



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



In the matter of:)	
)	
)	ISCR Case No. 15-01327
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. He was delinquent in filing his state and federal income tax returns for eight tax years. He owes approximately \$66,000 in federal income tax and more than \$5,000 in state income tax. In June 2012, he started working with the IRS to address the problem. He has now filed his tax returns, but failed to show any payment on his delinquent tax obligations. He has failed to mitigate the financial considerations security concerns. Clearance is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on September 11, 2015, the DoD issued a Statement of Reasons (SOR) detailing security concerns. On

¹ 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.

October 20, 2015, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated November 20, 2015. The FORM contained seven attachments (Items). On November 30, 2015, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. His response was due on December 30, 2015. No response has been received. On March 22, 2016, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he denied the SOR allegations and provided documentation from the Internal Revenue Service (IRS) showing the status of his federal filing. He also indicated he had arranged a repayment agreement to pay the \$5,000 owed in state taxes. Applicant had filed the eight years of federal returns listed in the SOR, although they were filed between one and five years late. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is a 44 year-old painter who has worked for a defense contractor since April 2013 and seeks to obtain a security clearance. From June 2000 through November 2008, he owned a painting company and from March 2008 through November 2012, he was an independent contractor. His accountant was supposed to file his tax returns, but never did. Applicant never checked to see if the returns were filed. (Item 3) At some point, he was separated from his wife. He has three children. In April 2013, he was in Chapter 13, the Wage Earner's Plan, bankruptcy. (Item 2) The amount of the bankruptcy was approximately \$32,000. In his December 2014 response to written financial interrogatories, he states the Chapter 13 bankruptcy had been converted to a Chapter 7.² (Item 3)

Applicant provided a state tax amnesty letter dated October 2015 indicating he owed \$5,426 for tax years 2003, 2004, 2008, 2009, and 2010. (Item 1) Under the amnesty agreement, all penalties, interest, and collection fees were waived. The repayment agreement required him to make a \$542 payment in November 2015 followed by eight additional payments of \$610 each. (Item 1) If the payment schedule is met, the debt to the state will be paid by June 2016. He provided no documents showing payment.

Applicant's IRS account transcripts indicate his tax returns for tax year 2001 due in April 2002 were filed five years late in May 2007. (Item 1) As of August 2015, he owed no taxes for tax year 2001. His return for 2002 was filed in May 2007, four years late. He owed no federal taxes for tax year 2002. His 2003 federal tax return was filed in August 2007 and he owes \$6,262. His 2004 federal tax return was filed in May 2007 and he owes \$6,229. He owed \$20,739 for tax year 2004. His 2005 return was also filed in May 2007. No federal tax is owed for tax year 2005. (Item 5)

² The Chapter 7 material indicates debts that are not discharged include "Debts for most taxes." (Item 3)

The SOR does not allege a failure to file tax returns for tax years 2006 and 2007. As of October 2015, he owed \$13,217 for federal taxes for tax year 2008. (Item 1) The return was filed three years late in October 2012. His 2009 and 2010 federal returns were also filed in 2012. He owed \$16,883 in federal taxes for tax year 2009 and \$2,993 for tax year 2010. (Item 1) These total \$66,323 in delinquent federal tax.

On Applicant's April 2013 Electronic Questionnaires for Investigations Processing (e-QIP), he indicated his delinquent taxes were discovered in an IRS audit. (Item 2) He indicated his payments to the state tax authority and the IRS were included in the Chapter 13 bankruptcy repayment plan. (Item 2) Applicant's November 2014 pay statement indicates \$2,113 had been deducted from his pay for the bankruptcy. (Item 3) However, all payments ended when his Chapter 13 was converted to a Chapter 7. In his December 2014 response to written financial interrogatories, he stated he was in discussions concerning the establishment of repayment plans with the IRS and state tax authority related to his delinquent state and federal taxes. (Item 3)

As of December 2014, Applicant's monthly net remainder (monthly income less monthly expenses and debt payment) was \$85. (Item 3) The debt payment did not include amounts for federal or state tax payments. As of December 2014, he owed \$12,561 in delinquent state tax and owed more than \$66,000 in delinquent federal tax. (Item 3) During a May 2013 Personal Subject Interview (PSI), he was asked about the non-filing of his tax returns, the nonpayment of taxes, and the various tax liens that had been filed. (Item 3) At that time, he indicated he had paid various tax liens in full in December 2012. He provided no documentation supporting payment of the liens. There is no evidence he has received financial counseling.

Applicant was informed he had 30 days to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. No documents were received.

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 must be considered 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 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.

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 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.

Section 7 of Executive Order (EO) 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and

safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his or her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage their finances to meet their financial obligations.

Applicant failed to timely file his state income tax returns and timely pay his state taxes for seven years resulting in more than \$5,000 of delinquent state tax. He failed to timely file his federal returns from 2001 through 2005 and 2008 through 2010. He has a federal income tax delinquency of more than \$66,000. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same," apply.

Five financial considerations 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;
- (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.

None of the mitigating factors for financial considerations fully extenuate the security concerns. Applicant's financial difficulties are both recent and multiple. He failed

to file state and federal income tax returns for seven years. The returns were filed in 2007 and 2012. He owes more than \$71,000 in delinquent state and federal taxes.

In May 2013, Applicant was made aware of the Government's concerns about his unfiled state and federal tax returns and the unpaid tax obligation. During his May 2013 PSI, he indicated he intended to pay his state and federal tax obligations and intended to establish repayment plans. In his November 2014 written financial interrogatories, he was again questioned about the status of his delinquent tax obligations. The state and federal tax returns are now filed and Applicant owes no federal tax for tax year 2001, 2002 and 2005. He filed these returns five, four, and one year late.

Applicant provided no documentation showing a repayment agreement with the IRS or payment in accord with any such agreement. He provided a state tax amnesty letter indicating he had been offered a repayment agreement. However, he failed to show documentation that he complied with the agreement which required him to pay \$542 by mid-November 2015 and make \$610 monthly payments thereafter.

Applicant blames his income tax problem on his accountant who failed to file his returns. However, Applicant never checked to insure the returns were filed. Applicant provided no evidence he has received credit or financial counseling. He has not demonstrated that his financial problems are under control or that he has a plan to bring them under control. As of December 2014, his net monthly remainder was \$85, which did not include any payment for delinquent taxes. With such a low net monthly remainder it is unlikely Applicant will be able to address the \$71,000 delinquent tax obligation any time in the near future.

AG ¶ 20(a) does not apply because the delinquent debts remain unpaid, and because they remain unpaid, they are considered recent. There is nothing in the record supporting that conditions under which the debts were incurred were unusual. In May 2013, he was notified of the Government's concern over his delinquent obligations. Given sufficient opportunity to address his financial delinquencies, Applicant has failed to act timely or responsibly under the circumstances. Failing to pay the debts casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) does not apply. Applicant provided no information concerning factors beyond his control other than he was at some point separated from his wife. By failing to show any payments he has failed to show he has acted responsibly under the circumstances.

The mitigating condition listed in AG ¶ 20(c) does not apply. There has been no evidence Applicant has received financial counseling. Additionally, there is no clear showing that his delinquent taxes are being addressed. The mitigating condition listed in AG ¶ 20(d) minimally applies because he no longer owes federal taxes for tax year 2001, 2002, and 2005. The mitigating condition listed in AG ¶ 20(e) does not apply, because he is not disputing the tax obligations, except for tax years 2001, 2002, and 2005. He did dispute the non-filing allegation because he filed his federal returns in

2007 and 2012. His state taxes were addressed in the October 2015 state tax amnesty letter.

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. Applicant provided no information about his duty performance. He has been aware of the Government's concern about his delinquent debts since his May 2013 interview, the November 2014 written financial interrogatories, the September 2015 SOR, and November 2015 FORM. A substantial state and federal delinquent tax obligation remains.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate the financial considerations security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. He provided IRS documents indicating he had filed his federal returns and provided a state tax amnesty letter. However, he failed to show payment on his state or federal delinquent tax obligation. He, therefore, failed to mitigate the financial considerations security concerns.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, a clearance is not recommended. In the future, if Applicant establishes repayment plans and establishes

compliance with those repayment plans, or otherwise substantially addresses his past-due tax obligations, he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

Overall, the record evidence leaves me with substantial doubt as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations security concerns.

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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a, 1.c, and 1g: For Applicant

The remaining subparagraphs
through 1.q: 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.

CLAUDE R. HEINY II
Administrative Judge