



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



In the matter of:)
)
) ISCR Case No. 14-05744
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, financial considerations. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On March 19, 2015, 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 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 (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on April 17, 2015, and requested a hearing before an administrative judge. The case was assigned to another administrative judge in July 2015, and the case was scheduled for August 26, 2015. Applicant requested and was granted a continuance. The case was reassigned to another administrative judge based

on Applicant's location. His hearing was scheduled for February 12, 2016. Applicant was on extended temporary duty to another state and was granted another continuance. The case was then reassigned to me on January 29, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 22, 2016. I convened the hearing as rescheduled on March 16, 2016. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence without objection. Applicant testified and offered Applicant's Exhibits (AE) A through E, which were admitted into evidence without objection. The record was held open until March 30, 2016, to permit Applicant to submit additional documents, which he did. AE F through Q were admitted into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on March 24, 2016.

Procedural Issues

Department Counsel moved to amend SOR ¶ 1.c to add tax years "2003 through 2009." There was no objection and the motion was granted.²

Department Counsel moved to amend SOR ¶ 1.d and requested the word "pay" be deleted and the years "2003 through 2009" be added. There was no objection and the motion was granted.³

Findings of Fact

Applicant failed to admit or deny the allegations in the SOR, as required, but rather provided explanations in his response to the SOR. Therefore, I have considered his omissions as denials. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 58 years old. He has an associate's degree. He has worked for the same federal contractor since 1980. He was married from 1977 until his divorce in January 2003. He has four grown children.⁴

Applicant failed to timely file his federal income tax returns for tax years 2003 through 2009. He stated the reason for his failure was due to his 2003 divorce. He was not required to pay spousal support. He stated he was making poor financial decisions during this time. He spent money on attorney's fees. He purchased the family home from his wife and had difficulty with his finances. The cost of the home was \$225,000. He was having federal and state income taxes withheld from his pay, but did not file his

¹ Hearing Exhibit I is Department Counsel's memorandum with comments. There is no AE H. So as not to create confusion I have not re-labeled the documents.

² Tr. 79-80.

³ Tr. 79-80.

⁴ Tr. 20-23; 54-57; GE 1.

tax returns. He withdrew money from his retirement account to get his finances in order. He did not pay the taxes or penalties owed on the withdrawal at the time.⁵

Applicant indicated that starting in 2003 the Internal Revenue Service (IRS) filed his tax returns for him for some years and did not take the deductions he might have been entitled, so his tax debt began accumulating because he was not paying the taxes owed, and penalties and interest were accruing. He stated that in 2011 he decided he needed to resolve his tax problems because it was “catching up” to him.⁶ He testified that in 2011 he became aware of a federal tax lien against him. He stated that he filed his 2007, 2008, and 2009 federal tax returns in 2011. He testified that the tax liens were originally about \$120,000, but now are about \$67,000 because of payments he has made. Applicant stated that he timely filed his 2010 through 2014 federal income tax returns.⁷

Applicant also failed to timely file his state income tax returns for 2003 through 2009. He indicated in 2011 he filed the 2007, 2008, and 2009 state returns. It is unknown when he filed the other years. A judgment was entered against Applicant in May 2012 by his home state for delinquent state taxes of \$2,822. It was satisfied in May 2014. Applicant provided a document to show he has a zero balance owed for his state taxes for tax year 2013. He did not provide other documents to support whether he owes taxes to his state for other tax years. Applicant believes he does not owe any delinquent state taxes for other tax years.⁸

Applicant provided chronological transcripts from the IRS for tax year 2003 that showed Applicant was granted an extension to file his 2003 tax return until August 15, 2004. The IRS sent Applicant a notice regarding his failure to file his tax return for 2003 and sent a final notice in September 2008. The transcripts he provided also showed he was sent inquiries for tax years 2004 and 2006 about his failure to file his tax returns. No transcript was provided for 2005. Applicant believed the IRS was filing his tax returns on his behalf from 2003 to 2006. Each of the three transcripts provided had notations that in March 2011 on sequential dates a “lien placed on assets due to balance owed;” an “issuance of lien filing and right to collection due process hearing” was noted; a “collection of due process Notice of Intent to Levy issued;” and a “collection due process Notice of Intent to Levy-return receipt signed.”⁹

⁵ Tr. 20-26, 28-31, 54-58, 74.

⁶ Tr. 37-38.

⁷ Tr. 23-28, 39-51, 59.

⁸ Tr. 39-43, 62-66; AE G. The judgment for state taxes is not alleged and will not be considered for disqualifying purposes, but will be considered when analyzing Applicant’s credibility, in mitigation, and the whole person.

⁹ Tr. 39-51, 57-59-60; AE B is an IRS transcript, but it is missing the first page, so it is unclear what specific tax year it pertains to. AE C is for tax year 2004; AE D is for tax year 2003; and AE E is for tax year 2006.

Applicant testified that he began making payments to the IRS based on the tax liens. He paid \$1,290 a month beginning in August 2011. He stated he made approximately 40 payments. The IRS transcripts indicated he made payments from August 2011 and the payments stopped in July 2012. Applicant did not provide additional proof to show he continued to make monthly payments after that date. He testified that he made a lump sum payment of \$6,000 toward the federal tax debt in October 2015.¹⁰

The federal tax liens and state judgment are supported by credit reports from January 2014, August 2014, and June 2015.¹¹

Applicant's explanation for why he failed to file his federal and state income tax was because of his divorce. He testified that all of his past federal and state income tax returns have now been filed. He testified that the IRS filed for him for some years, but he filed his 2010 through 2014 federal income tax returns timely. Applicant's post-hearing documents indicate his 2009 federal income tax return was filed in March 2011; the 2010 return was filed in May 2011; the 2011 return was filed timely in April 2012; the 2013 return was filed in April 2015. It appeared he owed taxes for tax years 2009 and 2010, but was due refunds for tax years 2011, 2012, and 2013. No explanation was provided for why he did not timely file his 2013 federal income tax return. Applicant did not provide a copy of his 2014 federal income tax return, but rather provided a "tax scenario analysis," which does not document when or if he filed the return.¹²

Post-hearing, Applicant provided a notice from the IRS dated January 28, 2016, providing him with collection information. It indicated that the amount he owed the IRS was \$67,867 for tax years 2006 through 2009.¹³

Post-hearing, Applicant also provided a letter from the IRS from March 2016 referencing a telephone conversation from March 4, 2016. The letter addresses tax years 2006, 2007, 2008, and 2009, indicating the IRS' acceptance of an installment agreement by automatic deduction of \$1,150 monthly from Applicant's account, but it needed additional information about his account to complete the agreement. Applicant did not provide other information verifying that he is making regular payments to the IRS.¹⁴

¹⁰ Tr. 44-45, 58, 77-78; AE B, C, D, E.

¹¹ GE 3, 4, 6.

¹² Tr. 60-61; AE J through O. I have not considered the information about Applicant's untimely tax returns beyond tax year 2009 for disqualifying purposes. I may consider the information when analyzing Applicant's credibility, in mitigation, and when considering the whole person.

¹³ AE Q.

¹⁴ Tr. 77-78; AE I.

Applicant provided his performance appraisal for March 2014 to February 2015. His performance rating was “exceeds job requirements.”¹⁵

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 decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn 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 to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

¹⁵ AE P.

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 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 notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three 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. . . .

Applicant failed to timely file his 2003 through 2009 federal and state income tax returns. He is indebted to the IRS for unpaid tax liens filed in 2011 in the approximate amounts of \$87,937 and \$34,483. The above disqualifying conditions apply.

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 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 owes federal income taxes to the IRS for tax liens entered in 2011. He exhibited a pattern of untimely filing his state and federal income tax returns. His behavior casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not establish mitigation of the alleged security concerns. Applicant attributed his delinquent debts to a period of making poor financial decisions and his divorce in 2003. Although going through a divorce may have caused Applicant distress, he failed to articulate how it prevented him from timely filing his federal and state tax returns from 2003 through 2009. He also failed to articulate how making poor financial decisions was beyond his control. AG ¶ 20(b) does not apply. Even if Applicant was so distraught that he was unable to file his 2003 tax returns in April 2004, and the condition was beyond his control, he failed to show he acted responsibly under those circumstances. He was granted an extension to file his return for tax year 2003, but failed to file them before the extension expired. His conduct continued for many years and he did not take action to resolve the problems until he received notice by the IRS that a tax lien was levied.

Applicant did not provide evidence he participated in financial counseling. There is evidence that Applicant filed some of his delinquent tax returns, but there is also substantial evidence that the IRS filed them for him after providing notice that he had not filed the returns. The evidence confirms his failure to take action to resolve his delinquent filings until 2011, after he was notified that a tax lien was filed against him. He entered an installment agreement with the IRS and made payments from August 2011 to July 2012. Applicant testified that he made 40 payments to the IRS. He did not provide proof of additional payments beyond July 2012, but he did show that the current debt is reduced. It is unknown exactly how much Applicant's current federal tax debt is, but a minimal estimation is \$67,000. Applicant provided a document to show he had an installment agreement accepted by the IRS in March 2016. He was required to provide additional information to the IRS. There is some evidence that Applicant is resolving his debt to the IRS, but he still has a large tax debt. It appears Applicant no longer has a tax debt for state income taxes for 2013, but any liability for other years is unknown. AG ¶¶ 20(c) and 20(d) have partial application to his federal and state income taxes and liens. Neither condition provides full mitigation because of the outstanding debt and long pattern of failure to timely file income tax returns.

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.

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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 58 years old. He failed to timely file his federal and state income tax returns from 2003 through 2009. His behavior shows a pattern of irresponsible conduct. The IRS filed his federal income tax returns for some years. In 2011 he began to address his tax problems, but only after the IRS entered a tax lien. Applicant continues to have a substantial tax debt. Even after he addressed some of his past delinquent tax filings, he did not file his 2013 federal income taxes until 2015. Applicant has the burden of persuasion to mitigate the security concerns. Although he provided some evidence that he has reduced the amount he owes to the IRS, it is insufficient to overcome his years of deliberate disregard for complying with his legal obligation to file income tax returns and pay his taxes. He has not met that burden. Applicant's conduct raises questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	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. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge