



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



In the matter of:)
)
) ISCR Case: 14-03577
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

03/31/2015

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of failing to file federal and state income tax returns, and accumulating delinquent debts and unpaid taxes since 2005. He failed to provide evidence that he paid or resolved any of the allegations raised by the Government. Financial security concerns were not mitigated. Eligibility for access to classified information is denied.

Statement of Case

On March 19, 2013, Applicant submitted a security clearance application (SF-86). On October 1, 2014, the Department of Defense (DoD) 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 for Determining Eligibility for Access to Classified Information* (AG), effective within the DOD after September 1, 2006.

Applicant answered the SOR on October 23, 2014, and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On December 22, 2014, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing seven Items was provided to Applicant on December 30, 2014, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on January 9, 2015, and timely returned the receipt to the Defense Office of Hearings and Appeals (DOHA). He provided no additional information in response to the FORM within the 30-day period. DOHA assigned the case to me on March 16, 2015.

Rulings on Evidence

Item 5 is a Report of Investigation (ROI) from the background investigation of Applicant. The nine-page document is a summary of an interview of Applicant conducted on May 7, 2013. An ROI may be received and considered as evidence when it is authenticated by a witness.¹ Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is acting in good faith, having highlighted the issue in the FORM,² Item 5 is not authenticated. Applicant's failure to raise this issue in a reply to the FORM is not a knowing waiver of the rule.³ Accordingly, Item 5 is not admissible and is not considered in this Decision.

Findings of Fact

Applicant's SOR response admitted all SOR allegations. (Item 2.) His admissions are accepted as factual findings.

Applicant is 53 years old and divorced since December 2003. He and his former wife have three children, ages 20, 23 and 18. In June 2011 he began a position with a defense contractor. Prior to obtaining this position, he had been unemployed since July 2010, although he worked part-time occasionally and received unemployment benefits. Before that time period, he was employed full-time in the private sector from April 2008 to July 2010. (Item 4.)

¹Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing case law that a properly authenticated report of investigation is admissible).

² Department Counsel Brief at 2.

³Wavier means "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

In his SOR response, Applicant attributed his financial problems to a contentious divorce and subsequent custody battle, a long period of unemployment, and the economic downward spiral in 2007. After moving out of the family residence in August 2003, he lived in his truck for a period of time before he could afford an apartment. He noted that his three children live with him. He said he could not file taxes because his ex-wife refused to give him the necessary documents. He stated that he recently contacted a lawyer regarding filing his tax returns. (Item 3.)

Based on credit bureau reports dated April 2013 and May 2014, the SOR alleged the following: (a) Applicant owed the federal government \$24,378 for an unpaid tax lien filed in 2011; (b) Applicant failed to file or pay federal and state income tax returns for tax years 2005 through 2012; and (c) Applicant owed \$427 to a retail store for a delinquent debt. Applicant did not provide documentary proof that he has addressed or resolved any of these allegations.

Applicant did not present evidence that he obtained credit counseling. He did not submit a budget or a plan to pay the outstanding tax lien or retail debt. He offered no timeline for filing his delinquent tax returns. He submitted no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling classified information and observation of security procedures. He provided no character references describing his judgment, trustworthiness, integrity, or reliability.

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 conditions and mitigating conditions, which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 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. Directive ¶ E3.1.15 states that “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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.

AG ¶ 19 describes three conditions that could raise security concerns and may be disqualifying 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.

Applicant's financial problems, including tax issues, began accumulating in 2005. Since then he has been unable or unwilling to satisfy or resolve them. The evidence raises the above security concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

(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; 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 delinquent debts and unfiled tax returns continue to be unresolved. Because he failed to provide proof that he has paid, resolved, or is paying the debts and filing the returns, he did not demonstrate that such problems are unlikely to continue or recur. His reliability and trustworthiness in managing his taxes and debts remain a concern. The evidence does not support the application of AG ¶ 20(a).

Applicant provided some evidence that his financial problems arose as a result of a divorce in 2003, subsequent custody issues, and unemployment from July 2010 to June 2011. Those were circumstances beyond his control. However, he failed to provide evidence that he acted responsibly under the circumstances; or that he attempted to resolve the debts or tax problems while they were accumulating. AG ¶ 20(b) has limited application.

Applicant has not participated in financial or credit counseling, and there are no clear indications that his delinquent debts or tax problems are under control; thus, AG ¶ 20(c) has no application. He did not provide sufficient documentation to demonstrate that he made a good-faith effort to resolve the tax lien, to file delinquent returns, or to pay the small retail debt alleged in the SOR. AG ¶ 20(d) does not apply. Applicant admitted the three allegations listed in the SOR; thus, AG ¶ 20(e) does not apply.

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.

According to 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 pertinent facts and circumstances surrounding this case. Applicant is 53 years old. He has been employed by a defense contractor since June 2011. Prior to obtaining this position he was unemployed for almost a year, during which time he occasionally found part-time work and received unemployment benefits. Subsequent to his divorce in 2003, he failed to file federal or state income tax returns, or pay taxes for the years 2005 to 2012. In March 2011 the federal government notified him of a \$24,000 tax lien. To date he has not established a plan to pay the lien, nor has he filed any of the seven years of unfiled returns. On October 1, 2014, the SOR notified Applicant of the Government's security concerns related to his taxes. On October 23, 2014, he responded to the SOR, but provided no documentation pertinent to the allegations. In December 2014 the Government filed its FORM again notifying Applicant of his failure to provide evidence of resolution of the taxes or debts. He then had 30 days to submit additional information, but failed to do so. Applicant has been on notice for four months that his tax problems and delinquent debts were raising security concerns that could affect his security clearance and employment. Despite that notice he failed to document any steps that he had taken to address the security concerns. The likelihood that similar problems will continue is significant.

Overall, the record evidence leaves me with substantial doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising under the guideline for 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge