



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



In the matter of:)
)
) ISCR Case No. 14-05867
)
Applicant for Security Clearance)

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: *Pro se*

02/16/2016

Decision

CURRY, Marc E., Administrative Judge:

Although Applicant’s financial problems were caused by a business downturn, and he has been making good-faith efforts to resolve his debts, he failed to provide enough corroborating evidence for me to conclude that his finances no longer pose a security concern. Clearance is denied.

Statement of the Case

On June 20, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant 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 (AG) implemented by the DOD on September 1, 2006. On July 26, 2015, Applicant answered the SOR, admitting subparagraphs 1.a through 1.c(1), and denying subparagraphs 1.c(2) and 1.c(3). He requested a hearing, whereupon the case was assigned to me on October 1, 2015.

DOHA issued a notice of hearing on October 7, 2015, scheduling the hearing for October 26, 2015. The hearing was held as scheduled. At the hearing, I received seven Government exhibits (GE 1 - GE 7), and four Applicant exhibits (AE A - AE D). Also, I took administrative notice of a copy of the discovery letter from Department Counsel to Applicant, dated September 3, 2015. At the close of the hearing, I left the record open, at Applicant's request, to allow him the opportunity to submit additional exhibits. Within the time allotted he submitted six additional exhibits that I admitted and incorporated into the record as AE E through AE J. DOHA received the transcript (Tr.) on November 3, 2015.

Findings of Fact

Applicant is a 72-year-old man who is a veteran of the United States Air Force, serving from 1961 to 1965. He was honorably discharged. He graduated from college with a degree in general studies in 1970, earned a master's degree in 1990, in the field of educational administration, and a Ph.D in the field of educational leadership in 1994. (Tr. 21) Since 1994, Applicant has been self-employed as a consultant who investigates discrimination and workplace harassment complaints on a contract basis for various U.S. Government agencies. Applicant began this line of work after retiring from a career in state government in 1994.

Typically, Applicant's business generated between \$60,000 and \$80,000 in revenue. (Tr. 63) However, after the 2008 economic downturn, Applicant's contracts decreased drastically, causing his revenue to decrease to less than \$6,000 annually. (GE 2 at 1; Tr. 25; Tr. 63) Consequently, Applicant became unable to make ends meet.

In September 2009, Applicant filed for Chapter 7 bankruptcy protection. The debt included \$369,694 from two home mortgages and \$33,470 of unsecured debt. (GE 6 at 21) In May 2010, the case was dismissed on technical grounds. (GE 5)

In September 2010, Applicant re-filed the Chapter 7 bankruptcy petition. (GE 6) As part of the Chapter 7 proceedings, Applicant agreed to re-affirm the mortgage debt. (AE J) In January 2011, the bankruptcy court discharged Applicant's unsecured debt. (GE 2 at 7)

Having re-affirmed the mortgage debt, Applicant sought to negotiate a refinance with the bank. (Tr. 60) His efforts were unsuccessful, as the bank in June 2011 moved to foreclose the home. (AE I at 3) While the foreclosure process was pending, the IRS in early 2012, audited Applicant's federal income tax returns from 2002, 2004, and 2008 through 2011. The audit concluded that Applicant owed \$78,000. (AE F; GE 3 at 3)

In October 2012, Applicant filed for Chapter 13 bankruptcy protection, including the mortgagee as a scheduled creditor. (GE 7 at 4) His attorney advised him that taking this route would forestall the foreclosure proceedings. (Tr. 61) At that time, Applicant was approximately \$86,000 behind on mortgage payments. (Item 7 at 6)

The SOR alleges that he scheduled two federal income tax debts in the bankruptcy petition, in addition to the mortgage. The income tax debts stemmed from the 2012 audit, and had, by the time of the bankruptcy filing, increased to approximately \$82,000. In 2013, a federal tax lien of \$58,936 was entered to secure a portion of the total amount past due.

Applicant admits filing the bankruptcy petition, but, contrary to the Government's allegation in SOR subparagraph 1.(c)(3), denies including the tax debts in the petition. The Government's supporting evidence is inconclusive.

In October 2012, the bankruptcy court dismissed the Chapter 13 petition because, under bankruptcy law, it was filed too close in time to Applicant's Chapter 7 bankruptcy discharge. (GE 7) Subsequently, the bank, after satisfying proper notice requirements, sold Applicant's home in September 2013. (AE I at 3) In November 2013, Applicant filed exceptions to the sale, arguing, among other things, that lawyers for the bank stopped refinance negotiations in bad faith. As a remedy, he asked that the court set aside the foreclosure sale and order the bank to participate in mediation with him and assist him with a mortgage modification. (AE I at 3)

On November 22, 2013, the court rejected Applicant's claim and ratified the sale. (AE I at 4) Applicant appealed the case, and on July 9, 2015, the state's appellate court upheld the lower court decision. (AE I)

In August 2013, Applicant sought to resolve the IRS tax debts by seeking an offer in compromise for \$500. (AE F at 2) He contends that the IRS accepted his offer, and after receiving his payment, released the lien. (Answer at 1) In support of his contention, he submitted an October 2015 credit report that does not include a tax lien or any other tax liability. (AE D)

Currently, Applicant's company has an annual revenue of approximately \$51,000 annually. (Tr. 64) He contends that the only debts that he has are a car note and a credit card with a \$600 balance. (AE D) Neither debt is delinquent.

Policies

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 together with the factors listed in the adjudicative process. 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

The Government failed to establish that Applicant listed the IRS as a creditor for a \$13,726 debt, as it alleged in SOR subparagraph 1.c(3). I resolve this allegation in Applicant’s favor. As for the remainder of the SOR, the potential security ramifications must be evaluated under the financial considerations guideline. Specifically, it sets forth that “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.” (AG ¶ 18)

Between 2008 and 2012 Applicant incurred approximately \$180,000 of delinquent debt. Moreover, an IRS audit revealed tax underpayments from multiple tax years totalling approximately \$78,000. AG ¶ 19(a), “inability or unwillingness to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply.

The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (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 debt; 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 evidence of actions to resolve the issue.

Applicant’s financial problems related entirely to his business struggles that began with the 2008 recession. Although a few of the years that the IRS audit covered predated the 2008 recession, there is no record evidence to infer that the tax

underpayments resulted from financial problems. Applicant actively confronted his financial problems, obtaining a Chapter 7 discharge, and attempting to negotiate a refinance of his delinquent mortgage. AG ¶¶ 20(b) and 20(d) apply.

Applicant's contention, appealed to his state's appellate court, that the court should set aside the foreclosure sale of his home, was robust and in good faith, despite its ultimate failure. Under these circumstances AG ¶ 20(e) applies.

Regardless of the good-faith basis of Applicant's dispute of the foreclosure ratification, he did not prevail, and his eviction was scheduled within six weeks after the hearing. Moreover, as for the income tax delinquencies, I conclude that their absence from the credit report that he submitted is insufficient to establish that he has settled them.

Given that Applicant has been a wage-earning adult for nearly 55 years, his period of financial difficulty was isolated. Under these circumstances, I conclude that he has mitigated the negative security ramifications of his Chapter 7 bankruptcy discharge, as alleged in SOR subparagraphs 1.a and 1.b. Accordingly, I resolve them in his favor.

Conversely, Applicant was scheduled to be evicted from his home approximately six weeks after this hearing, and he failed to prove that he resolved the federal tax delinquencies. Under these circumstances, I cannot conclude that there are clear indications that the problem is being resolved or is under control. AG ¶ 20(c) does not apply. I resolve SOR subparagraphs 1.c(1) and 1.c(2) against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They are as follows:

- (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.

The issue of the tax debts was of critical importance to the resolution of this case. Applicant testified credibly, and there is nothing on record to indicate that he has ever had any financial problems, excluding those related to the 2008 business downturn, during his 55-year career. Moreover, he has been actively involved in attempting to resolve his financial problems. However, Applicant only provided circumstantial evidence that he satisfied the tax debts. There is no *per se* rule that prevents me from finding that debts were paid based solely on testimonial and circumstantial evidence.

However, the debt alleged in subparagraph 1.c(2) is not a miscellaneous utility bills, or a nominal credit card or medical bill. It is a tax debt owed to the U.S. Government, totalling more than \$60,000. Under these circumstances, concrete proof such as a cancelled check or an IRS Form 1450, a Certificate of Release of Federal Tax Lien, was imperative. Applicant provided no such evidence, therefore, he did not carry the burden.

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.b:	For Applicant
Subparagraph 1.c(1):	Against Applicant
Subparagraph 1.c(2):	Against Applicant
Subparagraph 1.c(3):	For 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.

MARC E. CURRY
Administrative Judge