated that one credit reporting agency is reporting this debt as paid in full, while another is still reporting it as past due.

SOR ¶ 1.i – collection account for \$195. This debt was a utility bill that had a date of last activity of May 2010. In his answer to the SOR, Applicant provided a letter from a creditor showing that this account was paid in full on August 9, 2013.²⁰

Applicant testified that his current annual net income is about \$50,000. In a post-hearing submission, he indicated that his monthly income was \$3,995 and his monthly expenses were about \$3,291, which left him a net monthly remainder of about \$703. He also provided a credit report from November 2013 that reflected he had incurred no new or recent delinquent debts. At the time of the hearing, he stated that he had about \$1,500 in his checking account and about \$1,500 in a 401(k) account.²¹

Applicant indicated that he intended to pay the alleged debts. In his post-hearing submission, he provided a plan for satisfying the debts in SOR ¶¶ 1.d and 1.g by making monthly payments and applying his next tax refund toward those debts. He estimated that he would pay off both debts in the next 12 months.²²

Applicant was open and forthcoming about his finances and debts. I found him to be a credible witness. While on active duty in the Army, he served in Iraq for six months. He was awarded the Air Medal for Valor and that Army Achievement Medal.²³

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

²⁰ Tr. at 51-52; Applicant answer to the SOR; GE 2, 3, 4.

²¹ Tr. at 56-60, 63; AE J, M-T.

²² Tr. at 56-60, 63; GE 2; AE I.

²³ Tr. at 66-68.

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. Four are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (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; and

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

Applicant failed to file his 2009 federal income tax return as required. AG ¶ 19(g) applies to SOR ¶ 1.a.

Applicant filed his 2010 federal income tax return within the set time limits, but did not report the proper amount of his income. He testified that he received income “under the table” in 2010 and initially failed to report that income. When questioned at the hearing about whether he was attempting to evade paying his taxes by not reporting that income, Applicant testified that he never realized he had to report that income and was not attempting to violate the law. I found his testimony credible. His omission in reporting his income was not an attempt to submit a fraudulent tax return or to evade taxes, but due to a lack of understanding of the requirements. He later filed an amended income tax return reporting the “under the table” income. AG ¶ 19(d) does not apply. AG ¶ 19(g) does not apply to SOR ¶ 1.b. I find in favor of Applicant on SOR ¶¶ 1.b and 1.j.

Applicant accumulated delinquent debts over an extended period that he was unable or unwilling to satisfy. AG ¶¶ 19(a) and 19(c) apply to his delinquent debts.

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.

In 2009, Applicant attempted to file his federal income tax return on time, but was unable to find a tax preparer familiar with the rules concerning foreign earned income. In 2011, he provided a tax preparer with his tax paperwork for 2009. Periodically, he checked with the tax preparer about the status of his income tax return and was advised that he would be contacted when the tax return was ready. In about July 2013, he learned the tax preparer lost his paperwork. He contacted the IRS to obtain the missing documents. In August 2013, he filed his federal income tax return for 2009. He always intended to file that tax return. His failure to file that tax return as required by law occurred under circumstances that are unlikely to recur. AG ¶ 20(a) applies to SOR ¶ 1.a.

Even though he experienced periods of underemployment, Applicant admitted that he acted in a fiscally irresponsible manner before the birth of his child. AG ¶ 20(b) does not apply.

Since the issuance of the SOR, Applicant has focused on resolving his delinquent debts. He paid the debts in SOR ¶¶ 1.c, 1.f, 1.h, and 1.i. He testified that he intends to pay the two remaining debts. In his post-hearing submission, he provided a plan for paying them. While it will take a number of months for him to pay those debts, he has shown that he is committed to resolving his financial problems. Additionally, his most recent credit report shows that he is living within his means and has not incurred any recent delinquent debts. I find that AG ¶¶ 20(c) and 20(d) apply.

SOR ¶ 1.e is a duplicate of SOR ¶ 1.f. AG ¶ 20(e) applies to SOR ¶ 1.e.

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.

Applicant served honorably in the Army. He served in Iraq and was awarded an Air Medal for Valor. Since the issuance of the SOR, he has realized the importance of taking care of his financial problems and has taken sufficient steps to show he is committed to resolving his debts. His current financial situation is under control, and his delinquent debts are unlikely to recur. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline F.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.j:	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.

James F. Duffy
Administrative Judge