



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



In the matter of:)
)
) ISCR Case No: 15-03234
)
)
Applicant for Security Clearance)

For Government: Caroline Heintzelman, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

08/09/2016

Decision

DAM, Shari, Administrative Judge:

Applicant failed to timely file Federal income tax returns for the years 2003 through 2010. He has an unpaid tax liability of over \$33,000 for those years. He failed to mitigate those financial security concerns. He did not mitigate personal conduct security concerns related to his failure to disclose a felony charge. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On July 21, 2014, Applicant submitted an electronic Questionnaire for Investigations Processing Investigation Request (e-QIP), as part of an investigation for a security clearance. On November 2, 2015, the Department of Defense (DOD) issued 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 for Determining Eligibility for Access to Classified Information* effective within the DOD on September 1, 2006.

Applicant answered the SOR in writing (Answer) on December 1, 2015, and requested a hearing before an administrative judge. On March 10, 2016, DOHA issued a Notice of Hearing setting the case for April 8, 2016. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through GE 5 into evidence without objection. Applicant testified. He offered Applicant Exhibits (AE) A through AE J into evidence without objection. DOHA received the hearing transcript (Tr.) on April 14, 2016.

Findings of Fact

In his Answer Applicant admitted the allegations contained in ¶¶ 1.a and 1.b, and denied those in ¶¶ 2.a and 2.b. His admissions are incorporated herein.

Applicant is 52 years old and divorced. He has a teenage son, whom he supports. He earned an associate's degree in 2012. In July 2014 he began a position with a defense contractor. He was unemployed from May 2012 to July 2014. Prior to that, he was a tutor at a local college while attending college. From about 1986 until 2008 he owned a trucking business. (Tr. 31-33; GE 1.)

Applicant's income tax problems began in 2003 and continued through 2010. He was self-employed until 2008 and was not paying estimated taxes, nor filing income tax returns.¹ He said he did not have enough money to pay living expenses and taxes. (Tr. 33.) In January 2013 the Internal Revenue Service (IRS), based on its information, filed a Federal tax lien against him in the amount of \$437,033: \$53,322 for 2003; \$112,310 for 2004; \$148,289 for 2005; and \$117,110 for 2006. In August 2014 Applicant filed his Federal tax returns for 2003, 2004, 2005, and 2006. In December 2015 the IRS notified Applicant that the total assessed lien for those four years was reduced to \$25,826. (Tr. 20, 33, 38; AE H.)

In April 2013 the IRS, based on its information, filed a second Federal tax lien against Applicant in the amount of about \$6,301: \$2,999 for 2008; \$2,775 for 2009; and \$526 for 2010. Applicant filed his tax returns for these years late. (AE H.) He said he timely filed his tax returns for tax years 2007, and 2011 through 2015. He does not owe any Federal or state taxes for those five years. (Tr. 36- 37.)

As of April 1, 2016, Applicant owes the IRS about \$33,196 for tax years 2003, 2004, 2005, 2006, 2008, 2009, and 2010. He is trying to negotiate an offer of settlement

¹ The SOR did not allege failure to file annual income tax returns as a security concern; hence, said information will not be considered in an analysis of the disqualifying conditions. However, said information may be considered in an analysis of mitigating conditions and the whole-person concept.

and will then work out a payment plan. The amount includes unpaid taxes and penalties. His tax debts remain unresolved. (Tr. 37, 43, 53; AE J.)

In January 2013 Applicant met with an IRS agent and discussed his outstanding tax issues, beginning with the year 2003. The agent advised him how to proceed in order to resolve the tax issues, specifically, he told Applicant to reconstruct and file the earliest tax years first. (Tr. 21; 40-41.)

When he completed his July 2014 e-QIP, Applicant failed to disclose to the Government that he had failed to pay the outstanding Federal tax liens, as alleged in the SOR. During a personal interview with a government investigator in November 2014 regarding information in his e-QIP, Applicant discussed his tax situation and brought information from the IRS to explain his tax problems. (GE 2.) In his Answer Applicant admitted that he answered the tax question incorrectly, but denied that he did so intentionally. He reiterated that position while testifying. (Tr. 49.) He explained that he started filling out the e-QIP before he left for a vacation and worked on it while on vacation, at one point while sick. He said that when he read the question asking "have you failed to file or pay Federal, state, or other taxes," he knew he had filed all returns, but did not "catch the part about paying" when he read the question. (Tr. 48, 49-50.)

When he completed his July 2014 e-QIP, Applicant failed to disclose that he was charged and convicted of Felony Stealing in 1985, as alleged in the SOR. In November 2014 an investigator interviewed Applicant about his answers in the e-QIP. When confronted with documentation from the FBI of the charge, arrest, conviction, and sentence that included one year of probation, Applicant strongly asserted that he had never been arrested and insisted the information was a mistake. However, personally identifying information on the FBI report matches information he supplied on his e-QIP. (GE 2, GE 3.)

In response to questioning about the 1985 felony conviction, Applicant testified that he had no knowledge of an arrest or conviction for a felony. He recalled that he and a former partner had built a custom trailer about that time. After deciding to dissolve their partnership, the partner agreed to pay Applicant half of the costs for the trailer. When the partner failed to do that, Applicant picked up the trailer. The partner subsequently called the police, who told Applicant that he must return the trailer because it was in his partner's name. Applicant said he returned it and was never arrested or went to court about the incident. He denied any knowledge of a criminal charge. (Tr. 27, 51; Answer.)

Applicant submitted letters of recommendation from his employer, co-workers, and former classmates. His current manager and former manager consider him a trustworthy and ethical employee. (AE A, AE C, AE E.) His colleagues have found him to be hard working and a valuable team asset. (AE D, AE F.) Former classmates commented on his reliability and leadership abilities. (AE B, AE G.)

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 Executive Order 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.²

AG ¶ 19 notes two disqualifying conditions that could potentially raise security concerns in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a history of not satisfying his Federal income tax obligations. He has not resolved outstanding Federal tax liens for tax years 2003, 2004, 2005, 2006, 2008, 2009, and 2010. The evidence is sufficient to raise these disqualifying conditions.

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets forth conditions that could potentially mitigate financial 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;

² See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

(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; and

(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.

Applicant's income tax problems for the years 2003 through 2010 are ongoing. Hence, AG ¶ 20(a) does not apply. Applicant failed to establish mitigation under AG ¶ 20(b), as there is insufficient evidence that the tax liens arose as a result of circumstances beyond his control. Nor did he present evidence demonstrating that he attempted to responsibly manage his tax debts or timely file his returns for those years.

Applicant did not submit evidence to support the application of AG ¶ 20(c). Although he has been in contact with the IRS since 2013 and subsequently filed all outstanding returns sometime in 2014, there are not clear indications that his unpaid tax liens are under control. Given the lateness of said return filings, and the fact that he has not made any payments on the liens, he did not establish mitigation of good faith effort under AG ¶ 20(d). He disputed the amount of the two tax liens, but not their legitimacy. AG ¶ 20(e) does not provide mitigation.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 a condition that could raise a security concern and may be disqualifying in this case:

(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.

Applicant denied that he intentionally omitted information about Federal tax returns and liens on his e-QIP. He also denied intentionally omitting information about a 1985 felony arrest and conviction. When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred.³

Applicant asserted that he misconstrued the question relating to filing and paying taxes, and did not deliberately withhold information. When he met with an investigator, he voluntarily brought IRS documents to explain his tax issues. He stated that he filled out some of the e-QIP information while on vacation and sick. He repeatedly said he did not intentionally attempt to mislead the government. Based on his testimony and demeanor, I find that his explanation for this omission is credible. The evidence does not establish a deliberate falsification as to this allegation.

Applicant repeatedly denied any knowledge of having been arrested and charged with a felony in 1985. He insisted that he was never arrested or appeared in court for a crime, and thus could not disclose a crime of which he had no knowledge. While he strongly asserts that position, the FBI data sheet refutes his denial. It documents that he was arrested and charged in January 1985 with Felony Stealing; was convicted in March 1985; and was placed on probation for one year. He presented no persuasive evidence to contradict the FBI's report. Hence, I find it difficult to believe that he does not remember this crime for which he served one year of probation. His explanation for not disclosing the felony is not credible. The evidence establishes a deliberate falsification as to this allegation.

AG ¶ 17 includes three conditions that could mitigate security concerns arising under this guideline:

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

³See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

(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; and

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

AG ¶ 17(a) does not provide mitigation because Applicant did not make a prompt effort to correct the omission before being confronted with the facts. Intentionally withholding information from the Government is not a minor offense and does cast doubt on an individual's judgment. AG ¶ 17(c) does not apply. Applicant repeatedly stated that he has never been arrested for a felony, and therefore could not have disclosed one. However, he failed to produce documentation that the FBI report was either unsubstantiated or incorrect, which evidence would establish mitigation under AG ¶ 17(f).

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 a 52-year-old man, who has successfully worked for a defense contractor since July 2014 and is dedicated to his job. He has earned the support and recommendation of his employer and co-workers. Those are positive factors in this case. However, between 2003 and 2010 he failed to timely file Federal tax returns. He continues to owe the IRS over \$33,000 for unpaid taxes, interest, and penalties for those years. His long-term failure to comply with legal tax obligations, along with his non-disclosure of a 1985 felony conviction, leaves me with questions as to Applicant's eligibility and suitability for a security clearance. Based

on the record evidence, I conclude Applicant failed to fully mitigate the personal conduct security concerns and 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge