



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



In the matter of:)
)
) ISCR Case No. 14-05509
)
Applicant for Security Clearance)

Appearances

For Government: Candace Garcia, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire
Ryan C. Nerney, Esquire

10/02/2015

Decision

HENRY, Mary E., Administrative Judge:

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

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on November 19, 2013, which he signed on November 20, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on December 2, 2014, 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; DOD 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), implemented on September 1, 2006.

Applicant received the SOR on December 10, 2014, and he answered it through counsel on December 19, 2014. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on July 2, 2015, and I received the case assignment on August 25, 2015. DOHA issued a Notice of Hearing on September 2, 2015, and I convened the hearing as scheduled on September 24, 2015. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE S, which were received and admitted into evidence without objection. I held the record open until September 30, 2015, for Applicant to submit additional matters. Applicant timely submitted AE T and AE U, which were received and admitted without objection. The record closed on September 30, 2015. DOHA received the hearing transcript (Tr.) on October 2, 2015.

Procedural and Evidentiary Rulings

Motions

At the hearing, Department Counsel moved to amend the SOR to correct Applicant's name. The motion was granted, and the SOR was amended to correct Applicant's name (Tr. 8-9)

At the hearing, Department Counsel objected to the admission of AE M. After Applicant clarified the information contained in this exhibit, it was admitted into evidence without objection. (Tr. 21-22, 67).

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in ¶¶ 1.a and 1.b of the SOR with explanations.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 56 years old, works as a management consultant in his own company. His company competes as a prime contractor to the DOD. His company is formed as a S Corporation under the law, and he employs approximately 22 staff.

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

Before starting his business in 2006, Applicant worked for the United States Marine Corps in a civilian position as a logistics management specialist. He served in the United States Marine Corps for 21 years. He retired in the pay grade of E-7 in 1997 with an honorable discharge. Following his military service, the Department of Veteran's Affairs gave him an 80% disability rating based on two service connected injuries, which left him with serious arthritis issues.²

Applicant married his first wife in 1981, they separated in 2004, and they finalized their divorce in 2009. He and his first wife have three adult children, ages 33, 31 and 29. He married his current wife in 2009. He is helping to raise her two children, who are 16 and 14 years of age.³

In 2006, Applicant started his own business, a consulting service. His business provides engineering and logistical services, program management services, financial support, and administrative support. Initially, Applicant and a lady friend, now his wife, comprised the only employees of the business. Early in his business, Applicant could not compete as a prime government contractor; rather, his business came from his status as a subcontractor. As a subcontractor, he received less income, but incurred similar costs to the prime contractor. During the first few years of his business operations, the economic downturn and the withdrawal of troops from Iraq in 2009 impacted his ability to fully develop his business and his ability to create other business opportunities. This status created tight finances for his business. The federal government sequestration in 2013 also hurt his business. He is now a prime contractor to DOD, which improved his business finances.⁴

Applicant's lady friend kept the business financial records when his business first started, as the recording involved was basic bookkeeping. As his business grew, the financial record keeping became more complex. In 2008, Applicant sent his lady friend for QuickBooks training to help her manage the financial records. His company continued to grow, and his financial records management grew even more complex. In 2009, he hired a certified public accountant (CPA) to take over the management of his business financial records and to teach him more about business finances.⁵

By 2010, Applicant understood that he needed to change his business plan and structure. He decided that he could no longer provide jobs to family and friends who were not qualified for positions his company needed to fill. In 2010, he hired a professional contracts manager and a professional contracts cost accounting manager to help improve his business. With these changes, Applicant's business improved, and his business finances stabilized. His business has a solid rating. The Defense

²GE 1; AE G; Tr. 25, 39-42, 60.

³GE 1; Tr, 23-25.

⁴GE 2; Tr. 25, 43-45, 56.

⁵Tr. 50-61.

Contracting Auditing Agency conducted an audit of his finances and accounting systems in 2012. The agency found his systems compliant with financial accounting standards and in compliance with the agency requirements.⁶

The SOR alleges that Applicant owes the Internal Revenue Service (IRS) \$76,828 in past-due taxes as shown by two tax liens filed in February and June 2010. These tax liens apply to the tax years 2006, 2007, and 2008.⁷ IRS documentation also identifies tax issues for the tax years 2005, 2009, 2010, and 2012.⁸ Applicant's tax issues began when he and his first wife sold the marital home in 2005. His first wife refused to provide him with the necessary documentation from this sale to complete his 2005 federal income tax return, despite repeated requests. The title company ceased operations, making it impossible for Applicant to obtain the necessary documentation from this company. The IRS required Applicant to file this return before it would accept later income returns. After discussions with the IRS about the document problem, Applicant agreed to file the return absent the documentation and pay the resulting higher taxes. He filed the 2005 income tax return in 2009 as well as the tax returns for 2006 through 2008.⁹

In addition to the documentation problem, Applicant's business entity, the S Corporation created significant issues with taxes. Applicant is the sole shareholder in his company. Under the tax laws, any money remaining on his company financial records at the end of the calendar year is treated as personal income to him and becomes the basis for his own taxable income. Each year, particularly when he was a subcontractor, companies distributed contracting income to his company late in the calendar year as these companies sought to clear their books before the end of the tax year. He learned that he also needed to distribute this income quickly. With the assistance of his accountants, he worked to distribute this income from his company quickly.¹⁰

In 2007, Applicant realized that he had a tax issue and hired an accountant to resolve his 2005 and 2006 tax issues. It is unclear if this hiring helped. By 2009, he hired an accountant to regularly manage his income and expenses, as well as work on his tax issues. In that same year, Applicant began discussions with the IRS about his past-due taxes. He reached an agreement to make payments as he could because his business income fluctuated. He made three payments of \$299 each and one payment of \$252 in 2009 before the IRS filed any liens and a \$398 payment in March 2010 before the IRS filed its second lien. Beginning in July 2010, Applicant made regular payments of \$1,500 to the IRS. In July 2011, these payments increased to \$2,600 a

⁶AE I - AE L; AE O; AE S; Tr. 34-35.

⁷AE E; AE N.

⁸AE D.

⁹SOR; GE 3; Tr. 35-37.

¹⁰Tr. 60, 64-65.

month, and in March 2014, Applicant and the IRS reached an agreement for him to pay \$2,500 a month to resolve his remaining tax debts. As his business income improved, Applicant periodically made a large payment to the IRS towards the resolution of his tax liens. He also paid any additional taxes owed on his timely filed business and personal income taxes. On March 26, 2014, the IRS released the \$29,940 tax lien filed on February 12, 2010, noting that the tax debt had been fully paid. On April 22, 2015, the IRS released the \$46,888 tax lien filed on June 3, 2010, noting that it had been fully paid. Applicant timely files his business and personal income taxes with the assistance of his accountant.¹¹

Applicant's work facility has a security clearance. His financial advisor has provided him with financial counseling and guidance on both business and personal finances. His financial advisor indicates that his overall financial situation is "very stable" and that they have worked together for five years on achieving good financial choices for him.¹²

Applicant and his current wife established a nonprofit to provide a community breakfast every Sunday morning. Their nonprofit also provides meals to the elderly on a fixed income, medical shut-ins, and motel families during the week. Applicant also supports another charitable foundation in his community.¹³

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 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 access to classified information will be resolved in favor of national security." In reaching this

¹¹GE 3; GE 4; AE D; AE E; AE N; Tr. 26,-28, 36-37, 51-59.

¹²AE Q; AE R; AE T.

¹³AE A; Tr. 38-39.

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, 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. . . .” An applicant has the ultimate burden of persuasion for 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 an 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (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 developed significant tax issues after he and his first wife separated, and she refused to provide him with necessary documentation to file his 2005 income taxes. Her conduct resulted in delays in filing his yearly income tax returns. Her refusal to provide information and his decision to form a S Corporation as his business created significant unpaid tax debts for which the IRS filed tax liens in 2010. These three disqualifying conditions apply.

The financial considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following 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 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's tax issues began about 10 years ago when his first wife refused to provide tax documentation to him. Their divorce finalized in 2009, making the initial source of his tax problem moot. AG ¶ 20(a) is partially applicable because his tax issues continued until recently.

Applicant's divorce and former wife's conduct along with the economic downturn, sequestration, and the Iraq troop reduction impacted his business income over the years, factors beyond his control. Despite these adverse impacts on his business, he experienced enough business growth to necessitate the hiring of an accountant in 2009. He also realized at this time that if he wanted his business to succeed, he needed to change his business model. In 2010, he hired a professional contracts manager and a professional contracts cost accounting manager. With their assistance, he made difficult decisions about firing employees, who were family members and friends. His work with these individuals changed the direction of his business in a positive manner. His business is financially stable and sound. He not only worked to improve his business, he contacted the IRS in 2009 to resolve his tax issues. He made payments on his taxes

when he could. As his business improved, he increased his payments to the IRS, and eventually, he resolved his significant tax debts. His financial advisor provided him with solid financial counseling, which he followed. His finances are under control, and his tax debts are resolved. AG ¶¶ 20(b) - 20(d) 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 an 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.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.¹⁴

¹⁴In assessing whether an applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's divorce from his first wife was acrimonious, causing financial problems for Applicant, particularly with his income taxes. His decision to make his company an S corporation further increased his tax liability because any money left on his business records at the end of the calendar year is treated as his personal income. Applicant recognized he had a tax problem and took action to correct his problem. This task of correcting his business problems was not easy. Applicant made difficult decisions about keeping his initial employees when he realized that he needed individuals with different skills to make his business a success. He hired professionals to help develop a better business model. These decisions created a better and stronger business. At the same time, he hired an accountant to take over the management of his business finances, and he began a long-term relationship with a financial planner, which has benefitted his overall financial well-being. Over a six-year period of time, Applicant has taken the right steps and made good decisions about the growth and continued operation of his company. These decisions placed his company on solid financial ground. These sound business decisions made it possible for Applicant to pay his large tax debt quickly. He did not ignore his tax debt as shown by his small payments in 2009 before the IRS filed its tax liens. As his income grew, his payments to the IRS increased. When he had significant extra income, he voluntarily made large payments to the IRS to reduce his debt faster. In a short period of time, he paid his tax debts. Applicant supports the community, and he served honorably in the Marine Corps for more than 20 years. After reviewing all the evidence of record, I conclude that Applicant's tax debts are not a security concern.

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 finances under Guideline F.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

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 a security clearance is granted.

MARY E. HENRY
Administrative Judge