



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



In the matter of:)
)
) ISCR Case No. 14-04202
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Sequitta Banks, Esq.

09/30/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant is a 62-year-old consultant (independent contractor) employed by a defense contractor. He has a history of financial problems, including a current debt to the IRS for around \$260,000 for tax years 2006 through 2012. He failed to establish financial responsibility in the handling of his legal obligations. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 4, 2012. On December 8, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline F (financial considerations).¹ Applicant answered the SOR on December 31, 2014, and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2015.

¹ The DOD acted 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on May 6, 2015, scheduling a hearing for June 3, 2015.

At the hearing, the Government offered six exhibits (GE 1 through 6). Applicant testified, presented the testimony of an expert witness, and submitted 24 exhibits, marked AE 1 through 19, and AE 21 through 25. Applicant did not submit AE 20. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on June 11, 2015.

Findings of Fact

In his answer to the SOR, and at his hearing, Applicant admitted all of the SOR factual allegations. After a thorough review of the evidence of record, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 62-year-old consultant (independent contractor) employed by a defense contractor. He attended college and completed a bachelor's degree in 1975. He married his first wife in 1983, and divorced in May 1999. He married his current wife in August 1999. He has four children, two of them are adults from his and his wife's prior relationships, and two are from their current marriage.

Applicant worked as a wage employee for a company from 2002 to 2005. He was unemployed during four months in 2003. He testified that for tax years 2002 through 2005, he timely filed his income tax returns and paid his taxes. In 2005-2006, he was informed that he would have to become an independent contractor to be eligible for contracts. In 2006, he established his own company and became self-employed as an independent consultant. He has worked as an independent consultant for numerous federal contractors from 2006 to present. Applicant was unemployed during four months in 2009. Except for the two four-month periods of unemployment in 2003 and 2009, Applicant has been fully employed from 2002 to present.

Applicant has possessed a security clearance for about 33 years. He was first granted access to classified information between 1979 and 1999. From 1999 to 2003, he had no need for a clearance, and his access was suspended. In 2003, Applicant returned to work for federal contractors, and his security clearance was reinstated. He requires a top secret clearance to continue working on his job. There is no evidence of any security problems or concerns during the time he has held a clearance, except for the concerns alleged in the current SOR.

At his hearing, Applicant estimated his yearly earnings were around \$120,000 in 2005; \$130,000 in 2006; \$150,000 in 2007 through 2009; \$175,000 in 2010; \$200,000 in 2011 and 2012; and around \$250,000 a year from 2013 to present. He anticipates earning more than \$250,000 a year during 2015 and 2016, because he has several contracts and his work hours will be increased.

Applicant testified that he timely filed his federal and state income tax returns for tax years 2002 through 2007. He did not timely file his federal and state income tax returns for tax years 2008 through 2012, which were filed together in 2012. Applicant did not pay estimated taxes for tax years 2006 through 2012, and he did not pay his federal and state taxes for tax years 2006 through 2012. He received IRS Forms 1099 for each year he worked as an independent contractor between 2006 and 2014.

Applicant disclosed in his 2012 SCA (Section 26 – Financial Record) that he had failed to timely pay his 2006 taxes because of “Lack of all funds for years 2006 to present. All forms submitted.” He stated that he estimated he owed the IRS and his state about \$50,000 in back taxes. (GE 1)

The background investigation addressed his financial problems and revealed that Applicant filed for Chapter 7 bankruptcy protection in 1993, and his debts were discharged in 1994. Applicant explained that he was four months out of work and accumulated about \$12,000 in credit card debt setting up a restaurant business with his ex-wife. He filed for Chapter 13 bankruptcy protection in 1999, and his debts were discharged in 2002. Applicant explained that he was out of work for a period, was separated from his first wife, and incurred burial expenses associated with his father’s passing and his burial in Hawaii.

The investigation also revealed that the IRS filed a lien against Applicant in 2012 for around \$93,000, two liens in 2013 for around \$120,000, and that Applicant owed his state about \$2,700 in delinquent taxes. The SOR factual allegations are established by the Government’s evidence and by Applicant’s testimony.

Applicant provided a number of explanations about his failure to file income tax returns (2008 through 2012) and to pay his taxes (2006 through 2012). He testified that he was his family’s sole provider; he set up a restaurant in 1987 that depleted his savings and retirement accounts; he had extra living expenses while separated from his first wife pending their divorce (1998); his children were born in 1996 and 1998 and they had medical problems; he did not have medical insurance for him and his family between 2006 and 2014, and incurred hundreds of thousands in medical bills; his in-laws lived with him for four years (and other relatives during periods of time), and he supported and paid his father-in-law’s medical and burial expenses; and he was unemployed for four months both in 2003 and 2009.

Additionally, Applicant explained that he incorporated himself to be able to compete for contracts as an independent consultant. He averred he was not made aware of his tax responsibilities and legal obligations, and he did not make any estimated tax payments from 2006 to 2012.

Applicant’s documents show that he purchased two timeshares in 1996-1997; he bought a boat and trailer for \$42,000 (cash) in 2005; he bought a 55 acre farm in another state for \$110,000 (paid \$85,000 cash) in 2009; he bought a \$30,000 car for his wife in 2010; he bought (or refinanced) a car for his son in 2012; and he bought a

\$32,000 car in 2013. To afford the farm, Applicant had to refinance his personal home, and at some point was paying around \$7,000 a month in mortgage payments.

Applicant purchased the farm as a retirement and investment property. He was anticipating being able to sell the gas rights on the property for an amount between \$500,000 and one million dollars a year. However, the governor of the state banned fracking, and Applicant will not be able to do so.

In 2010, Applicant started to pay his past-due taxes. He paid \$25,000 to the IRS, and \$7,000 to his state. In 2011, the IRS started its efforts to collect Applicant's past-due taxes. Applicant hired an attorney in December 2011, to help him resolve his problems with the IRS and his state. After Applicant started his efforts to establish a payment plan with the IRS in 2012, the IRS suspended its garnishments and levies against Applicant. Applicant established a payment plan with his state and is making payments.

Applicant anticipates being able to pay \$5,000 a month to the IRS, and about \$400 to his state to pay his past-due taxes. Additionally, he claimed that he intends to sell some of his property to accelerate the payment of his tax debt. Applicant placed his farm for sale in December 2014. He also placed his boat and a car for sale the week before his hearing.

Applicant expressed remorse for his financial situation and accepted responsibility for his financial problems. He admitted that he did not manage properly his tax debt. He believes that he has been truthful and forthcoming during the security clearance process. Applicant testified that he has specialized knowledge and expertise that make him a valuable asset. He is considered to be a valuable employee who makes significant contributions to his employers. Applicant's current employer supports his eligibility for a security clearance.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available,

reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (AG ¶ 18)

The evidence established that Applicant has a long history of financial problems. He filed for bankruptcy protection in 1993 and 1999. He failed to file federal and state income tax returns for tax years 2008 through 2012, and he failed to pay his federal and state taxes from 2006 through 2012. As a result, he owes the IRS around \$260,000, and the IRS filed tax liens against him in 2012 and 2013. Financial considerations disqualifying conditions AG ¶ 19(a): "inability or unwillingness to satisfy debts," and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Considering the evidence as a whole, I find that none of the financial considerations mitigating conditions fully apply, and they do not mitigate the financial considerations security concerns. Applicant's financial problems are ongoing, and he owes a substantial debt. The circumstances under which he acquired his tax debts continue to cast doubt on Applicant's reliability, trustworthiness, and judgment.

I considered Applicant's assertions that the debts became delinquent because of his 1998 divorce; his four-month periods of unemployment in 2003 and 2009; his lack of medical insurance from 2006 to 2014, and the extensive medical expenses he paid for himself, his family, and relatives; and that he was the sole provider for his family and for other relatives during extended periods. Applicant's unemployment periods and divorce could be considered as circumstances beyond his control that contributed or aggravated his financial problems. Notwithstanding, considering the evidence as a whole, Applicant's evidence is insufficient to show financial responsibility.

Applicant has been fully employed and received substantial yearly earnings from 2006, when he earned about \$130,000, to present. His earnings have progressively increased to around \$250,000 a year for the last three years. Applicant did not have medical insurance because he elected not to purchase medical insurance for himself and his family.

Applicant's liens and tax debt resulted from his failure to timely file state and federal income tax returns, his failure to pay estimated taxes, and his failure to pay his

yearly taxes. Applicant claimed he was ignorant of the tax laws and that he made an honest mistake when he failed to pay estimated taxes because he did not know the tax rules and responsibilities applicable to an independent contractor. His claims and explanations lack credibility in light of the record evidence.

Applicant did not have tax problems before 2006. He timely filed his income tax returns until 2007. Thus, he knew of his responsibility and legal obligation to file his income tax returns and to pay his taxes. Applicant failed to file his income tax returns for tax years 2008 through 2012, which were filed late in 2012. Moreover, he failed to pay his federal and state taxes from 2006 to 2012. Instead of paying his taxes, or buying medical insurance for himself and his family, Applicant chose to use his income to buy a boat (\$42,000), three cars (around \$72,000), and a farm (\$110,000). His actions show an unwillingness to follow the law and lack of judgment.

Applicant claimed that his financial problems are under control because he retained an attorney in 2011 to help him resolve his tax problems, his high earnings will allow him to make substantial monthly payments to the IRS, he paid about \$32,000 to the state and IRS, and he is in negotiations to establish a payment plan with the IRS in the near future. He also believes that he has a viable payment plan because he anticipates selling some of his property to make lump sum payments towards his tax debt. He presented evidence to show that he established a payment plan with his state.

Notwithstanding, his recent efforts to pay his tax debt, Applicant's unresolved tax debt and his lack of financial responsibility cast doubt on his current reliability, trustworthiness, and judgment. He has received substantial earnings since 2006, and he failed to timely file his income tax returns or to pay his taxes. Applicant does not have an established payment plan to pay his federal taxes, nor has he sold any of his property to make the promised lump sum payments. Considering the evidence as a whole, Applicant failed to show financial responsibility and sufficient progress in the resolution of his tax debts.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). 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 a 62-year-old consultant working for defense contractors as an independent contractor since 2006. He has possessed a security clearance during the last 33 years, without security concerns except for those in the current SOR. He failed to submit sufficient evidence to establish financial responsibility in the handling of his financial obligations.

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 and 1.b:	For Applicant
Subparagraphs 1.c - 1.f:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge