

+



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



In the matter of:)	
)	
)	ISCR Case No. 12-04078
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

01/26/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant used his income to pay his family's expenses and neglected paying his quarterly or estimated federal and state taxes during several tax years. He owes a significant tax debt. Notwithstanding, Applicant established payment plans with the IRS and his state when he filed his taxes or shortly thereafter, and has been somewhat consistent with his payments. He sought the assistance of an attorney and accountant to rectify his situation. He understands he needs to maintain financial responsibility to possess a security clearance. Applicant did not falsify his 2011 SCA. Clearance granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on November 15, 2011. The Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) and Guideline F (financial considerations) on July 2, 2014.¹ Applicant answered the SOR on

¹ The DOD acted 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* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines

July 29, 2014, and requested a hearing before an administrative judge. The case was assigned to me on October 20, 2014. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on November 4, 2014, scheduling a hearing for December 4, 2014.

At the hearing, the Government offered seven exhibits (GE 1 through 7). Applicant testified and submitted one exhibit post-hearing (AE 1 with enclosures marked AE 1.a through AE 1.d). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on December 4, 2014.

Findings of Fact

In his response to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.a through 1.d. He denied the SOR ¶ 2.a allegation. Applicant's admissions are incorporated as findings of fact. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 52-year-old software consultant employed by a defense contractor. Applicant married his wife in 1992. They have a 21-year-old son and twin 18-year-old daughters. He attended college from 1980 to 1985 and received a bachelor's degree in biology. Applicant is a self-employed independent contractor. He has worked for government contractors on and off since 1998. He possessed access to classified information from 1990 to 1991; in 2002 (ten months); and from 2005 to 2008.

Applicant submitted his most recent SCA in November 2011. Section 26 (financial record) of the SCA asked Applicant to disclose whether "in the past seven years (he) failed to pay Federal, state, or other taxes when required by law or ordinance". Applicant answered "Yes," and indicated that he failed to file his "IRS" income tax return for tax year 2010, and estimated his tax debt to be \$12,000. He explained that while between contracts, he was traveling looking for work and his wife failed to mail the income tax return. He filed 30 days late and did not have the money to pay the taxes, but requested a payment arrangement with his filing.

Section 26 of the 2011 SCA also asked Applicant whether there were "any other instances in the past seven years where (he) failed to file or pay Federal, state, or other taxes when required by law or ordinance?" Applicant answered "No" to this question. He failed to disclose that he owed back taxes to his state for tax years 2009 and 2010.

A government investigator interviewed Applicant in December 2011. During the interview, Applicant volunteered that he filed his 2010 taxes late, and that he owed the IRS \$20,000 for tax year 2010 and \$6,000 to his state. He told the investigator that he filed late because he had no money to pay the taxes. Applicant requested to establish a payment plan when he filed the income tax returns.

for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant's background investigation addressed his financial situation, including his history of filing and paying federal and state taxes. Concerning his federal taxes, the investigation revealed that for tax year 2008, Applicant requested an extension to file in April 2009, and made a \$100 payment. He filed his 2008 income tax return in October 2009, and made another \$100 payment. The IRS assessed penalties against Applicant for not pre-paying his taxes, for paying late, and he was charged interest. Applicant established an installment agreement in December 2009, and started to inconsistently pay his back taxes. He completed paying his 2008 taxes in August 2013.

For tax year 2009, Applicant requested an extension to file in April 2010, and made a \$119 payment. He filed his 2009 income tax return in October 2010, and made a \$22,368 payment. He was assessed penalties for not pre-paying his taxes, for paying late, and he was charged interest. Applicant established an installment agreement in December 2010. He paid his 2009 taxes before January 2014.

For tax year 2010, Applicant requested an extension to file in April 2011. He filed his 2010 income tax return in November 2011. He was assessed penalties for not pre-paying his taxes and for late payment of taxes, and was charged interest. Applicant established an installment agreement in May 2012. As of November 2014, he owed the IRS \$48,186 for his 2010 taxes.

For tax year 2011, Applicant requested an extension to file in April 2012, and paid \$3,000. He filed his 2011 income tax return in June 2012. He did not owe taxes for tax year 2011.

For tax year 2012, Applicant requested an extension to file in April 2013. He filed his 2012 income tax return in October 2013. He was assessed a penalty for paying late and was charged interest. As of November 2014, he owed the IRS \$15,693 for his 2012 taxes.

For tax year 2013, Applicant requested an extension to file in April 2014. He filed his 2013 income tax return in October 2014. He was assessed penalties for not pre-paying his taxes and for late payment of taxes, and was charged interest. As of November 2014, he owed the IRS \$20,077 for his 2013 taxes. (GE 3, AE 1.b)

Concerning his delinquent state taxes, Applicant admitted in his answer to the SOR that he owed \$6,822 for tax year 2009 and \$9,557 for tax year 2010. Applicant established an installment agreement in early 2010 to pay his delinquent 2009 taxes. He has since been making somewhat consistent payments. (AE 1.c and 1.d) Applicant's current state tax liability is not clear from the record evidence.

Applicant explained, during his December 2011 interview and at his hearing, that his inability to pay his taxes resulted from him being self-employed and his fluctuating or irregular income. He has been working as an independent contractor (software/technology consultant) since 1998. He was subcontracted by companies to

work on particular contracts. When the contract ended, he went through periods of unemployment between contracts wherein he had no income; he was unemployed from May 2005 to August 2005; September 2007 to November 2007; and February 2008 to April 2008. Applicant has been under contract with his current employer, a government contractor, from November 2011 to present. While between contracts, Applicant was living off his savings and his spouses' income. She works as a teacher's assistant.

Applicant explained that he used his income to pay for his family's living expenses and debts. Applicant's 2011, 2013, and 2014 credit reports reflect no delinquent or late accounts. (GE 4-6) A review of the credit reports show that he has been living within his financial means. Applicant neglected to make quarterly/estimated tax payments to the IRS and his state. When the tax season arrived, sometimes he did not have work or the financial means to pay his income taxes. Notwithstanding, the IRS records show that whenever Applicant did not have the money to pay his taxes, he immediately established payment plans with the IRS and his state to pay his back taxes.

Applicant expressed remorse for his failure to pay his taxes. He averred that he has finally learned his lesson. He retained the services of a tax attorney and an accountant to help him establish quarterly payments to the IRS and his state, and to resolve his tax problems. He testified that he recently established a bank account where he routinely deposits money to pay his quarterly taxes automatically.

Applicant averred that he did not deliberately falsify his 2011 SCA. He claimed that he unintentionally omitted the information. He noted that he disclosed that he owed the IRS back taxes from tax year 2010. Applicant also voluntarily disclosed during his December 2011 interview that he owed the IRS and state back taxes.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern 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 having to engage in illegal acts to generate funds. (AG ¶ 18)

Applicant was 30 days late filing his 2010 federal income tax return. He is indebted to the IRS \$48,186 for tax year 2010; \$15,693 for tax year 2012; and \$20,077 for tax year 2013. He also owes his state around \$16,379 for tax years 2009 and 2010. Financial considerations disqualifying conditions AG ¶ 19(a): "inability or unwillingness to satisfy debts," AG ¶ 19(c): "a history of not meeting financial obligations," and AG ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

- (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;

(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; and

(f) the affluence resulted from a legal source of income.

Financial considerations mitigating condition AG ¶ 20(a) does not apply. Applicant's financial problems are ongoing, and he owes a large debt.

AG ¶ 20(b) applies to some extent. Applicant's periods of unemployment were not completely within his control. He was subject to the financial fluctuations of his employers and the economy. However, he contributed to his own tax problems with his failure to pay estimated taxes or to set a quarterly tax payment system. He should have been more diligent about his legal obligation to timely file and pay his income taxes. He has been confronted with his failure to pay estimated taxes since 2008, when the IRS assessed penalties and interest against him for his failure to pre-pay his taxes and for paying his taxes late. Notwithstanding, he continued his behavior and failed to pre-pay his taxes for tax years 2008, 2010, 2012, and 2013. He also failed to pre-pay his state taxes for tax years 2009 and 2010.

AG ¶ 20(c) and 20(d) apply. Applicant showed some responsibility when he filed his 2010 delinquent income tax return only 30 days late. Moreover, he requested the IRS and state to establish payment plans to pay his delinquent taxes with the submission of his income tax returns or shortly thereafter. Applicant has been paying his back taxes with some regularity. His failure to make more consistent payments appears to be a consequence of his sporadic employment and not due to negligence or disregard of his legal obligations. Applicant retained the services of a tax attorney and an accountant to help him resolve his tax problems. He recently started a quarterly tax payment system to avoid future tax problems. Applicant has a viable payment plan and is making progress paying his back taxes. His credit reports show that he is in control of his financial situation and is not living above his financial means. AG ¶¶ 20(e) and (f) are not applicable to the facts of this case.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

SOR ¶ 2.a alleges that Applicant falsified his 2011 SCA because he failed to disclose in his answer to Section 26 that he owed back taxes to his state for tax years 2009 and 2010. Applicant testified that his failure to disclose his state tax debt was an unintentional omission. When he submitted his 2011 SCA, Applicant had established payment arrangements with the IRS and the state. He was paying back taxes for tax years 2008, 2009, and 2010 on a somewhat consistent basis.

Applicant's omission triggers the applicability of the following disqualifying condition under AG ¶ 16:

(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.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

I note that Applicant disclosed in his 2011 SCA that he owed the IRS back taxes. He also voluntarily disclosed during his December 2011 interview that he owed the IRS and his state back taxes. Applicant established payment plans to pay his back taxes when he filed his income tax returns or shortly thereafter, and he has been making somewhat consistent payments since 2008. Because of his experience working for government contractors and possessing a clearance, Applicant knew that the Government would have access to his tax and financial records. Considering the evidence as a whole, and having observed Applicant's demeanor while testifying, I find that Applicant's omissions were not made with the intent to mislead the Government or to falsify his SCA.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant, 52, is a self-employed independent contractor. He has worked for numerous defense contractors since 1998. Applicant used his income to pay for his family's day-to-day living expenses and neglected paying his quarterly or estimated federal and state taxes during several tax years. He owes a significant tax debt to the IRS and state. When he filed his income tax returns, or shortly thereafter, Applicant established payment plans with the IRS and his state. He has been somewhat consistent paying his back taxes since 2008.

Considering the evidence as a whole, I find that Applicant should have been more responsible fulfilling his tax responsibilities. Notwithstanding, Applicant acknowledged his negligence and his mistakes. He obtained the assistance of an attorney and an accountant to help him change his behavior and to resolve his tax problems. His credit reports show no other delinquent or late financial obligations. He appears to be living within his means. His financial practices, although misguided, do not indicate a lack of financial responsibility or an unwillingness to comply with the law.

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:	FOR APPLICANT
Subparagraphs 1.a -1.d:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge