



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



In the matter of:)	
)	
†)	ISCR Case No. 14-05264
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: *Kerry Moore, Personal Representative*

08/11/2015

Decision

LYNCH, Noreen A., Administrative Judge:

On December 9, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline E (Personal Conduct) and 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2015. A notice of hearing was issued on June 17, 2015, scheduling the hearing for July 17, 2015. Government Exhibits (GX) 1-2 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AX) A-B, which were admitted without objection. I held the record open for additional submissions until July 24, 2015. Applicant timely submitted a packet of documents (12 pages), which was admitted as AX D, without objection. The transcript was received on July 27, 2015. Based on a

review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the SOR allegations under Guideline F. He denied the allegation under Guideline E and provided explanations.

Applicant is 49 years old. He graduated from high school. Applicant is married and has three children. Applicant has been with his current employer since 2013. He completed a security clearance application in March 2014. (GX 1)

The SOR alleges three state tax liens from 2006, 2007, and 2013 for a total amount of about \$5,000, and a 2008 Federal tax lien in the amount of \$6,908. Applicant admits that he did not file state or federal taxes from about 2004 until 2011. (Tr 14).

Applicant realizes that he is obligated to file a tax return each year. (Tr. 44) He explained that he was immature and it was a mistake that happened a long time ago. (Tr.28) He elaborated that he was young and had a family to take care of and that he is heartily sorry for his actions. Applicant believes he tried to make a payment plan a long time ago, but "it fell through the cracks." (Tr. 32) He stands ready to pay his bills. He acknowledged that he recently filed his tax returns from 2004 to 2012. Applicant has filed his 2013 and 2014 tax returns. (Tr.31)

Applicant produced documentation that confirms the satisfaction of the state lien, alleged in SOR 1.a, in the amount of \$1,909.38 as satisfied on December 7, 2013. He also submitted a release of a state tax lien, alleged in SOR 1.d, in the amount of \$1,062.51 as satisfied. () The state intercepted Applicant's refunds in order to resolve the debt. (Tr. 37)

Applicant arranged a monthly installment payment plan with the IRS in 2014 so that he could pay the 2008 federal tax lien in the amount of \$6,908, which is alleged in SOR 1.b. (AX A) He consolidated the various tax years that he had not resolved. He started paying \$300 a month, which is automatically deducted from his checking account. His first payment was made in February 2015. (AX D) He is current with the IRS.

As to the allegation in SOR 1.c, Applicant entered into a payment plan with the state for the 2007 tax lien in the amount of \$1,813. (AX B) He pays a monthly amount of \$124.19 to the comptroller of the state. (AX D) His first payment was made in January 2015, and he provided documentation that he is current with his payments.

The tax return filings and payment plans were completed after Applicant's security clearance application and his investigative interview.

Applicant works as a drywall framer and restores federal buildings. He works long hours. When he works overtime, he could earn about \$51 an hour. (Tr. 20) His income fluctuates given the number of hours worked. He has not experienced any unemployment from 1991 through 2012. He explained that some weeks he can earn \$980 to \$1,100 a week. (Tr. 24) He has a savings account. Applicant believes that he has a monthly net remainder of about \$1,000. (Tr. 27)

Personal Conduct

Applicant explained that his wife completed his 2014 security clearance application. He noted that it took a couple of days to complete. His wife consulted with him on some questions, but he said she knew the answers to most and did not ask him. (Tr. 51) In response to Section 26 - Financial Record: Delinquency Involving Enforcement, Applicant responded "No" to the question asked about a lien in the past seven years for failure to pay taxes or other debts. It also asked about failure to file or pay taxes, Federal or state. (GX 1) The answer checked was "No."

At the hearing, Applicant stated that he did not read through the question properly, but he did not mean to be deceptive. Applicant agreed that he read the certification before he signed the document. (Tr. 54) He admitted that he did not review the document. At one point Applicant explained that he did not know what he was doing and that this is a common mistake. Applicant said it was an error and he is sorry. He also admitted at the hearing that when he spoke to the investigator, she remarked that Applicant had unfiled taxes and he agreed that he knew that he did. (Tr. 58) He also stated that the investigator told him to go the state and federal government and arrange for a payment plan. When questioned, Applicant stated that he and his wife knew that he had not filed tax returns for the years from 2004 until 2011. (Tr. 63)

Applicant did not disclose the information concerning the non-filing of the taxes, or tax liens, but stated that he made no attempt to deceive the investigator during the interview after she confronted him with the credit report He asks for a fresh start.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Analysis

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

In this case AG ¶¶ 16 (a) and (c) apply. Applicant is a mature man. He knew that he had not filed his taxes and had tax liens. He already paid two of them earlier. I do not accept his explanation that he checked the wrong box and that it was a common mistake. He did not disclose material information and intentionally falsified his security clearance application.

Applicant's explanations do not persuade me that he is reliable, trustworthy, or has met his burden to mitigate the personal conduct concerns. I find this leaves me with doubts about her eligibility for a security clearance. Any doubts must be resolved in favor of the Government. After considering the mitigating factors, I conclude that Applicant has not mitigated the personal conduct concerns under Guideline E.

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant admitted that he did not timely file his federal and state tax returns for almost nine years. He owed federal and state taxes, which resulted in liens. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), FC DC AG ¶ 19(c) (a history of not meeting financial obligations), and FC DC AG ¶ 19(g) (failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same) apply. With such conditions raised, it is left to Applicant to overcome the case against her and mitigate security concerns.

The nature, frequency, and relative recency of Applicant's financial difficulties make it difficult to conclude that it occurred "so long ago." Applicant's untimely filings of federal and state taxes continued until 2014, after he was advised by the security investigator. He recently started a payment plan with the IRS and the state. He satisfied two liens through tax refund interceptions. Consequently, Financial Considerations Mitigating Condition (FC MC) 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) does not apply.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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 in part. Applicant was employed for many years. He did not experience unemployment. He stated that he was immature and had too much on his plate. At the time he was 38 years old. He still had not filed his tax returns or paid the federal or state liens until after his security clearance application and interview. He is currently in an installment plan. However, II cannot find that he acted responsibly under the circumstances.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has some application. Applicant as noted above recently took steps to arrange payments with the IRS. FC MC 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) does not apply.

The Appeal Board has addressed this issue concerning Applicant's responsibility for fulfilling a legal obligation. In regard to federal and state income taxes, the Appeal Board has commented:

A person who fails repeatedly to fulfil his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of

persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information. See, e.g. ISCR Case No., 98-0608 at 2 (App. Bd. Jun. 27, 2000).

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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 49 years old. He has been with his current employer since 2013. He is married and provides for his family. He is a hard worker. He stated that he is very sorry for the situation and mistakes that he made. He stated that this would never occur again.

Applicant not provided information concerning the payment plan with the IRS and the state. However, he initiated the plans after being confronted by the security interviewer in 2014. The fact that he did not file taxes timely for almost nine years in a row gives me grave doubts about his reliability. His recent filing and payment plans do not mitigate the concerns.

Applicant did not persuade me that he refuted or mitigated the Government's case concerning the personal conduct and financial considerations security concerns. Any doubts must be resolved in the Government's favor. For all these reasons, clearance is denied.

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 :	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline :	AGAINST APPLICANT
Subparagraph 2.a:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge