



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07508

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel

For Applicant: Matthew J. Reilly, Esquire

01/31/2017

Decision

HOWE, Philip S., Administrative Judge:

On June 4, 2014, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On April 4, 2016, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). 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 on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 7, 2016. He answered the SOR in writing on April 21, 2016, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 1, 2016, and I received the case assignment on June 13, 2016. DOHA issued a Notice of Hearing on August 4, 2016, and I convened the hearing as scheduled on August 23, 2016. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified

and submitted Exhibits A through H, without objection. DOHA received the transcript of the hearing (Tr.) on August 31, 2016. I granted Applicant's request to keep the record open until September 6, 2016, to submit additional matters. On September 6, 2016, he submitted Exhibits I to N, without objection. The record closed on September 6, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR Applicant denied all the allegations concerning his unpaid Federal and state income taxes of several types. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 56 years old and married. He had two children, one of which is deceased, and one stepchild. He worked for a state government (State M) from 1998 to 2001. He lived in state M until 2004 when he moved to State A. He was a contractual employee for a private corporation from August 2001 to December 2014. Now he works as a full-time employee for a defense contractor and has since June 1, 2015. He lives now in another state (State I). His wife operated a private business from 2005 to 2009 in State A. Applicant inherited money and he used large sums of it to purchase a coffee franchise for his wife while he worked in the corporate contractual position. He helped her in their business on weekends. (Tr. 27, 56, 63, 75-77; Exhibit 1)

Applicant is alleged not to have filed income tax returns for States A and M from 2009 to 2013. He is also alleged to not have filed his Federal corporate and personal income tax returns for the same years. He owes the Internal Revenue Service (IRS) and the same two states self-employment taxes for 2009 and 2010. He owes his State M \$902.00 on a tax lien from 2002 personal income taxes. The lien was filed in 2011. The state tax authority claims Applicant underreported his contractual income for that year. Applicant has not paid that debt because he wants the basis for it explained to him and verified that he owes it. He contacted by telephone the state tax authority in the summer months of 2015, but does not remember exactly when he made that contact. He claims the state tax authority will not give him any information, so he refuses to pay it. (Tr. 21-73; Exhibits 2-4; SOR)

Applicant admits he did not file his Federal and state income taxes on time after he closed the coffee shop business in State A in June 2009 because it was losing too much money. The franchisor of the business then withdrew Applicant's access to the company computer system so Applicant could not access financial records with which to prepare and file the various returns. He stated he needed an IRS Form K-1 for the business income tax form and then used that form to file his personal income taxes because the corporate structure of the coffee shop was a Subchapter S corporation under the IRS Code. This business structure involved corporate income passing through to him and his wife to be included on his personal income tax form. Without the business tax return being completed, he contended he could not file his personal tax forms for each year at issue. To resolve his tax problems, Applicant used the certified

public accountant (CPA) he used since 2005 and who dealt with the franchisor on a regular basis so he was familiar with that business to prepare his 2009 to 2013 tax returns. (Tr. 28, 31, 37, 46-60; Exhibits 2-4, A-N)

Applicant submitted unsigned copies of the 2009 to 2013 Federal and State A income tax returns. He submitted an email marked as Exhibit J from State A showing all tax returns from 2009 to 2014 were filed before August 29, 2016 and current. Applicant submitted IRS tax transcripts showing the 2009 tax forms were filed and paid on February 7, 2012 (Exhibits B and M), the 2010 tax forms were filed on January 11, 2016, and paid (Exhibits C and K), the 2011 tax forms were filed and paid on April 21, 2016, (Exhibits D and N), and the 2012 taxes were filed and paid on May 2, 2016 (Exhibits E and I). Applicant submitted a copy of his unsigned 2013 Federal and State A personal and corporate income forms. He did not submit an IRS tax transcript showing the 2013 Federal tax forms were filed and paid. (Tr. 21-73; Exhibits 2-4, A-N)

Applicant submitted a letter from his CPA dated June 30, 2016, stating the history of his tax problems and the efforts the CPA firm made to resolve them. Applicant also testified his heart attack in 2013 delayed the transmittal of information to the CPA and receipt by him of information, further delaying the final preparation of the income tax forms. The CPA firm also submitted two documents showing the Federal tax penalty for 2010 imposed for failure to timely file the corporate tax return was removed by the IRS. The June 2016 CPA letter states that based on their work and discussions with Applicant that all tax returns have been filed, taxes paid, and Applicant is owed several refunds from the IRS for certain tax years. The CPA also stated that extension requests were filed by it for Applicant on each tax year's obligations. (Tr. 21-73; Exhibits A, G, H)

The SOR in Subparagraph 1.a alleges Applicant did not file personal income tax forms for State M for 2009 to 2013. Subparagraph 1.d alleges he did not file and pay State M self-employment taxes for 2009 and 2010. Applicant testified he has not lived in State M since 2004 and does not owe that state any tax money. Applicant submitted a mailing form showing he mailed some document to State M on August 25, 2016, but did not submit any explanation on the exhibit as to what it was or its purpose. Applicant has not filed a written objection or protest with that state about this tax lien. (Tr. 27; Exhibits 2-4, L)

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 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 the adjudicative process (AG ¶ 2(a)). 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.

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 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 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 at AG ¶ 19 contains nine disqualifying conditions that could raise security concerns. Two conditions are applicable to the facts found 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 did not pay his Federal and state income taxes, both his personal taxes, self-employment, and corporate taxes, from 2009 to 2013, as he is required to do so. Applicant worked as a contract employee for a private corporation from 2002 to 2015 while his wife and he owned and operated a coffee house restaurant in their town of residence in State A. Applicant has not paid a \$902 tax lien for underreported self-employment income to his original state of residence, State M. He has not submitted any evidence of a written document to show he objected to the tax lien on a legitimate basis that he is not required to pay it. The evidence raises all of the three security concerns stated, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline in AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. Five conditions may be 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;
- (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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant has not lived in State M since 2004. Therefore, he is not legally obligated to pay income taxes to that state in 2009 to 2013. SOR Subparagraph 1.a is not substantiated as a legitimate tax obligation of his to pay. Subparagraph 1.e. alleges, and the credit reports submitted show, that he has a \$902 personal income tax lien owed to State M from 2002 when it is asserted by that state that Applicant understated his self-employment income, resulting in a lower tax obligation than legally owed. Applicant has not submitted any documents to show he objected in writing to the lien. However, he claims credibly that he has a legitimate basis to object to the lien. His e-QIP shows he worked out of that state after 2001 while maintaining a residence until 2004. He submitted an exhibit showing he mailed in August 2016 a document to State M about the tax situation, but not a copy of the document itself. Therefore, regarding all taxes claimed by State M to be owed to it by Applicant AG ¶ 20 (e) is established.

Applicant's State A and Federal tax obligations started in 2009 when he shut the coffee house business and was locked out of a computer system he contends contained tax documents he needed to calculate his obligations. That assertion is supported by the letters submitted by his CPA. No longer operating such a business means its circumstances were unusual and are not likely to recur. His actions to engage a CPA firm to prepare the tax forms and calculate his tax obligations show that he has good judgment, is trustworthy, and is currently reliable. He did not ignore the duty to file but actively engaged a professional to resolve his tax obligations. AG ¶ 20 (a) is established.

The conditions that resulted in Applicant having unpaid tax obligations were beyond his control as shown by the tax documents he submitted as exhibits. They show substantial losses from the business that could no longer be sustained. Applicant acted responsibly under these circumstances by closing the business, obtaining better employment for himself, and engaging a CPA to gather data upon which to correctly calculate his tax obligations to the Federal government and State A. Those tax forms have now been filed and the money paid as required. Because of the business losses under the Subchapter S corporate structure Applicant is now due refunds on his income taxes for certain years. AG ¶ 20 (b) is established.

Applicant filed and paid the taxes he owed on his personal income and his coffee house business. These tax obligations are resolved. AG ¶ 20 (c) is established.

Applicant paid his tax obligations. His tax forms for the Federal and State A government are paid. His only income now is from his current job. All the issues

presented in the SOR are resolved. AG ¶ 20 (d) applies because of Applicant's good-faith efforts to repay his delinquent tax debts after filing the required tax forms.

AG ¶ 20 (f) is not established because there is no showing of affluence that has raised any issue. It is not relevant in this case.

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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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. Applicant started and then closed a business. The coffee house business collapsed because it was not making a profit sufficient to sustain itself. Applicant acted responsibly in taking that action. But by doing so he incurred another problem, accessing the necessary financial information he alleged was on the business franchisor's computer system so that he could prepare his tax returns for the Federal and State A governments. The business was located in State A. These events were unique and are now in the past, not to be repeated. It can be said his participation in the entire series of events was voluntary. But his behavior has changed permanently. There is no likelihood of continuance or recurrence, nor a potential for pressure, coercion, exploitation, or duress because all tax matters have been resolved. The entire issue is closed.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

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

Subparagraph 1.a to 1.e: For Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge