



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



In the matter of:)
)
-----) ISCR Case No.: 12-00749
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq.
For Applicant: William F. Savarino, Esq.

03/12/2014

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On May 6, 2013, 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.

In a letter dated May 28, 2013, Applicant addressed the SOR allegations and requested a hearing before an administrative judge. On June 21, 2013, an amended SOR correcting errors in the original SOR was issued. The case was assigned to me on July 11, 2013. On July 26, 2013, a notice of hearing was issued setting the hearing for August 15, 2013. The hearing was convened as scheduled. The Government offered nine exhibits (Exs.), which were accepted into the record without objection as Exs. 1-9.

Applicant offered testimony, introduced one witness, and submitted seven documents, which were accepted as Exs. A-G.

Applicant initially was given until August 26, 2013, to submit any additional documents. Applicant later requested an extension to that submission date. Noting no objection from the Government, Applicant was given until September 13, 2013, to submit any additional materials. Following a temporary Government shutdown, Applicant forwarded additional material to the Government on October 11, 2013. Department Counsel forwarded that material to me without objection. It was received on October 16, 2013 as Exs. H-I, and the record was closed. In the interim, the transcript of the proceeding (Tr.) was received on August 21, 2013. Based on my review of the testimony and materials, Applicant failed to meet his burden in mitigating Guideline F security concerns. Security clearance is denied.

Findings of Fact

Appellant is a 54-year-old senior staff specialist who has worked for the same defense contractor since November 2012. He served in the United States military for nearly seven years before being honorably discharged. During his years of service, he attended post-secondary level coursework and completed specialty training in his field. He is married to a defense contractor with a security clearance. She earns about \$20,000 to \$30,000 a year. They have lived in their present home since 1991.

In 2005, Applicant purchased a second home in a distant state in anticipation of a transfer. He did not have time to first sell his current home in order to have cash ready for a down payment on the new home. The required down payment was approximately \$36,000. His employer gave him \$6,000 toward the purchase. Applicant understood that proceeds could be withdrawn from a 401(k) retirement fund for a home purchase, so he withdrew the remaining \$30,000 from his 401(k) account, which had a balance of approximately \$140,000. (Tr. 42, 45) He did not seek financial advice regarding the withdrawal; rather, he completed the related paperwork, including a buyer's statement, and conducted the transaction electronically through his company's retirement account administrator. (Tr. 43) Soon thereafter, the funds were deposited into his bank account.

Applicant was not advised by the administrator that there might be tax repercussions, and he was not aware of any tax implications from the withdrawal. (Tr. 44) He received a 1099 form concerning the transaction. He set it aside to help him prepare his federal tax return, which he performed on a popular tax preparation software program. The employer's contribution toward his home purchase and Applicant's withdrawal from his retirement substantially raised his income for the year, which became an issue in his tax preparation:

. . . (L)ike normally I make 140/150,000 a year. But this put me over \$200,000. But (the tax preparation program) popped up and said "Would you like to do an average?" So I did the average. And then that's what got me. A few years later, the IRS come back and said, "Well, you can't

do that. Because you didn't do something right." And that's where this mess started. And I really don't know what I did wrong . . . if I wouldn't have averaged, I would've been okay. But that's what got me. (Tr. 46)

In 2008, Applicant met with an attorney, who discovered Applicant owed additional taxes because his tax software program's calculation was incorrect. Applicant explained to the IRS what his finances were. He proposed a \$400 a month payment plan toward his tax debt. Under that plan, Applicant states that he reduced his tax debt of about \$18,000 to around \$9,000 over three years. Tr. 48-54, 66; Ex. G. Applicant no longer has his copy of the repayment agreement. (Tr. 100) He testified that the IRS is still working on his tax situation. At issue in the SOR are three federal tax liens: one for \$18,463 filed in 2009, one for \$8,546 filed in February 2009, and one for \$5,597 filed in November 2010. The Applicant's documents fail to clarify whether Applicant's tax debt is related only to his 2005 tax filing and the 401(k) withdrawal or all of Applicant's federal tax debts; the documents also fail to show whether his repayment plan addresses the debts shown in the SOR. (Tr. 57-65, 68, 101; Ex. H)

In 2012, Applicant's state contacted Applicant concerning an estimated tax obligation of about "30 or \$47,000." (Tr. 70) It indicated that this liability was related to Applicant's retirement account withdrawal. As his state tax obligation determination is based on his federal tax filings, adjustments are not expected until after the IRS finishes reviewing his taxes on that issue. (Tr. 70, 101) The state is currently working on this situation. Applicant anticipates negotiating a payment plan with his state if it is still determined he owes taxes. It is unclear as to which of the three state tax liens noted in the SOR is specifically related to the retirement fund withdrawal. The SOR cites to a \$6,127 state tax lien from May 2012, a \$22,182 state tax lien from March 2011, and a \$1,165 state tax medical lien from March 2010. Applicant showed that the latter tax lien materials had his middle initial wrong, but he was otherwise unable to identify the lien. (Tr. 76-77) It is possible that the \$1,165 lien was against Applicant's son. Regardless, evidence was provided showing that the \$1,165 tax lien noted at SOR allegation 1.e was released. (Tr. 107)

The five collection or charged-off accounts at issue in the SOR are:

1.g - Charged-off account for \$1,775. *Unpaid*. This account is shown in Applicant's credit report as having been opened in 2005. Applicant testified he has had three credit card accounts with this lender. Tr. 80. His evidence showed no outstanding balance on those active accounts, which appear to have been opened in 2010, 2011, and 2012, respectively. (Tr. 95-96) He could not connect any of those accounts with the delinquent account at issue, which is reflected on his credit report as charged-off with the balance noted above. Tr. 81-82, 95, 102, 109. No documentation was introduced rebutting the Government's information regarding this alleged debt, which was culled from Applicant's credit report.

1.h - Charged-off account for \$252. *Partially paid.* Applicant stated that he is in repayment on this balance and is otherwise current on this account. (Tr. 85-86; Exs. H-I) He provided evidence the balance has been reduced to \$133.98. (Ex. I)

1.i - Charged-off account for \$827. *Paid.* Applicant provided evidence that this account was paid-off and closed after he paid \$3,100 in 2007. (Tr. 83-84; Ex. A)

1.j – Collection account for \$625. *Unpaid.* Applicant cannot identify this alleged debt. (Tr. 88) After the hearing, it was reported that he contested the obligation noted, but no copy of his dispute was submitted. (Ex. H)

1.k – Collection account for \$277. *Unpaid.* Applicant cannot identify this alleged debt. (Tr. 89) After the hearing, it was reported that he contested the obligation noted, but no copy of his dispute was submitted. (Ex. H)

Applicant first reviewed his credit report about six months before the hearing. At that time, he saw the debts noted in 1.j and 1.k. It occurred to him to “reach out to [those] people to figure out what [the entries] were all about,” but no more than “some calls” were initiated to investigate the matters. (Tr. 90) If they are shown to be his debts, he is willing to pay them. He believes they might be medical bills. (Tr. 91) After the hearing, he wrote that they had been disputed. As previously noted, there is no documentary evidence of his dispute with either creditor.

It is Applicant’s custom to make some amount of payment on any outstanding debts each month. (Tr. 91-92) He does not recall ever foregoing a monthly payment on an obligation. (Tr. 92-93) He was laid off from work from August 2011 until November 2012, during which time he maintained a part-time job that was “pretty good” and enabled him to make “some” payments on his debts. (Tr. 92, 105) He worked in his part-time job 20 to 30 hours per week. Little more is known of this period. He had back surgeries in 2007, 2012, and 2013, for which he had medical insurance coverage through the Department of Veteran’s Affairs. (Tr. 124-125) There is no evidence his medical issues contributed adversely to his financial situation.

Applicant lives modestly and has a reputation for honoring his debts. He is considered thrifty. (Tr. 27-31) Applicant prefers to be a “cash and carry” person who does not use credit regularly. (Tr. 80). He currently maintains about \$475,000 in his 401(k) retirement accounts. He has a checking account and a savings account, which has a balance of about \$1,000. Applicant’s wife maintains her own bank accounts. (Tr. 99) Applicant has a net monthly remainder of about \$500 or \$600. (Tr. 72) He has not had financial counseling.

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 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 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.

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

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that 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 engaging in illegal acts to generate funds.

Here, the Government introduced credible evidence showing Applicant has multiple tax liens and delinquent debts. Such facts are sufficient to invoke two of the financial considerations disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts, and

AG ¶ 19(c): a history of not meeting financial obligations.

Five conditions could mitigate these finance-related security concerns:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

At issue here are three federal tax liens, three state tax liens, and, as reflected on Applicant's credit report, five delinquent consumer accounts. The tax liens amount to over \$60,000. The credit balances represent approximately \$3,750 in consumer debt.

Responsible behavior in the face of circumstances beyond one's control can be a mitigating factor. Applicant testified that he has had multiple back surgeries, but he did not directly relate how his surgeries, recuperations, or underlying medical condition contributed to the debts at issue. It can be logically deduced that his lay-off from his main job from August 2011 through November 2012 had at least some adverse financial repercussions. Lacking additional insight from Applicant, the precise extent to which this period of underemployment adversely affected the delinquent debts at issue is unclear.

It is to his credit, however, that he responsibly maintained a part-time job during this period, thus enabling him to make “some” undefined progress on his obligations. Therefore, AG ¶ 20(b) applies to a limited extent.

There is no documentary evidence showing Applicant has received formal financial counseling. He failed to provide corroborating documentation showing that he formally disputed the debts alleged at 1.j and 1.k after the hearing, debts of which he had knowledge for six months before the hearing. Applicant only provided documentary evidence showing that one consumer debt has been satisfied (1.i) and one state tax lien (1.e) had been released. The remainder of his documentation was either lacking or insufficient to demonstrate either on-going or completed payments plans, or other indications of progress on the remaining obligations at issue in the SOR. Although he should be commended for working with the IRS so diligently, such facts are insufficient to raise any of the remaining mitigating conditions.

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). 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 incorporated my comments under the three guidelines at issue 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 a 54-year-old senior staff specialist. He has worked for the same defense contractor since November 2012. He served in the United States military for nearly seven years before being honorably discharged. While in military service, he completed specialty training in his field and attended some post-secondary classes. He is married.

Alleged in this case are tax liens amounting to over \$60,000 and delinquent consumer credit balances representing approximately \$3,750. Applicant argues that his federal tax debt is the result of a misapplication by his tax preparation software, which, he has been told by the IRS, misapplied his withdrawal of funds from a retirement account. By extension, his state tax filings, which are predicated on his federal tax information, were flagged for review and additional liability was determined. While Applicant provided evidence that he is working with the IRS on some debt, it does not directly connect his efforts to the 2009 and 2010 federal tax liens at issue in the SOR. His state tax lien situation is similarly unclear. His documentation only shows that one state tax lien (noted at 1.e) has been released.

Applicant wrote after the hearing that two consumer debts (1.j and 1.k) had been disputed. He failed, however, to provide documentation reflecting such disputation. His assertions regarding two other SOR allegations (1.g and 1.h) similarly lack proper documentation. Only the debt noted at 1.i is persuasively shown as addressed and satisfied.

The limited corroborating documentation submitted in this case is insufficient to carry Applicant in his burden. The lack of documentation regarding these debts sustains financial considerations security concerns. Therefore, I conclude Applicant failed to mitigate security concerns arising under Guideline F.

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.d:	Against Applicant
Subparagraphs 1.e:	For Applicant
Subparagraphs 1.f-1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraphs 1.j-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. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge