



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



In the matter of:)
)
) ISCR Case No. 12-01173
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: Sean E. Smith, Esq.

03/06/2014

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 September 23, 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 November 14, 2013, and requested a hearing before an administrative judge. The case was assigned to me on January 17, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 30, 2014, scheduling the hearing for February 20, 2014. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 3 were

admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. DOHA received the hearing transcript (Tr.) on March 5, 2014.

Findings of Fact

Applicant is a 40-year-old prospective employee of a defense contractor. He will be hired if he obtains a security clearance. He has a bachelor's degree. He has never married, and he has no children.¹

Applicant held a security clearance when he worked for a defense contractor from 2002 to 2007. His security clearance was revoked because of alcohol problems. He lost his job when his clearance was revoked. He does not currently drink alcohol, and he has not had any alcohol-related incidents since 2007.²

Applicant has not been able to obtain a job that pays well since he lost his contractor job. He has a sales job that appeared to be promising when he accepted the position. He is paid only in commissions, and the large commissions he envisioned when he accepted the job never materialized. He also works a part-time job.³

The SOR alleges that Applicant did not file his federal and state tax returns for tax years 2010, 2011, and 2012 (SOR ¶¶ 1.a and 1.b); that an \$18,944 federal tax lien was filed against him in May 2012 (SOR ¶ 1.c); and that he owed \$7,864 to a collection company on behalf of a bank (SOR ¶ 1.d). Applicant admitted all the allegations.⁴

Applicant borrowed from his 401(k) retirement account when he worked for the defense contractor. When he stopped working at the company, the loan converted to a withdrawal. He also withdrew about \$10,000 from the 401(k) in 2007. Both actions generated tax consequences.⁵

Applicant did not pay all his federal taxes that were due from 2007. The Internal Revenue Service (IRS) filed a tax lien of \$18,944 against him in May 2012. Applicant testified that the tax lien was for his 2007 taxes. He stated that he filed his own return, and he incorrectly filled out the form and noted his withdrawal from the 401(k) as additional taxes owed, as opposed to additional income. He stated that his mistake

¹ Tr. at 20-21, 66; GE 1; AE B.

² Tr. at 53, 58, 66-67, 72; GE 1, 3. Applicant's alcohol problems were not alleged in the SOR and will not be used for disqualification purposes. They may be considered in the application of mitigating conditions.

³ Tr. at 21-23, 43, 55-56; GE 1, 3.

⁴ Applicant's response to SOR.

⁵ Tr. at 32-35, 58-59, 64.

greatly inflated what he actually owed the IRS. He did not have the money to pay what he thought he owed.⁶

Applicant submitted a Questionnaire for National Security Positions (SF 86) on August 30, 2011. He reported that he had a \$627 debt to the IRS that he was “[i]n the process of paying.” He also noted that he had “[f]iled for an extension to file for the 2010 tax year.” He was interviewed for his background investigation on September 19, 2011. He told the investigator he planned to pay the \$627 tax debt within the next month, with assistance from his parents. He stated that his accountant was completing the paperwork for his 2010 tax return, and that he would make a payment plan with the IRS after the return was filed.⁷

Applicant did not file federal and state income tax returns when they were due for tax years 2010, 2011, and 2012. Although his income was low, he thought he would owe taxes if he filed the returns. He stated that he did not file the returns because he did not have the money to pay any taxes that were owed.⁸

Applicant responded to DOHA interrogatories on August 9, 2013. He reported that he had not filed his 2010, 2011, and 2012 federal and state income tax returns.⁹ Regarding his 2007 taxes, he wrote:

I have a debt of roughly \$15,000 due to the Federal Government. I have not entered a payment plan yet. There was an error on my 2007 tax return that inadvertently stated I owed an extra \$10,000 in taxes when in fact, it should've been roughly \$2,500. I am working to correct this mistake with an undetermined tax resolution agency and will enter into a payment plan once the correct tax owed is determined. The \$15,000 figure is grossly inflated due to interest and penalties and will ultimately be significantly reduced.¹⁰

Applicant filed his 2010, 2011, and 2012 federal and state income tax returns in late January and early February 2014. His federal returns reflect that he would have been due refunds from the IRS of \$1,339; \$1,073; and \$679. His state returns reflect refunds due of \$638; \$509; and \$316.¹¹

Applicant filed an amended return for 2007 on February 12, 2014. The amended return reflects a tax liability for the year of \$9,735, with \$3,661 withheld from his wages,

⁶ Tr. at 28-41, 64; Applicant's response to SOR; GE 2.

⁷ GE 1, 3.

⁸ Tr. at 41-42, 50-51; Applicant's response to SOR; GE 3.

⁹ GE 3.

¹⁰ GE 3.

¹¹ Tr. at 42-45, 50-51; AE D-F.

and \$6,074 owed. That figure, even if accurate, does not include interest and penalties. The amended return does not reflect any changes in Applicant's tax liability from what was originally filed.¹² For example the amended return shows:

Adjusted Gross Income as Originally Filed	\$	56,735.00
Adjusted Gross Income Correct Amount	\$	56,735.00
Taxable Income as Originally Filed	\$	47,985.00
Taxable Income Correct Amount	\$	47,985.00
Total Tax as Originally Filed	\$	8,418.00
Total Tax as Originally Filed	\$	8,418.00
Total Payments/Credits Correct Amount	\$	3,661.00
Payment Due	\$	6,074.00 ¹³

Applicant's parents paid \$5,927 in February 2014 as settlement in full for the \$7,864 debt alleged in SOR ¶ 1.d.¹⁴

Applicant has not received formal financial counseling. He lives with his parents, and he has a frugal lifestyle. He stated that his refunds for 2010, 2011, and 2012 will offset some of what he owes the IRS, and that he will make a payment plan to pay whatever the IRS determines he owes. He stated that he has learned from the experience and will file his future income tax returns in a timely manner. Applicant stated that he plans to pay his delinquent taxes with the additional income that will come from his new job.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.

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.

¹² AE C.

¹³ AE C.

¹⁴ Tr. at 53-57; GE 2; AE A.

¹⁵ Tr. at 21-27, 41, 45-50, 66; AE B.

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. The following are potentially applicable in this case:

- (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.

The IRS filed an \$18,944 tax lien against Applicant in May 2012. He owed \$7,864 to a collection company on behalf of a bank. He did not file federal and state income tax returns when they were due for tax years 2010, 2011, and 2012. The above disqualifying conditions are applicable.

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's finances were adversely affected by the loss of his job in 2007. However, he lost his job when his clearance was revoked because of alcohol problems. His job loss was not beyond his control. AG ¶ 20(b) is not applicable.

Applicant's parents paid \$5,927 in February 2014 as settlement in full for the \$7,864 debt alleged in SOR ¶ 1.d. Applicant knew in 2011 that his taxes were a concern to the DOD. He did not file his tax returns after he was interviewed for his background investigation, after he responded to DOHA interrogatories, or after he received the SOR. He did not file his state and federal tax returns for 2010, 2011, and 2012 until late January and early February 2014. The Appeal Board has held that "it is proper for a Judge to consider that an applicant, aware of his debts, has undertaken to address them only after having been advised that his clearance is in jeopardy." See ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013). The returns indicate that he has refunds due for those years. The refunds are insufficient to offset the \$18,944 tax lien filed by the IRS. Applicant filed an amended 2007 return in February 2014. The amended return reflected \$6,074 owed, which does not include interest and penalties. Applicant stated that he plans to pay his delinquent taxes with the additional income that will come from his new job. "[I]ntentions 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)).

Applicant's financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his judgment, reliability, trustworthiness, and ability to comply with laws and regulations. AG ¶¶ 20(a) and 20(d) are not applicable. AG ¶ 20(c) is applicable to the \$7,864 debt alleged in SOR ¶ 1.d, but it is insufficient to mitigate Applicant's irresponsible conduct in shirking his legal obligations. 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.

Applicant has made some strides in addressing his financial problems. 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 the 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
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge