



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



In the matter of:)
)
) ISCR Case No: 15-00797
)
)
Applicant for Security Clearance)

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2017

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the security concerns related to his failure to timely file Federal income tax returns and pay delinquent debts. Eligibility for access to classified information is granted.

Statement of the Case

On March 24, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) 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 for Determining Eligibility for Access to Classified Information* effective within the DOD on September 1, 2006.

Applicant answered the SOR in writing (Answer) on May 2, 2016, and requested a hearing before an administrative judge. On September 8, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

On November 15, 2016, DOHA issued a Notice of Hearing setting the case for December 7, 2016. The case proceeded as scheduled. Department Counsel offered GE 1 through 3 into evidence. Applicant testified and offered Applicant Exhibits (AE) 1 through 10 into evidence. All exhibits were admitted without objections. DOHA received the hearing transcript of this proceeding (Tr.) on December 16, 2016.

Findings of Fact

Applicant admitted the allegations in the SOR ¶¶ 1.a, 1.b, 1.c and 1.f. He denied the allegations in the SOR ¶¶ 1.d and 1.e. (Answer.) His admissions are incorporated into these findings of fact.

Applicant is 40 years old and divorced since July 2012. He and his former wife have three children. He enlisted in the Air Force in 1998 and was honorably discharged in 2007 as an E-6. He has held a security clearance since serving in the military. In 2006, he earned a bachelor's degree. (Tr. 9, 19-23.)

Applicant has worked for his current employer since June 2007. On July 31, 2014, he submitted a security clearance application (SF-86) for re-investigation. In response to questions about his financial record, Applicant disclosed delinquent debts, and his failure to file Federal tax returns for 2009, 2010, 2011, 2012, and 2013, along with extensive explanations.¹ In October 2014, a government investigator interviewed Applicant about his background and disclosures. Applicant explained that his previous marital situation contributed to his financial and tax issues. He said he filed those returns in July 2014. Based on his disclosures, the March 2016 SOR alleged five delinquent debts and Applicant's failure to file Federal tax returns for 2009, 2010, 2011, 2012, and 2013 until August 2014.² (GE 1, 3.)

Applicant explained that a separation from his former wife and a contentious divorce underlie the financial security concerns. In June 2008, Applicant and his wife separated. In April 2010, they signed a collaborative law settlement agreement (CLA) to resolve matters related to their impending dissolution of marriage. During meetings related to negotiating the CLA, they agreed to file 2009 tax returns in compliance with Federal requirements. For 2010, they agreed to file separate returns. Applicant's wife would be entitled to take the annual deduction for their two oldest children, and Applicant would take a deduction for their youngest child. (Tr. 25, 27-28; Answer.)

¹ Applicant lives in a state that does not have income tax, so reference to state tax returns is irrelevant.

² In his Answer, Applicant stated that he filed all tax returns "in or around August 2014." (Answer.) The SOR referenced August 2014, as the month he filed the returns.

In the fall of 2011, Applicant withdrew from the CLA due to disagreements with his former wife and his desire to initiate the divorce proceeding. Afterward, Applicant's attorney advised him not to take any action to repudiate the CLA. Applicant interpreted that as including filing tax returns that did not comply with the terms of the CLA. Between 2010 and 2012, Applicant's ex-wife refused to execute a federal tax document releasing their youngest child as an exemption, as previously agreed. Based on her failure to cooperate and provide the form, Applicant thought he was unable to file his Federal tax returns, and instead decided to have more money withheld from his paychecks to cover any outstanding taxes. (Tr. 29-31.)

In July 2012, the court held a hearing on Applicant's divorce. At the hearing, Applicant learned that his former wife took all three children as exemptions on her 2009 and 2010 tax returns, which was the reason she refused to sign the forms. On July 13, 2012, the court entered an order granting Applicant's divorce and finalizing a marital settlement agreement (MLA), which incorporated the CLA's terms. Despite agreeing to execute the child tax exemptions, Applicant's ex-wife did not give him those Federal forms until April 2014. Between the date of the divorce and the date she provided Applicant with the documents, he did not file Federal tax returns because he did not want to breach the MLA. He explained that he contacted the Internal Revenue Service (IRS) about the situation at one point. The IRS told him that it did not rely on state divorce decrees, and only abided by federal release documents. (Tr. 31-33.)

Applicant spoke to his lawyer about his tax filing dilemma. The lawyer told Applicant he could file an action to enforce the marital agreement, which would cost additional legal fees. Applicant chose not to do that, as the costs of the divorce had risen to about \$20,000. He admitted that he did not consult a tax specialist after July 13, 2012, for filing advice. He thought depositing additional monies with the IRS to cover unknown taxes was more important than filing returns. (Tr. 34-35.)

In April 2014, Applicant's ex-wife signed the required child exemption forms. In August 2014, he filed the 2009, 2010, 2011, 2012, and 2013 Federal tax returns. He timely filed his 2014 and 2015 taxes. He owed some money for 2009 and 2010, and received a refund for 2014 and 2015. He has since resolved all taxes. He does not owe the IRS money. (Tr. 36-38.)

The SOR also alleged five debts that became delinquent between 2010 and 2013, and totaled \$15,996. (GE 2.) The status of each debt is as follows:

(1.a) The \$485 credit card debt was paid on April 15, 2016. It was a joint account with his former wife that was charged off in 2013. (Tr. 39; Answer.)

(1.b) The \$15,077 credit card debt is being paid monthly. The original debt was \$16,252. Between 2012 and 2013, Applicant paid \$1,175 toward the debt. He then stopped because he was unable to afford the payments. In May 2016, he resumed monthly payments of \$100. As of November 2016, he reduced the

balance to \$13,477. He intends to continue those payments until the debt is paid. (Tr. 40-43; Answer; AE 10.) It is being resolved.

(1.c) The \$197 cell phone debt was paid on April 15, 2016. It was a joint account with his former wife that became delinquent in 2012. (Tr. 39; Answer.)

(1.d) The \$136 medical bill was paid on January 4, 2016. It was a joint account Applicant had with his former wife that became delinquent in 2010. (Tr. 39; Answer.)

(1.e) The \$101 cable bill was paid on November 30, 2015. It was a joint account Applicant had with his former wife that became delinquent in 2013. (Tr. 39; Answer.)

In September 2015, Applicant started an online and well-known debt reduction and budgeting course. He completed it in November 2015, and began implementing its principles. He established a detailed budget with a debt repayment plan. In accordance with that plan, he prioritized repayments of debts from the smallest to the largest. Based on that plan, Applicant is paying off the large credit card debt last. (Tr. 40-42, 49-50; AE 4, 5, 6.)

After deducting child support, Applicant's net monthly income is \$5,532, and his expenses are about \$3,200. In addition, he pays \$936 for other obligations: a car loan, a legal bill from his divorce, a \$683 property settlement obligation, and the \$100 repayment to his credit card. He has about \$1,300 remaining at the end of the month for other expenses. In July 2017 his property division obligation terminates, which will give him additional money to pay debts. He has no financial difficulty staying current on his expenses and saving money. (Tr. 44, 49; AE 7, 8.)

Applicant's supervisor is aware of this proceeding and the underlying financial issues. (Tr. 23.) Applicant submitted copies of various achievement awards he received from his employer from 2009 through 2015. He summarized his performance year ratings from 2007 through 2015. For five of those ten years, he received an "exceeds" rating; one year he received a "far exceeds" rating. The other four years he met requirements. (AE 2.)

Applicant understands now that his failure to file tax returns raised a security concern. He said, "I thought I was doing the right thing [for purposes of the divorce action] by not filing them and having more money taken out." (Tr. 48.) He appreciated the seriousness of this situation and expressed remorse.

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 (AG) list

potentially disqualifying and mitigating conditions, which are useful 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 AG ¶ 2(a), describing 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or 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. Section 7 of EO 10865 provides that an adverse decision shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.³

AG ¶ 19 notes three disqualifying conditions that could potentially raise security concerns 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.

Applicant had five delinquent debts that he was unable to resolve until 2015 and 2016. He failed to timely file Federal tax returns for 2009, 2010, 2011, 2012, and 2013, until 2014. The evidence is sufficient to raise the above disqualifying conditions.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out four conditions that could potentially mitigate financial security concerns under this guideline:

- (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;

³ See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

(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 history of failing to file Federal tax returns spanned five years, from 2009 through 2013. That situation arose while he was in the process of divorcing and subsequent to the divorce. Those circumstances are unlikely to recur, as they were resolved in August 2014. He began resolving five delinquent debts between 2015 and 2016, four of which were joint accounts with his ex-wife and were paid by him. These circumstances do not cast doubt on his current judgment and reliability. The evidence establishes mitigation under AG ¶ 20(a).

There is some evidence to conclude that circumstances beyond Applicant's control contributed to his failing to timely filing Federal tax returns for 2009 through 2013. However, he could have more diligently sought professional tax advice to help resolve the tax issues during those five years. His belief that paying additional money toward taxes was a method for mitigating the failure to file returns has some credibility. AG ¶ 20(b) has limited application.

The evidence establishes some mitigation under AG ¶ 20(c). As of August 2014, Applicant filed all delinquent Federal tax returns. He timely filed his 2014 and 2015 Federal returns. All taxes are paid. He paid four of the five alleged debts, and is making regular monthly payments toward the remaining debt. He closely monitors his budget and pays all ongoing expenses, following precepts learned during his online financial management course. The security concerns raised in the SOR are under control.

Applicant did not submit evidence that he took good-faith steps to file delinquent Federal tax returns until August 2014, when he filed the outstanding returns. He tried to mitigate his lack of action by depositing additional money with the IRS. AG ¶ 20(d) applies minimally to the tax allegations. In 2011, he completed a budgeting and debt reduction course. He subsequently established a detailed budget and repayment plan to systematically resolve debts and manage expenses. Those actions demonstrated a good-faith attempt to resolve delinquent debts. AG ¶ 20(d) provides mitigation for the five SOR-alleged debts.

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). They include the following:

(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) 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 include 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 facts and circumstances surrounding this case. Applicant is an intelligent, educated, 40-year-old man, who honorably served in the military for almost ten years. Since 2007, he has successfully worked for his employer, as documented by nine years of commendable performance evaluations, including periods relevant to this case. He has held a security clearance since his enlistment in 1998. He is dedicated to his current job. He honestly disclosed, in an SF-86, his Federal tax return issues and delinquent debts. These are positive factors in the analysis of the whole person.

In 2008, Applicant's marital problems developed. In 2010, he and his former wife attempted to resolve their differences through a CLA, which included provisions for tax exemptions related to their children. Subsequently, Applicant's wife reneged on her obligation to execute an IRS form that Applicant needed to file Federal tax returns. She did not sign the form until April 2014, almost two years after their divorce.

During the intervening years, Applicant was overly cautious about complying with the CLA and MLA. He did not want to violate their terms by filing tax returns without a child exemption release. He based that belief on his attorney's advice not to repudiate the terms of those agreements, and on a call to the IRS, which informed him of its position on federal exemptions and state divorce decrees. In order to guard against a tax liability for unfilled years, he had additional monies withheld from his paychecks and deposited with the IRS. Obviously, Applicant misunderstood his attorney's advice and his underlying legal obligations under the IRS tax code.

Applicant admitted, with remorse, that he made a serious mistake by not timely filing Federal tax returns for 2009 through 2013. He understands he should have filed all Federal tax returns, and filed amended returns later, if necessary. He timely filed 2014 and 2015 Federal tax returns. He has paid any monies owed to the IRS. He has also paid four of the five alleged debts, and is resolving the fifth debt. He is establishing a record of managing financial obligations. There is sufficient evidence suggesting that Applicant will continue to responsibly comply with his tax obligations in the future and that similar problems will not recur.

In many cases, failure to file timely Federal tax returns for five years would preclude a finding in favor of an applicant. However, after listening to Applicant testify and observing his demeanor, I find his explanations both credible and reasonable. He was not attempting to avoid his responsibility to file or pay taxes, or hide information from the government. His focus on with complying with the legal terms set out in marital settlement agreements, while misguided on the issue of filing tax returns, was his primary concern. This was understandable, given the contentious situation he and his former wife were in for several years.

The record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. Applicant mitigated the security concerns arising under the financial considerations guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

| | |
|--------------------------------|---------------|
| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraphs 1.a through 1.f: | For Applicant |

Conclusion

In light of all circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

SHARI DAM
Administrative Judge