



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 15-03640
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

11/14/2016

Decision

HOGAN, Erin C., Administrative Judge:

On November 14, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense after September 1, 2006.

On December 16, 2015, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 12, 2016. The case was assigned to me on May 10, 2016. On August 1, 2016, a Notice of Hearing was issued, scheduling the hearing for August 23, 2016. The hearing was held as scheduled. During the hearing, the Government offered eight exhibits which were admitted as Government Exhibits (Gov) 1 – 8. Applicant testified and offered seven exhibits which were admitted as Applicant Exhibits (AE) A – G. The transcript (Tr.) was received on August 31, 2016. The record was held open until September 7, 2016, to allow Applicant to submit additional documents. Applicant timely submitted additional

documents. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his response to the SOR, Applicant admits all SOR allegations.

Applicant is a 54-year-old employee of a Department of Defense contractor seeking to maintain a security clearance. He has worked for his current employer since October 2002. He served on active duty in the United States Navy from 1980 to 2001, retiring honorably in the grade of chief petty officer (E-7). His first marriage was from 1986 to 2001. A son and daughter were born during this marriage. He married again in 2002. His second wife has two children. All of the children are adults and no longer live with them. (Tr at 27-28; Gov 1)

Applicant's security clearance background investigation revealed a Chapter 7 bankruptcy filed in April 2001 and discharged in July 2001 (SOR ¶ 1.a: Gov 2 at 12; Gov 6 at 2; Gov 7; Gov 8); a \$21,889 state tax lien entered against Applicant in 2011 (SOR ¶ 1.b: Gov 3 at 2; Gov 4 at 5; Gov 5 at 3; Gov 6 at 3); and Applicant failed to pay federal income taxes for tax years 2007 through 2011, resulting in a delinquent federal tax debt in the amount of \$34,839. (SOR ¶ 1.c: Gov 1 at 30-32; Gov 3 at 1; Gov 5 at 3; Gov 6 at 2-3).

Under personal conduct, the SOR alleged that Applicant deliberately falsified his security clearance application, dated April 20, 2014, by answering "no" to the question in section 26, "In the past seven years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance? Applicant answered. "yes" and listed that he owed federal income taxes for tax years 2007 to 2011, because he "FELL BEHIND WITH MY WIFE BEING SELF EMPLOYED." He also mentioned that he entered into a payment plan with the IRS. He pays \$2,000 a month. It is alleged Applicant falsified the answer to this question because he failed to mention the state taxes. (Gov 1 at 30)

The SOR also alleged that Applicant deliberately falsified his security clearance application, dated April 20, 2014, by answering "no" to the question in section 26, "Other than previously listed have any of the following happened to you? In the past seven (7) years, you had a lien placed against your property for failing to pay taxes or other debts? Applicant failed to list a federal tax lien filed against him in July 2010 which was released in December 2012, and a state tax lien entered against Applicant in 2011. (Gov 1 at 32)

Applicant filed for Chapter 7 bankruptcy in 2001 based on the advice of his attorney. The bankruptcy occurred around Applicant's divorce from his first wife. While Applicant was still on active duty and serving sea duty, his wife incurred a lot of debt. They bought a house and his wife quit her job shortly after the purchase of the house. The mortgage was in Applicant's name. (Tr. 30-31)

Applicant's tax issues began in 2004 when his current wife became self-employed as a private contractor. She did not set aside money to pay her income taxes and they did not understand the different tax rules involving self-employed individuals. They realized they owed a lot of taxes when they filed taxes in 2005. They initially did not know what to do. In 2008, they hired a tax attorney. The tax attorney helped them file the correct forms and negotiate a payment plan with the IRS. Their tax returns were filed in 2008 with the help of the tax attorney. Applicant and his wife entered into an agreement with the IRS on April 20, 2013, to pay \$2,000 a month. The federal tax lien was released on April 1, 2015. (Tr. 30, 32-36, 39; AE B; AE H at 2-6)

In 2008, Applicant began to put money aside for tax payments and changed his tax deduction to have more money taken out. He is doing what he can to pay all of the tax debts. They have paid all past-due amounts owed through tax year 2009. The federal tax debts will be paid off in mid 2017. He and his wife now use a tax firm to file their taxes for them. They are current on all of their taxes for tax years 2012 to 2015. (Tr. 41-46, 68; AE H at 1, 15 - 44)

A state tax lien was entered against Applicant and his wife in 2011. Applicant and his wife were unaware of the state tax lien until they attempted to refinance their mortgage. The tax attorney helped Applicant resolve his state tax debt. The state tax debt was garnished from his paycheck (approximately \$300 to \$400 a pay period, as a percentage of his income). The state tax lien was satisfied and removed on November 15, 2013. (Tr. 46-47; AE A; AE E at 3)

For several years, Applicant and his wife have reviewed their budget using a spiral notebook and spreadsheets. His wife is primarily responsible for paying the bills. They are current on their bills. (Tr. 49-52) Applicant and his wife's total monthly income is \$15,600. Their total monthly expenses, to include the \$2,000 monthly payment to the IRS is \$11,406. After expenses, they have approximately \$4,194 remaining each month. (AE H at 45)

Personal Conduct

The SOR alleged that Applicant intentionally falsified his April 2014 security clearance application by omitting that he owed state taxes for undisclosed years in response to the tax questions in Section 26 of the application which reads, "In the past seven (7) years, have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" Applicant listed that he failed to pay federal taxes for tax years 2007-2011. The SOR also alleged Applicant intentionally falsified his security clearance application in response to Section 26, Financial Record Delinquency Involving Enforcement, "In the past seven (7) years, you had a lien placed against your property for failing to pay taxes or other debt(s)? (Include financial obligations for which you were the sole debtor, as well as those for which you were a cosigner or guarantor)" Applicant failed to list his state and federal tax liens. (Gov 1)

In his response to the SOR, Applicant denied intentionally falsifying his security clearance application. He believed that he provided the government notice about his tax issues when he listed that he owed federal taxes for tax years 2007-2011. He forgot to include the state taxes owed, but believed that he was talking about his tax issues as a whole when answering the SOR. He made no conscious decision to deceive the government about his tax issues.

During the hearing, Applicant testified that his state tax lien was removed on November 15, 2013, when his state tax issues were resolved. (AE A at 3) He did not realize he had a state tax lien until he applied to refinance his mortgage about a year ago. He discovered the state tax lien after he paid off the debt. He had no intent to withhold information about his taxes. He has been making payments towards his repayment plan with the IRS and anticipates his federal tax debt will be resolved in 2017. (Tr. 59 – 63, 67-68)

I find that Applicant did not intentionally falsify his security clearance application when he omitted that he owed state income taxes and his state and federal tax liens. He listed that he owed federal taxes for tax years 2007-2011, a reasonable person could conclude that he had state tax issues as well. His explanation for failing to list the information is reasonable. I find he had no intent to withhold information on his security clearance application and that his omissions were immaterial based on the fact that he notified the government of his federal tax issues.

Whole-Person Factors

Applicant provided copies of his performance evaluations for the periods March 2013 to March 2014, March 2014 to March 2015, and March 2015 to March 2016. Each performance evaluation was favorable. He has never been disciplined or suspended from work. (Tr. 55, AE G) During his active duty service in the United States Navy, Appellant's awards and decorations include: the Navy Commendation Medal, the Navy Achievement Medal (4), Good Conduct Awards (5), United Battle "E" (2), Meritorious Unit citation, Navy Expeditionary Medals (2), National Defense Service Medal, Submarine Surface Warfare "Dolphins", Arctic Service award, Sea Service Awards (8) and the Pistol Expert Award. (AE H at 7-14)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, which must be considered when determining 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 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 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 relating to the guideline 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.

The guideline notes several disqualifying conditions that could raise security concerns. I find AG ¶19(a) (an inability or unwillingness to satisfy debts); and AG ¶19(c) (a history of not meeting financial obligations), apply. Applicant previously filed for Chapter 7 bankruptcy in April 2001. He owed delinquent federal income taxes for tax years 2007 to 2011 and a state tax lien was filed against him in 2011 for \$21,889.

An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his obligations to protect classified information. Behaving irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to pay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions apply:

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) applies. Applicant's Chapter 7 bankruptcy occurred over 15 years ago and was caused by the break-up of his first marriage and his first wife's excessive spending habits. Applicant and his current wife encountered tax problems when his wife began to work as an independent contractor. They did not understand how to file her income taxes and his wife did not set aside money for income tax payments. While there were a number of years when they did not pay taxes, they retained a tax lawyer in 2008. They entered into an agreement with the IRS and have been dutifully paying \$2,000 a month since April 2013 towards their federal tax debt. They resolved the state tax debt in November 2013. They took steps to insure that they file taxes correctly and have not incurred additional delinquent taxes since 2011. They are current on all of their other debts. Applicant has demonstrated he is reliable, trustworthy, and has good judgment.

AG ¶ 20(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) applies with respect to Applicant's 2001 Chapter 7 bankruptcy. The bankruptcy occurred during Applicant's divorce from his first wife. His first wife incurred a lot of debt while Applicant was deployed at sea. He was unable to pay off the debt. Since the bankruptcy, he has maintained his bills aside from the tax issue. Applicant acted responsibly under the circumstances.

AG ¶ 20(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) applies because Applicant took the initiative several years ago and hired a tax attorney. The attorney negotiated a repayment plan with the IRS. Applicant has dutifully paid the repayment plan since 2013 and the federal tax debt will be resolved in 2017. The state tax lien was resolved in November 2013. Applicant is current on his other bills and accounts. His financial situation is under control.

AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies. Applicant resolved the state tax lien. He is paying \$2000 a month towards the federal tax debt and has made payments since April 2013. He demonstrated a good-faith effort to repay his state and federal income tax obligations.

Guideline E – Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The following disqualifying condition potentially applies to Applicant's case:

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).

I cannot conclude Applicant deliberately omitted his state and federal tax liens or his delinquent state taxes in response to section 26 on his e-QIP application dated April 20, 2014. Applicant listed in his response to section 26 that he owed federal income

taxes for tax years 2007 to 2011. In his response to the SOR, he believed his listing of his tax problems covered all tax concerns. I find that his listing of the delinquent federal income taxes should have put the government on notice to investigate the status of his state taxes as well. He did not intend to hide the information about his state taxes. His failure to list his tax liens and his delinquent state taxes was the result of oversight as opposed to an intentional omission. He cooperated fully with the government once he learned of the delinquent accounts. It is also noted that Applicant paid off his state tax debt in November 2013, five months before completing his security clearance application in April 2014. The personal conduct concern is found for Applicant.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's favorable performance evaluations and his 14-year employment history with a defense contractor. I considered Applicant's 21 years of honorable active duty service in the United States Navy. I considered Applicant's 2001 Chapter 7 bankruptcy filing coincided with his divorce from his first wife. While it took several years for Applicant and his current wife to hire a tax attorney to resolve their tax issues, they took the initiative several years ago and have resolved the state tax debt and are dutifully paying off their federal tax debt. They are current on all of their remaining bills and have sufficient income to continue the \$2,000 monthly payments to the IRS until it is resolved in 2017. Applicant's failure to list his federal and state tax liens and state tax debt was the result of an innocent oversight as opposed to a willful intent to deceive 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:	FOR APPLICANT
Subparagraphs 1.a -1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a -2.b	For Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge