



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



In the matter of:)
)
) ISCR Case No. 15-02689
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esquire, Department Counsel
For Applicant: Ron Sykstus, Esquire

09/12/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guidelines F, financial considerations, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On November 14, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. 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 within the DOD on September 1, 2006.

Applicant answered the SOR on December 10, 2015, and requested a hearing before an administrative judge. The case was assigned to me on June 6, 2016. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 22, 2016. I convened the hearing as scheduled on July 18, 2016. The Government offered exhibits (GE) 1 through 6. Applicant and six witnesses testified. He offered Applicant Exhibits (AE) A through L. All exhibits were admitted into evidence without objection. The record remained open until August 4, 2016, to permit Applicant to submit additional documents. He submitted one document, and it was marked as AE J and admitted without objection.¹ DOHA received the hearing transcript (Tr.) on July 26, 2016.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.e. He denied the allegations in SOR ¶¶ 1.f and 2.a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 38 years old. He graduated from high school in 1996 and college in 2003. He began working for a federal contractor in 2004, and his current employer, a federal contractor, since 2008. He is not married and has no children.²

In 2004 Applicant was granted a security clearance when he began working for a federal contractor. In 2009 he was arrested for possession of Oxycontin, a narcotic pain reliever, which Applicant had been illegally using since the summer of 2008. Because he did not have a prescription, he obtained the drug illegally from a friend. He entered a pretrial diversion program that he completed in late 2010. He attended drug treatment from March 2010 until July 2010. He weaned himself off the drug and no longer associates with those who use illegal drugs. When he completed his 2009 security clearance application (SCA), he denied any past illegal drug use. In 2010 during an interview with a government investigator, he falsely stated that the Oxycontin belonged to his grandmother, and he had intended to dispose of it but forgot it was in his possession. In interrogatories provided to him later in 2010, he admitted the drug belonged to him, and acknowledged his drug use and false answers in both his SCA and during his interview.

Applicant received an SOR in February 2011 that alleged security concerns regarding drug involvement and personal conduct. He exercised his right to have a hearing. In September 2011, the administrative judge concluded Applicant mitigated the security concerns regarding his drug involvement, but failed to mitigate those regarding his personal conduct, in that his false statements on his SCA and to the investigator were recent and significant. Applicant's security clearance was revoked. Applicant

¹ Hearing Exhibit I is a copy of Department Counsel's discovery letter to Applicant. Hearing Exhibit II is Department Counsel's memorandum.

² Tr. 19-21.

appealed the decision, and the DOHA Appeal Board affirmed the administrative judge's decision.³

On October 16, 2012, a year after his clearance was revoked, Applicant completed another SCA. In response to question 26, which inquired whether in the past seven years he had failed to file or pay Federal, state, or other taxes as required by law, he answered "no." This was false, in that he had failed to file his 2009 and 2011 Federal income tax returns and his 2008 through 2011 state income tax returns.⁴

Applicant testified that he does not know why he answered "no" and that his response was unintentional and a mistake. He stated that when he was required to submit another SCA in July 2014, he realized he answered "no" about his taxes on the 2012 SCA. He testified he did not deliberately fail to disclose that he did not file his Federal and state income tax returns for certain years.

In response to question 26 in the 2014 SCA, Applicant responded "yes" that he had failed to file or pay Federal, state, or other taxes as required by law or ordinance. The questions further requested that Applicant list the year he failed to file or pay. It then states: "Provide the Federal, state, or other agency to which you failed to file or pay taxes." Applicant's response was; "IRS." He listed he failed to file his Federal income tax returns for tax years 2009 and 2011. Under the section "Taxes-Summary," it asks; "Are there any other instances in the past seven (7) years where you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" Applicant responded "no." Applicant did not disclose he failed to file or pay (if owed) his state income tax returns from 2008 through 2011.

Applicant testified that he is aware of the obligation to timely file tax returns each year. Applicant filed his 2009 and 2011 taxes in November 2014. He testified he does not have a good reason why he did not timely file his tax returns. He also disclosed he did not file his 2008 Federal income taxes until October 2013, and he did not file his 2010 Federal income return, but because he did not file it, it was filed for him by the IRS.⁵

Applicant also failed to timely file his 2008 through 2011 state income tax returns. He did not disclose this information on his October 2012 SCA. He was indebted to his state for \$592 for delinquent taxes owed for tax year 2010 and for \$738 for delinquent taxes for tax year 2011. He filed the state income tax returns for these tax years in 2014 after he completed his SCA and was interviewed by the government investigator. He

³ Tr. 22-24, 36, 39.

⁴ Tr. 30-31.

⁵ Tr. 24, 30-39, 42 44-51; AE B, C, J. I have not considered Applicant's failure to file his 2010 Federal income tax return or his failure to timely file his 2008 federal income tax return for disqualifying purposes. I may consider those facts when analyzing the mitigating conditions, his credibility, and in my whole person assessment.

testified that in 2015 he paid two lump sums to the state for the two tax years owed. He does not owe the state any other taxes.⁶

In May 2015 Applicant began paying his delinquent Federal taxes through an installment payment plan with the IRS. He owed taxes for 2009 (\$1,557), 2010 (\$1,384), and 2011 (\$1,557). The plan requires him to pay \$250 monthly. He has made consistent monthly payments. It appears the IRS has applied the payments to tax year 2010 first, and that year's taxes are now satisfied. Applicant still owes balances for tax years 2009 and 2011.⁷

Applicant obtained a loan from a friend for \$2,500. He used the money to pay bills and buy drugs. He paid his friend \$500 before he defaulted on the loan (SOR ¶ 1.f-\$2,425). A judgment was entered against Applicant, and the debt was repaid through garnishment. The debt is satisfied.⁸

Applicant provided copies of his performance reviews from June 2009 through December 2015 documenting ratings from "exceeds expectations," is "fully successful" and "fully meets" requirements.⁹

Applicant's mother, aunt and uncle testified on his behalf. They described Applicant as smart, hardworking, and trustworthy. When he was using drugs he could not be trusted, but now that he is drug-free, they have no questions about his trustworthiness.¹⁰

Three witnesses, who are coworkers and friends, testified that Applicant is a good worker. They believe he is responsible, trustworthy, and honest.¹¹

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 used in evaluating an applicant's eligibility for access to classified information.

⁶ Tr. 25-28, 39-41; AE A.

⁷ Tr. 26-27, 40-41; AE D, J.

⁸ Tr. 29-30, 42-44; Answer to SOR with attachments; AE E.

⁹ AE F through L.

¹⁰ Tr. 53-64.

¹¹ Tr. 64-81.

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under 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 applicant or proven by Department Counsel and 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 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." 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.

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.¹²

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three are potentially applicable:

- (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 failed to timely file Federal income tax returns for 2009 and 2011. He failed to timely file state income tax returns for 2008 through 2011. He was indebted to the Federal Government for delinquent taxes for 2010 and to the state for taxes for 2010 and 2011. A judgment was entered against him for failing to repay a loan. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 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;

¹² 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 testified that he did not have a good explanation for his repeated failure to timely file his Federal and state income tax returns. He did not disclose his failure to file Federal and state tax returns on his 2012 SCA, but was aware that he had not filed them at that time. He did not file the delinquent tax returns until November 2014, after he completed another SCA and was interviewed by a government investigator. Applicant paid his delinquent state taxes in 2015. He started an installment payment plan with the IRS and began monthly payments in May 2015 for delinquent Federal taxes. Applicant did not repay a loan and a judgment was entered. He has satisfied the judgment through garnishment. Applicant's repeated conduct of failing to file his tax returns casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

For the application of AG ¶ 20(b), there must be conditions that were beyond Applicant's control that resulted in the financial hardship, and he must have acted responsibly under the circumstances. Applicant was aware of his responsibility to timely file his Federal and state income returns, and his duty to pay them. He knew in 2012 that he had not filed his delinquent taxes, but failed to take action until after he completed a 2014 SCA and was interviewed by a government investigator in September 2014. Applicant did not present evidence that there were conditions beyond his control that impacted his ability to file his tax returns and pay them. AG ¶ 20(b) does not apply.

There is no evidence Applicant received financial counseling. He has an installment payment plan with the IRS to pay his delinquent taxes. He paid his delinquent state taxes in 2015. He satisfied the judgment entered against him through garnishment. AG ¶¶ 20(c) partially applies because there are clear indications he is resolving his financial issues. However, paying a loan after a judgment was entered and through garnishment does not constitute a good-faith effort to repay the creditor. I cannot find AG ¶ 20(d) applies to SOR ¶ 1.f. However, I acknowledge that the loan has been paid. There is sufficient evidence to apply AG ¶ 20(d) to the delinquent tax debts Applicant has paid or is paying. Although there is some evidence of mitigation, it is insufficient due to Applicant's repeated failure to timely file tax returns. He did not take action to do so until after he completed the 2014 SCA and the government interview. This raises questions about his judgment and willingness to follow rules.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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, awards benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant did not disclose on his October 2012 SCA that he failed to file or pay his Federal and state tax returns for certain years. Applicant testified when he completed the October 2012 SCA, he made a mistake when he did not disclose this information. In July 2014 he completed another SCA, at which time he stated that it came to his attention that he had made that mistake.

When Applicant completed the 2014 SCA, he disclosed his failure to file 2009 and 2011 Federal tax returns and that he owed the IRS. He did not disclose in this SCA that he also failed to file his state tax returns from 2008 through 2011. Applicant did not file his delinquent Federal tax returns until November 2014. His explanation that he made a mistake when he completed the October 2012 SCA by not reporting his failure to file his 2009, 2010,¹³ 2011 Federal income tax returns, and his 2008, 2009, 2010, and 2011 state income tax returns is not credible. It is unknown why he failed to disclose that he did not file his state tax returns for numerous years in the 2014 SCA.

I considered his explanation that his failure to disclose the information in 2012 was a "mistake." After considering all of the evidence, I conclude Applicant deliberately failed to disclose he had not timely filed tax returns or paid Federal and state tax income taxes for certain years. AG¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

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

¹³ Tax year 2010 was not alleged and is not considered for disqualifying purposes. Applicant testified he did not file his 2010 Federal income tax return, but rather the IRS did it for him, and this information is analyzed regarding his credibility, in mitigation, and the whole person.

(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.

When Applicant completed his 2009 SCA, he admitted that he failed to disclose previous drug use. When he completed his 2012 SCA he failed to disclose that he had not filed Federal tax returns for 2009 and 2011, and state tax returns for 2008, 2009, 2010, and 2011. When he completed his 2014 SCA, he disclosed that he did not file Federal tax returns for 2009 and 2011. He did not disclose that he had not filed his 2008, 2009, 2010, and 2011 state tax returns in the 2014 SCA. He attributed his non-disclosure of the Federal returns on his 2012 SCA to having made a mistake.

Applicant has established a pattern of falsifying information in his SCAs. His attempt to disclose information in his 2014 SCA that should have been disclosed in his 2012 SCA was not prompt or a good-faith effort to correct an omission. His ongoing misrepresentations of the status of his tax returns and unpaid taxes are not minor offenses. His conduct raises serious concerns about his trustworthiness and judgment. The evidence does not establish mitigation under AG ¶¶ 17(a) or 17(c).

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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 38 years old. He was aware of his duty to file his Federal and state income tax returns and failed to do so for several tax years. He attributed his problems to a drug addiction. However, even after he stopped using drugs in 2010, he did not file the past due Federal or state tax returns, and repeated his conduct for tax year 2011. He did not file all of his delinquent Federal and state returns until after he completed his July 2014 SCA and was interviewed in September 2014. I did not find Applicant's explanations or testimony credible. Applicant's deliberate falsification on his 2012 SCA and his failure to timely file Federal and state tax returns raises concerns about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the financial considerations and personal conduct 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.b:	Against Applicant
Subparagraphs 1.c-1.f:	For 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge