



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



In the matter of:)
)
) ISCR Case No. 15-01173
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

08/08/2016

Decision

LYNCH, Noreen A., Administrative Judge:

On October 27, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant listing security concerns arising under Guideline F (Financial Considerations). 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), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on April 11, 2016. A notice of hearing was issued on May 19, 2016, scheduling the hearing for June 21, 2016, but was rescheduled for June 28 for good cause. Government Exhibits (GX) 1-3 were admitted into evidence without objection. Applicant testified, but did not submit any exhibits at the hearing. I kept the record open until July 21, 2016, for additional documentation. Applicant requested another extension, which was granted. He submitted a packet of three documents, which was received into the record without objection and marked as exhibit (AX) A. The transcript was received on July 7, 2016. Based on a review of the

pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the SOR allegations under Guideline F, with explanations for each alleged debt.

Applicant is 54 years old. He obtained his undergraduate degree from a military academy. Applicant is married and has three children. He has owned his own company since 2009. He served in the United States Marine Corps (USMC) from December 2001 until March 2008 when he received an honorable discharge. He also served in the Reserves. He completed a security clearance application in 2012. (GX 1) He has held a security clearance since the 1980's. (GX 1)

The SOR alleges indebtedness to the Federal Government in the approximate amount of \$151,000 for past-due taxes for tax years 2009-2012; indebtedness to the state in the approximate amount of \$449 for tax year 2009; and a Chapter 7 bankruptcy filed and discharged in 2010. (GX 3)

Applicant left active duty in March 2008 and worked as a contractor. He was earning about \$150,00 a year. (Tr. 22) At the time he was still in the reserves, but suddenly the contract for reservists ended. (Tr. 14) He then worked for a small company, which promised a good opportunity. However, he worked for that company from April until September 2008 and he was paid once (about \$15,000). He stated that the company owes him about \$88,000. (Tr. 14) The company went out of business. Applicant was advised by counsel there was nothing to pursue so that he could get some of his money. Thus, his primary income was gone, as he was the sole income provider for his family. He started his own company. He used his savings and credit cards to survive.

At the same time, from about 2004 until 2007, Applicant bought four properties with the intention of remodeling and selling them. (Tr. 14) When the economy faltered, he was unable to sell any of them. The properties had no renters. He tried to make payments on the four mortgages for the properties by using credit cards and his savings. He also attempted to work out modifications for the mortgages. (Tr. 28) He tried to sell the properties, but he was not successful. He was advised to file bankruptcy in 2010. He filed for Chapter 7 in August 2010 and the bankruptcy was discharged in December 2010. (GX 3) His debt was discharged except for one property that he kept because he believed it was located in a state which would rebound quickly. He also wanted the house as a retirement home. He thought that the investment properties were an intelligent investment, but in hindsight it was not. (Tr. 15)

As to SOR allegation 1.a, in the amount of \$151,000, for the past due Federal taxes for tax years 2009-2012 (GX 2), Applicant is actively attempting to sell a property to settle the debt. He submitted documentation that shows the property is listed with a realtor for \$449,000. The listing period began on January 23, 2016. (AX A) His plan is to sell the property and since the Federal Government has filed a tax claim, they will be the

first in line to receive their money. He is positive that the land (160 acres) will sell and there will be sufficient money to settle the past-due Federal taxes. (Tr. 17) He also testified that if the property does not sell, as a retired reservist, in three years he will start to draw his pension and money will be intercepted and the taxes will be paid.

He noted that there is no incentive for him to do anything negative. He noted that he is not a security risk because he intends to pay the taxes as soon as the property sells or he receives his retired reservist's pension. He was emphatic that he has two plans in place and that is sufficient for mitigation. Applicant stated that he has called the IRS a few times, but he was never able to speak to the correct person to give him an answer on the method to resolve the taxes. (Tr. 18) He testified that his tax refunds had been intercepted over the years but he has never made any payment to the IRS. (Tr. 40) He also noted that he has increased his withholding tax. (Tr. 50)

As to SOR allegation 1.b, in the amount of \$449, owed for tax year 2009, he has been paying \$500 a month, which is garnished from his from his pay. (AX A) Applicant testified that the state tax has now been paid. He had a bill detail information sheet (GX 2) that showed the beginning debt balance was about \$7,194 and that he had made payments since about 2013 or 2014, which left a balance of \$449. Applicant was not successful in obtaining confirmation from the state that he no longer owes the \$449, and that the state tax has now been paid in full. However, he did produce an earnings statement that established that \$500 was taken from his salary for a state tax levy. (AX A)

As to SOR allegation 1.c, Applicant filed Chapter 7 bankruptcy in August 2010 and the bankruptcy was discharged in December 2010. The amount of liability was about \$340,000. This included four investment properties and credit card debt related to loss of income when he left the military in 2008. (GX 3) Applicant explained that he lost about \$100,000 in income and the real estate that he owned did not sell. (Tr. 16) At the time, he was living in the property that he hoped would be a retirement home.

Applicant earns about \$150,000 to \$180,000 per annum. He has discretionary income at the end of each month, but he testified that he is starting a small farm in another state. He is renting the property in another state, but he is using about \$2,000 a month to buy animals for the farm. He hopes to retire on the farm. (Tr. 36)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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. It also states that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Government produced credible evidence that Applicant incurred delinquent debt from past-due Federal and state taxes. He also filed bankruptcy in 2010. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. In addition, AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required....) applies. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

The nature, frequency, and relative recency of Applicant's financial difficulties make it difficult to conclude that it occurred "so long ago." Applicant's financial difficulties occurred in the past eight years. He obtained four mortgages on homes that he bought for investment. He could not sell them and used savings and credit cards, but had to file for bankruptcy in 2010. He chose not to pay his Federal and state income taxes, and put money in investments. He still owes a significant amount on the past-due federal taxes. He has been making payments on the state taxes and claims that the taxes are fully paid. Based on his documentation, I accept this state tax as resolved. Consequently, Financial Considerations Mitigating Condition (FC MC) 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) does not apply.

FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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) does not apply. Applicant had some unemployment and did not receive full pay for his year of work after the military, but at the same time he invested in four properties that he did not rent or sell due to the faltering economy. He filed for bankruptcy in 2010, which is a legitimate means to resolve debt. However, he did not act responsibly with regard to the Federal tax issue. He is using discretionary income to buy animals for a farm that he is renting. He intends to pay the Federal taxes eventually and believes that he has an appropriate plan.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has no application. Applicant as noted above had a wage garnishment for the state tax that he owed. He presented sufficient documentation to show that \$500 was garnished since about 2013. However, he has made no payments to the IRS for the past-due taxes in the amount of \$151,000. His tax refunds have been intercepted, but he has made no definite payment plan or agreement. He intends to pay the taxes when he sells the remaining property that he owns, or as a backup plan to pay the taxes with his retirement pay from the reserves in the future. He is using discretionary income of about \$2,000 a month to pay for a small farm that he is renting. FC MC AG ¶ 20(c) (the person has received or is receiving counseling for the problem) applies due to the bankruptcy financial counseling, but there are not clear indications that the problem is being resolved, or is under control.

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 an applicant's conduct and all the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 54 years old. He served in the military and retired with an honorable discharge. He is in the reserves. He is married and has two adult children. He is a mature and educated man. He has held a security clearance without incident since the 1980's. He had unemployment and suffered a loss when his investment properties lost value due to the faltering economy. He filed bankruptcy in 2010.

Applicant admits that he has not made any payment arrangement with the IRS for the significant back taxes. He has paid the bulk of the state tax through garnishment. His plan is to sell his property in the future and that will be more than adequate to pay the federal tax. If that plan does not work, he will have his reservist retirement pay to pay the tax in the future. He has not presented sufficient evidence to mitigate security concerns

in this case. He believes that he has mitigated the security concerns, but he has not carried his burden in this case. I have doubts about his judgment and any doubts must be resolved in favor of the Government.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge