



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 12-02827
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

01/28/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On May 12, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) issued Applicant interrogatories to clarify information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOD could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated August 28, 2013, detailing security concerns for financial considerations under Guideline F, and personal conduct under Guideline E. The action was taken under Executive Order 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) effective in the DOD on September 1, 2006.

Applicant answered the SOR in an undated response received on October 2, 2013. He admitted the two allegations under Guideline F but denied the allegation under Guideline E. Department Counsel was prepared to proceed on October 17, 2013, and the case was assigned to me on October 22, 2013. DOD issued a Notice of Hearing on October 25, 2013, scheduling a hearing for November 19, 2013. I convened the hearing as scheduled. The Government offered six exhibits that I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 6. Applicant testified and offered one exhibit that I marked and admitted into the record without objection as Applicant Exhibit (App. Ex.) A. I left the record open for Applicant to submit additional documents. Applicant timely submitted five documents I marked and admitted into the record without objection as App. Ex. B through F. I received the transcript of the hearing (Tr.) on November 27, 2013.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 47 years old and has been employed as a computer applications engineer for a defense contractor since 2006. His performance evaluation shows that his job performance is excellent. (App. Ex. A, Performance Evaluation, dated March 4, 2013)

Applicant has an associate's degree in computer science awarded in 1998. He has been married three times. He first married in October 1989 and divorced in August 1998. He married again in September 2005 and divorced in 2010. He married for the third time on June 28, 2013, and is still married. He has three children, ages 23, 18, and 8. He pays child support of \$877 a month for the eight-year-old. He is current with his support payments since the funds are withdrawn from his pay. He purchased his home in 2009. His youngest daughter has a medical condition that causes him and his present wife financial problems. (Tr. 23-30)

Applicant served on active duty in the Army from November 1986 until October 1997. In 1997, he was court-martialed for sexual harassment and sentenced to a reduction from staff sergeant (E-6) to sergeant (E-5). However, he accepted an administrative honorable discharge with a reduced rank to private (E-1). Upon leaving the Army in 1997, he immediately started working for defense contractors. He has been consistently employed since leaving the Army. (Tr. 30-33)

The SOR alleges under Guideline F that Applicant filed a Chapter 13 Bankruptcy in August 2012 and the trustee filed a Motion to Dismiss the bankruptcy because Applicant was in arrears on his payments and the Internal Revenue Service (IRS) had filed a claim of unpaid taxes for 2012 (SOR 1.a). The SOR further alleges that Applicant failed to file federal taxes for tax years 2004, 2005, 2010, 2011, and 2012 (SOR 1.b). The SOR alleges under Guideline E that in response to a question on the e-QIP asking if Applicant was delinquent on any federal debt, he responded "no". In fact, he had unpaid federal taxes for tax years 2004, 2005, 2010, and 2011 (SOR 2.a). In his response to the SOR, Applicant stated that he was unable to pay his debts because of

lost income from a part-time job, the cost of his divorce, the requirements to pay child support, and the medical expenses for his daughter. He admitted he had not filed all of his tax returns on-time but all had now been filed, and the taxes were being paid under a plan with the IRS. He also noted that his Chapter 13 bankruptcy was still in effect and his payments were current.

Applicant testified at the hearing that his financial problems were caused by two divorces, loss of income, and the cost of his youngest daughter's illness. (Tr. 33-38) He further noted that all required federal tax returns have been filed, even though they were filed late. However, he has not paid all of the taxes owed. He has a plan with the IRS to pay all federal taxes due prior to tax year 2012. When he purchased his house in 2009, he had to be current with all of his taxes to qualify for a mortgage. He is now working to incorporate the taxes owed after 2009 into his bankruptcy payment plan. (Tr. 34-38)

Applicant testified that he filed a Chapter 13 bankruptcy in August 2012 as a means to keep his house. He started making payments on the plan in September 2012, and the plan was confirmed in February 2013. The first payments were approximately \$660 monthly but increased in July 2013 to approximately \$1,530 after he no longer had two child support payments. Applicant started to fall behind on his payments starting in January 2013 because of additional expenses for his daughter's illness. Applicant testified that he took a loan from his 401K to make a payment of approximately \$1,940 to the trustee to bring the account current. He fell behind on payments again in May 2013. The trustee moved to dismiss the Chapter 13 bankruptcy in August 2013 because Applicant was still in arrears on his payments and the IRS had filed an additional tax deficiency. Applicant received a pay raise, restructured or delayed paying some bills, and received assistance from his wife so he could make a payment to the trustee in September 2013. Applicant testified that his bankruptcy action is still active and payments are current. (Tr. 38-46)

Applicant's personal financial statement presented in response to financial interrogatories shows a net monthly remainder of \$1,087.94. Applicant testified that he used the funds to pay bills that were past due. Some bills are still past due. (Tr. 46-49; Gov. Ex. 3, Response to Financial Interrogatories, dated July 31, 2013, at 3)

Applicant was provided the opportunity to provide his filed tax returns for tax years 2005, 2010, 2011, and 2012, as well as information from the IRS that he has a tax payment plan and the plan is current. He was also to provide updated information from the bankruptcy trustee to verify that his bankruptcy payments are current. (Tr. 51-59, 64-5) In response, Applicant provided a prepared tax return for tax year 2005 showing taxes due of \$4,114. (App. Ex. B, Tax Return dated October 4, 2010) He provided a tax return for tax year 2010 showing taxes owed of \$5,255 prepared by a tax preparer. (App. Ex. C, Tax Return, dated August 15, 2012) He provided tax information from a computer generated tax return that he prepared himself for tax years 2011 and 2012. These returns are not dated or signed. They show taxes owed of \$451 for tax year 2011, and \$2,672 for tax year 2012. (App. Ex. D and E) He provided computer generated payment vouchers for tax year 2013 but no information concerning the payments. (App. Ex. F) Applicant did not provide any information from the IRS of a tax

plan and that payments are current on that tax plan. He also did not provide any information from the bankruptcy trustee that his bankruptcy payments are current.

Applicant claims that he was not aware of any unpaid federal tax debt for tax years 2005, 2010, and 2011 when he completed his e-QIP in May 2011. Applicant claims to have paid the 2005 federal taxes as a requirement to qualify for a mortgage in 2009. He notes he did not recall when he completed the security clearance application that he had unpaid federal taxes for 2010 and 2011. (Tr. 34-37)

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 must be considered 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.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Financial Considerations

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. (AG ¶ 18) An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. However, the security concern is broader than the possibility that an individual might knowingly compromise classified information to raise money. It encompasses concerns about an individual's self-responsibility, trustworthiness, and good judgment. Security clearance adjudications are based on an evaluation of an individual's reliability and trustworthiness. It is not a debt-collection procedure. An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligations to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is at risk and inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

Applicant failed to timely file federal tax returns for tax years 2004, 2005, 2010, 2011, and 2012. He states that he has now filed the federal tax returns even though they were filed late. The returns that Applicant provided indicate that he has a federal income tax debt. Applicant also filed a Chapter 13 Bankruptcy in August 2012, but the payments are in arrears and the bankruptcy trustee filed a motion to dismiss the bankruptcy. Applicant's federal income tax debt and his bankruptcy arrears raise Financial Considerations Disqualifying Conditions AG ¶ 19(a) (inability or unwillingness to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations). The evidence shows a history of both an inability and an unwillingness to satisfy debt. Applicant's failure to file required federal tax returns raises Financial Consideration Disqualifying Condition AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same).

I considered Financial Considerations Mitigating Conditions 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 problems 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); and AG ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or

otherwise resolve debts). For AG ¶ 20(d) to apply, there must be an “ability” to repay the debts, the “desire” to repay, and “evidence” of a good-faith effort to repay. Good faith means acting in a way that shows reasonableness, prudence, and honest adherence to duty and obligation. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. These mitigating conditions do not apply except for AG 19(c). Since Applicant did file a Chapter 13 bankruptcy, he is required to have completed financial counseling.

Applicant claims he was unable to pay his federal tax debt and make his bankruptcy plan payments because of loss of income, his divorce, and the medical expenses for his daughter. He provided no information to establish how these circumstances prevented him from making the payments. In fact, his personal financial statement shows a net monthly remainder of over \$1,000 which indicates he has sufficient income to make the required payments. He included his bankruptcy payments as an expense on his personal financial statement. The circumstances of the debt are within his control and are not unusual. Applicant has been steadily employed since leaving the Army in 1997. He admits he failed to timely file federal income tax returns starting in 2004. He claims that he has now filed all of his tax returns and he has a federal tax debt being paid under a payment plan with the IRS. Applicant purchased his home in 2009 and to qualify for a mortgage, he had to have filed current tax returns. He provided a copy of his 2005 federal tax return but it is dated October 4, 2010, so it could not have been filed to qualify him for a mortgage in 2009. I find that he filed a federal tax return for 2004 that was filed before the mortgage on his home was issued.

Applicant provided copies of the federal tax returns he claims to have filed for tax years 2005, 2010, 2011, and 2012. The tax return he provided for 2005 was filed on October 4, 2010. While he did file this return, it was filed late. The tax returns for tax years 2010, 2011, and 2012 were prepared by a professional tax preparer or by using a computer tax preparation service. These documents are not adequate information to establish the returns were filed with the IRS or that there is a payment plan to pay the taxes owed. There is no information from the IRS that the tax forms were filed and that a tax payment plan has been established. Applicant did not provide sufficient information to meet his burden to establish that he is current with filing his tax returns and that the IRS has agreed to a payment plan for payment of his overdue taxes. Applicant also failed to provide sufficient information from the bankruptcy trustee to verify that he is current with his bankruptcy payments as he claims.

Applicant has not shown a good-faith effort to pay his taxes or meet his bankruptcy plan payments. He has not established a “meaningful track record” of debt payments. Applicant did not manage his financial obligations reasonably and responsibly, and this irresponsible financial conduct is likely to continue. There is ample evidence of irresponsible behavior, poor judgment, and unreliability. Accordingly, Applicant has failed to provide adequate information to mitigate the financial considerations security concerns raised by the federal tax and bankruptcy issues. His present and past management of his financial obligations raises adverse concerns about his trustworthiness, honesty, and good judgment. Based on all of the financial

information available to include the information provided by Applicant, I conclude that Applicant has not mitigated security concerns based on financial considerations.

Personal Conduct

Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified and sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for access to classified information or any other failure to cooperate with this process (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information. Authorization for a security clearance depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified or sensitive information is in the best interest of the United States Government.

On his e-QIP, Appellant stated he was not currently delinquent on any federal debt when in fact he owed back federal taxes. His failure to list the federal taxes he owed raises a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the 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 eligibility or trustworthiness, or award fiduciary responsibilities).

Applicant denied intentional falsification for failing to note his federal tax debt. Applicant stated that he did not recall owing taxes from 2005, 2010 or 2011. In fact, he had only filed his 2005 tax return in October 2010 reflecting federal income taxes owed of \$4,114. He did not file a 2010 federal tax return until August 2012. He admitted he filed his 2011 tax return late. At the time he completed his security clearance application in May 2011, he knew he owed federal taxes since he had filed the 2005 return only a few months earlier in October 2010. He had to realize he would owe federal taxes for 2010 since he had not filed a return for that tax year. He filed his 2011 tax return late so in May 2011 he should have realized he owed a federal tax debt. While there is a security concern for a deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant knew in May 2011 that he had federal tax debt from 2005 and would have federal tax debt for 2010 and 2011 when he finally filed his 2010 and 2011 tax returns. I find Applicant deliberately fail to provide correct and accurate financial information on the security clearance application. He knew of his federal debts and failed to alert the Government to those financial issues. I find against Applicant as to personal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An 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 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 considered that Applicant's job performance is excellent. Applicant has not presented sufficient information to establish that he acted reasonably and responsibly towards his finances. He has not presented sufficient documentation to establish that he filed all of his past due tax returns, that there is an agreed plan with the IRS to pay his past due taxes, and that his Chapter 13 bankruptcy payments are current. His past financial track record does not establish confidence in the responsible management of his financial obligations. This indicates he may not be concerned or act responsibly in regard to classified information. He also deliberately failed to provide accurate and correct information on his security clearance application concerning his current federal debt. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has not mitigated security concerns arising under the financial considerations and personal conduct guidelines. Eligibility for access to classified information is denied.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge