



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



In the matter of:

Applicant for Security Clearance

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) ISCR Case No. 16-01677
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)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

03/27/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the security concerns under Guideline F, financial considerations. Applicant's eligibility for a security clearance is granted.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86) on November 26, 2014.¹ On August 15, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 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 (AGs) effective within the DOD for SORs issued after September 1, 2006.

On December 10, 2016, Director of National Intelligence issued Security Executive Agent Directive (SEAD) 4, which revised and replaced the 2006 AGs and

¹ Also known as a Security Clearance Application (SCA).

became effective for all decisions issued on or after June 8, 2017. Accordingly, I have applied the newly revised AGs to this decision.²

Applicant answered the SOR on September 16, 2016, denying all of the allegations in the SOR. He requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the hearing for February 13, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 – 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A – R. I held the record open until February 23, 2018, for supplemental documentation. (Tr. 81) Post-hearing, AE S through AE MM were admitted without objection.

Findings of Fact³

Applicant is 44 years old. He obtained his bachelor's degree in 1997 (AE L) and he has been employed as the lead systems administrator for a federal contractor at a major health center since September 2013. He never married and reports no military service. (Tr. 41) He was unemployed from November 2007 to October 2008, and from August 2009 to February 2010. Applicant had a security clearance for over 20 years without incident. (Tr. 11) He disclosed in section 26 of his SCA that he had tax issues with the IRS. From 2004 – 2007, he day traded in stocks. He did not understand how to properly file his income tax returns and particularly, Schedule D. Applicant stated that as a result, his cost basis and losses were never reported to the IRS, or to the State A comptroller's office.

Applicant disclosed in his SCA that he retained legal assistance in 2011 and finally submitted amended income tax returns (for all four years in question) to the IRS and state A, in October 2014. (AE MM) The SOR alleges one tax lien entered against Applicant in 2007, for \$31,639 (SOR ¶1.e), and another in 2014, for \$17,528 (SOR ¶1.a). It also alleges four tax liens entered against Applicant by state A in 2007, 2008 (two liens) and 2012 at SOR ¶¶ 1.b – 1.d, and 1.f. Applicant testified that all of his delinquent state taxes have been completely paid and the tax liens satisfied. (Tr. 41-42, 50) He provided a document from state A comptroller dated September 12, 2016, showing that the state tax liens have been satisfied. (AE A)

Applicant testified that when he was day trading from 2004 – 2007, he was a naïve 25 year old, and he failed to perform due diligence concerning his investments. (Tr. 53-54) He credibly stated that he did not understand or account for cost-basis of capital gains when he filed his income tax returns. (Tr. 54) Consequently, he incurred

² Although I have applied the new AGs that became effective on June 8, 2017, to this decision, I have also considered the case under the previous AGs and my decision would be no different under either version.

³ Unless stated otherwise, the source of the information in this section is Applicant's November 26, 2014 SCA. (GE 1)

approximately \$75,000 in tax liens from state A and the IRS. (Tr. 20) When he realized this, he was overwhelmed and he initially consulted with some attorneys who were not helpful. (Tr. 61) Then, Applicant became unemployed from 2008 – 2010 because he suffered injuries playing hockey and an illness that required surgery. (Tr. 58) He is now employed full time since September 2013 and earns \$130,000 per year. (GE 1, Tr. 54) Applicant no longer day trades, or invests in the stock market. (Tr. 54-55)

Applicant denied the allegations in the SOR when he filed his September 2016 response because he had already completely satisfied the state tax liens at SOR ¶¶ 1.b, 1.c, 1.d, and 1.f. (Tr. 41, 50) He submitted documentation confirming this. (AE A) He also testified and submitted documentation to prove that he filed amended federal and state tax returns in 2014 for tax years (TY) 2004 – 2007. (Tr. 52, AE CC, DD, EE, FF) He finally found helpful tax advisors, at a reasonable rate, to help him with his tax issues. (Tr. 61, AE MM) Applicant denied the two federal tax liens alleged in the SOR because the stated amounts were wrong, due to him amending his returns. (Tr. 52)

Post hearing, Applicant submitted documentation reflecting the federal tax deficiencies, or amounts owed as of 2011, for TY 2004-2007 (AE T, U, V, X, and Y), compared to the amounts now owing in 2018. (AE Y, Z, AA, and BB) Applicant has substantially reduced his tax debts. Currently, he has a zero balance owing for TY 2004; \$1,463 owing for TY 2005; zero balance for TY 2006; and \$14,940 owing for TY 2007. He reached out to the IRS in June 2015 and entered into a payment plan. (AE B, KK). He has been making steady payments by automatic deductions from his bank account, to resolve the debts. (Tr. 44-45, AE C, O, J) Applicant has been making continuous payments of \$1,338 per month to the IRS for over two years. (Tr. 73) His last payment was on February 7, 2018. (AE O) Applicant testified credibly that he made some earlier payments to the IRS even before his payment plan. (Tr. 80) He delayed confronting the tax problems initially because he was not sure if it was an IRS mistake, and he did try to consult with attorneys. He had difficulty obtaining his stock transaction records from the trading houses, and those records arrived in indecipherable spreadsheet format. (Tr. 79-80)

Applicant presented testimony from three character witnesses including a biomedical engineer, an audiologist, and the information technology manager at NICOE. They observed him on a daily basis and all attested to his integrity, competence and reliability. They testified that he is proficient, trustworthy, and reliable, and he is critical to the operations at the health center data center. (Tr. 24-38) They have no reservations about Applicant having access to classified information. He also submitted four character reference letters from other staff members at the health center and a hockey teammate. (AE G) They extol Applicant's good character, collegiality, and trustworthiness. Applicant's credit reports reflect no new delinquencies, and his credit score is up to 741. (Tr. 19) He is committed to resolving his tax issues, and has established a payment plan, and continuous payments, to satisfy his two remaining federal tax liens.

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 used 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. 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 national security eligibility will be resolved in favor of the 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 applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for financial considerations is set out in AG ¶18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. 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.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax as required.

Applicant disclosed his tax issues in his SCA and the Government's case in chief, including credit bureau reports, confirm the delinquent debts alleged in the SOR. There is sufficient evidence to support the application of the above disqualifying conditions.

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 problems were largely beyond the person's control, (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation,

clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant has now resolved, or entered into a payment plan to resolve virtually all of the alleged delinquent debts. He had two years of unemployment from 2008 – 2010, and serious health issues. These factors were beyond his control. Although, it appears that he delayed taking action to address his tax liens until after he filed his SCA, he testified credibly that he was not simply ignoring them. Applicant disclosed his delinquent debts in his SCA, and he has contacted the state comptroller and the IRS to make payment arrangements to satisfy his tax liens. He followed through with a demonstrated track record of consistent payments of \$1,338 per month, pursuant to an installment plan with the IRS. He provided documentation from the state comptroller showing satisfaction of the state tax liens. Virtually all of his delinquent debts are now being addressed by payment plans, or otherwise resolved. Applicant has received financial counseling and assistance from tax advisors, and he has a viable plan going forward. Applicant was slow to start but he has now acted responsibly despite adverse circumstances. AG ¶¶ 20(a), 20(b), 20(c), 20(d) and 20(g) apply. I am satisfied that his tax liens are being resolved. They resulted from mistakes he made as a young man, which will not likely recur.

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(d):

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

Applicant's finances are no longer a security concern. There are ample indications that Applicant's financial problems are under control. He has met his burden of persuasion. The record evidence leaves me with no questions or doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising under Guideline F, financial considerations.

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.f: 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's eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert J. Kilmartin
Administrative Judge