



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 17-03462
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie Mendez, Esq., Deputy Chief Department Counsel  
 For Applicant: *Pro se*  
 09/26/2018

**Decision**

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his problematic federal and state tax history. Accordingly, this case is decided for Applicant.

**Statement of the Case**

On November 2, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline. Applicant answered the SOR on November 15, 2017, and requested a hearing to establish his eligibility for continued access to classified information.<sup>1</sup>

<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive). In addition, the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on June 8, 2017, apply here.

On June 29, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing, and the exhibits offered by the parties were admitted into the administrative record without objection. (Government Exhibits (GE) 1 – 3; Applicant’s Exhibits (AE) A – C.) The transcript of the hearing (Tr.) was received on July 11, 2018. At the request of Applicant, without objection, the record remained open until July 16, 2018. Applicant timely submitted a document that was marked as AE D and was admitted without objection. On September 11, 2018, I *sua sponte* reopened the record until close of business Friday, September 14, 2018, to allow Applicant to submit additional documents. Applicant submitted documents I have marked as AE E, F, G, and H, which were admitted without objection.

### **Findings of Fact**

Applicant is 71 years old, married, has three adult sons, and one adult daughter. He has a Bachelor of Science degree and three years of post-graduate work. From 1969 until 2004, Applicant was employed by a major defense contractor. In 2004, he retired, and he and his wife formed a limited liability company (“LLC”) to service DOD contracts.<sup>2</sup>

The SOR alleges that Applicant is indebted to the federal Government on two tax liens totaling \$118,261 and one state tax lien in the amount of \$5,585.<sup>3</sup> Applicant admitted the SOR allegations.<sup>4</sup>

Applicant testified about the LLC he and his wife established. By 2004, Applicant had spent 35 years employed by a major defense contractor. That year, his employer offered an attractive buy-out package. He and his wife decided that he should accept that package. Instead of retiring, however, Applicant and his wife formed their own company to service DOD contracts directly or to work for prime contractors on DOD contracts. Applicant was a 40% owner of the LLC, and his wife was a 60% owner. They also agreed on a division of labor. Applicant’s wife was to be responsible for administrative matters, such as paying bills, including tax bills, review of new contracts, and collecting accounts receivable. Applicant was responsible for technical matters, such as generating new business, hiring, technical direction, and interacting with clients.<sup>5</sup>

The LLC operated under this model successfully until between 2010 to 2012. During that time frame, Applicant’s wife gradually developed some very serious health problems. Ultimately, she had to undergo a major operation. She began to fall behind in carrying out her business obligations, including the payment of state and federal taxes. This resulted in the liens alleged in the SOR.<sup>6</sup> To make financial matters worse, Applicant

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<sup>2</sup> GE 1; AE A; Tr. 8, 23-24.

<sup>3</sup> SOR ¶ 1.

<sup>4</sup> Answer ¶ 1.

<sup>5</sup> Tr. 24-26; AE A, p. 3.

<sup>6</sup> AE A, p. 3; Tr. 36-37

discovered that some of the LLC's prime contractors were seriously late in paying the LLC's invoices. In fact, one of the LLC's clients was eight months late in paying a substantial bill. This made the LLC late and delinquent on its taxes. When Applicant did receive overdue payments from customers, he faced a choice between paying back taxes or paying his employees. He testified that he and his wife agreed that it was more important to keep their employees onboard than to catch up on back taxes but lose employees.<sup>7</sup>

By 2013, Applicant realized that he had seriously under-estimated the gravity of his tax problems. Although he testified that he had made about \$155,000 in payments towards back federal taxes, he still owes over \$100,000 (reflected in SOR ¶¶ 1.b and 1.c). At the hearing, Applicant testified that he was waiting for a revised installment plan to address those federal taxes based on his downward revenue projections. Applicant was told by the IRS to stop paying under the old installment plan and to just keep his taxes current until a new installment plan was approved. He complied.<sup>8</sup> Applicant has also been paying installments on the state tax lien alleged in SOR ¶ 1.a. Applicant and his wife have remained current in paying their quarterly taxes for years 2014 through 2016.<sup>9</sup>

In light of the financial circumstances facing Applicant and his wife and another serious medical condition his wife developed about five months ago, they have adopted a new business model. Applicant's wife has stepped out of the business. Applicant will take responsibility for administrative and technical duties. To assist with the administrative duties, Applicant hired an executive assistant in May 2017.<sup>10</sup> He also put his customers on 30-day payment terms.<sup>11</sup> The LLC has been in the black for the last couple of years and with one exception has been paying its bills and taxes on time.<sup>12</sup> The exception is a lien filed by the state a few weeks ago for back unemployment compensation taxes in the amount of about \$13,000. Applicant explained that he and his wife inadvertently missed a quarterly filing and payment, which triggered a much steeper tax rate (an 800% increase). Applicant has an installment agreement with the state to pay off that lien.<sup>13</sup>

Applicant's post-hearing submissions reflect the current state of his LLC's tax indebtedness:

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<sup>7</sup> Tr. 26-27, 35-38.

<sup>8</sup> Tr. 39-40; AE A, p. 3.

<sup>9</sup> Tr. 49, 59-60, 84.

<sup>10</sup> Tr. 33, 72-73, 75, 86.

<sup>11</sup> Tr. 33-35.

<sup>12</sup> Tr. 49, 61-62, 70.

<sup>13</sup> Tr. 52-54, 59-60. Because it was filed only recently, the lien was not alleged in the SOR. The Government did not move to amend the SOR to add this lien.

SOR ¶ 1.a (back state taxes) has been under a payment plan since January 2014. As of November 2017, Applicant has paid \$2,550, leaving a balance due of \$3,653.57.<sup>14</sup>

SOR ¶¶ 1.b and 1.c (liens for back federal taxes totaling \$109,230) are under a payment plan dated December 13, 2017. Those tax liens go back as far as tax year 2010.<sup>15</sup> Applicant documented the monthly payments under this plan from January 2018 through September 2018.<sup>16</sup> This plan supplanted an earlier installment payment plan under which Applicant paid \$151,756 from March 2010 to December 2015.<sup>17</sup>

The recently filed unalleged lien for back state unemployment compensation taxes (\$13,000) is under a payment plan dated July 3, 2018.<sup>18</sup>

Applicant submitted 16 character reference letters.<sup>19</sup> Many of the authors of those letters have known Applicant for over 40 years in their professional or personal capacities, sometimes in both. The letters uniformly commended him on his “exemplary honesty,” “integrity,” “professionalism,” and “loyalty.” Many of the authors were aware of why they were asked to write those letters.<sup>20</sup>

### **Law and Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

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<sup>14</sup> AE D, pp. 4-6.

<sup>15</sup> AE D, pp. 8-9.

<sup>16</sup> AE E.

<sup>17</sup> AE H. This Exhibit is consistent with Applicant’s testimony. Tr. 39-40 (he paid about \$155,000 under a prior plan). AE H is a summary of installment payments prepared by the LLC’s accountant. Applicant stated that this was the “payment history on the initial IRS installment agreement.” See Applicant’s cover letter submitting AE E through AE H.

<sup>18</sup> AE D, pp. 12-14; AE F.

<sup>19</sup> AE C.

<sup>20</sup> AE C, pp. 1-3, 8, 12-13.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See *also* SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Discussion**

### **Guideline F, Financial Considerations**

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to

delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.<sup>21</sup>

In assessing Applicant's case, I considered the following pertinent disqualifying and mitigating conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(f): failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;

AG ¶ 20(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;

AG ¶ 20(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

A security clearance adjudication is not a debt-collection process. Rather, an administrative judge examines the way an applicant handles his or her personal financial obligations to assess how they may handle their security obligations.<sup>22</sup> Here, Applicant's security clearance eligibility was called into question by his past state and federal income tax delinquencies. I conclude that disqualifying conditions AG ¶ 19(a), (c), and (f) apply. The next inquiry is whether any mitigating conditions apply.

A number of Applicant's federal and state tax liens reach back for a number of years. They remain problematic, however, to the current day. Therefore, I cannot say that AG ¶ 20(a) applies.

In January 2014, long before the SOR was issued, Applicant entered into an installment payment agreement with his state tax authority to address his back state income taxes. He is current on that agreement. That tax debt is mitigated under AG ¶ 20(g).

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<sup>21</sup> ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

<sup>22</sup> See *generally* ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

The nub of this case is the back federal taxes. A confluence of factors contributed to Applicant's federal tax delinquencies. He and his wife founded an LLC in 2004 to service the defense industry. They agreed to a division labor, with Applicant handling technical matters and his wife handling administrative matters, including payment of bills and taxes and collecting accounts receivables. This not uncommon small business model operated successfully until 2010 to 2012.

In that time frame, however, Applicant's wife developed serious health problems, which ultimately required major surgery.<sup>23</sup> This was the first factor that contributed to the tax problems, his wife's inability to keep up with her administrative duties, including payment of taxes and collecting accounts receivables. The second factor was caused by the first factor, namely that Applicant had to take over the burden of administrative matters. The third factor was that at about the same time, Applicant realized that his wife had been remiss in collecting overdue bills from customers, which aggravated the tax problem. Faced with the unpleasant choice of either paying employees or paying taxes, he and his wife agreed to pay their employees and come to some agreements with taxing authorities.<sup>24</sup> I conclude that the factors described above were conditions largely beyond Applicant's control under AG ¶ 20(b). That does not, however, end the inquiry. The next question under AG ¶ 20(b) is whether Applicant acted responsibly under the adverse circumstances that contributed to his tax indebtedness.

First, when he gradually became aware that his wife had not been fulfilling her administrative duties, Applicant took on those duties himself, in addition to shouldering the technical duties.

Second, from March 2010 to December 2015, Applicant adhered to a repayment plan under which his company paid \$151,756.<sup>25</sup> Based on his downward revisions of revenue projections, he approached the IRS to set up a new payment plan. The IRS told him to stop payment on the initial plan, keep up with current taxes, and await IRS's approval of a new plan. He complied, and in December 2017, the IRS approved a new plan, which Applicant has adhered to since then.

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<sup>23</sup> Unfortunately, Applicant's wife developed another serious medical condition several months ago.

<sup>24</sup> Applicant succeeded in coming to terms with the state tax authority in 2014. Thus, the plan with the state mitigated his back state taxes.

<sup>25</sup> This history of payments is embodied in AE H, a summary of payments to the IRS under the initial plan. The Government did not object to the admission of AE H. It did, however, argue that these payments were not made under an installment agreement but were "regular quarterly . . . business taxes," not "separate payments" towards delinquent taxes. I respectfully disagree. Under the Government's cross-examination, Applicant's testimony, as I read it, was that his company paid an estimated \$155,000 in back taxes. That figure is consistent with AE H, which Applicant stated was a "payments history on the *initial IRS installment agreement*." (Emphasis added.) The Government also noted that the summary of payments did not include any back-up documentation. Federal Rule of Evidence 1006, which we use as a guide, allows for the admission of summaries in place of voluminous documentation (such as six years of tax payments). In any event, the Government did not request any such back-up documentation.

Third, Applicant and his wife also agreed that she should step out of the business operations. To that end, Applicant recently hired an administrative assistant to handle administrative duties.

Fourth, Applicant became more aggressive in collecting accounts receivable, putting his clients on net 30-day terms.

These four steps not only addressed the back taxes owed, they did so in a way to minimize such an occurrence of tax arrearages in the future. This was responsible conduct. I conclude that Applicant has fully mitigated his problematic tax history under AG ¶ 20(b).<sup>26</sup>

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>27</sup> Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### 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 (Financial Considerations):	For Applicant
Subparagraphs 1.a – 1.c:	For Applicant

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Philip J. Katauskas  
Administrative Judge

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<sup>26</sup> I cannot consider the recently filed lien for back state unemployment compensation taxes, because it is not alleged in the SOR. I can, however, consider the lien in weighing mitigation, whether Applicant has demonstrated sufficient rehabilitation, under the whole person concept, and in weighing Applicant's credibility. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). It appears that the lien was filed due to an inadvertent error by Applicant that dramatically increased the tax due. He promptly entered into a payment plan with the state taxing authority. That weighs in favor of Applicant's credibility.

<sup>27</sup> AG ¶ 2(a)(1)-(9). I gave positive weight to the character reference letters Applicant submitted.