



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 18-00618
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

01/10/2019

Decision

MALONE, Matthew E., Administrative Judge:

A fair and commonsense assessment of the record evidence as a whole shows the security concerns raised by a tax lien recently entered against Applicant are mitigated. His request for continued security clearance eligibility is granted.

Statement of the Case

On January 29, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for a security clearance required for his employment with a federal contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not

determine that it is clearly consistent with the interests of national security for Applicant to have a security clearance.¹

On March 23, 2018, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on August 9, 2018, and convened the requested hearing on November 29, 2018. The parties appeared as scheduled. Department Counsel proffered Government Exhibits (GX) 1 – 5. Applicant testified and proffered Applicant Exhibits (AX) A and B. All exhibits were admitted without objection. I received a transcript of the hearing (Tr.) on December 7, 2018.

Findings of Fact

Under Guideline F, the Government alleged Applicant owed the IRS \$22,167 for unpaid taxes in the 2012 tax year (SOR 1.a), and \$28,175 for unpaid taxes in the 2013 tax year (SOR 1.b), with the \$50,342 total debt being preserved through a single tax lien entered against Applicant in September 2016. It was further alleged that Applicant owed \$1,605 for an unpaid medical account (SOR 1.c). In response, Applicant admitted all three allegations, and he provided explanations and supporting documents. (Answer) In addition to the facts established by Applicant's admissions, I make the following additional findings of fact.

As to SOR 1.c, Applicant disputed this debt during his November 14, 2017 personal subject interview (PSI) with a government investigator. At hearing, Applicant presented information that shows this debt has been satisfied. SOR 1.c is resolved for Applicant. (Answer; GX 2; AX A; Tr. 11 – 12)

Applicant is 49 years old and works as an instructor for a federal contractor, where he has been employed since September 2015. Applicant served in the U.S. Army from January 1992 until July 1995, when he received an honorable discharge for medical reasons. Applicant has held a security clearance since early 1992. He and his wife have been married since September 2013 and have one child together. Applicant was married twice previously and has one adult child from his first marriage. (GX 1)

From August 2005 until September 2015, Applicant worked for two different federal contractors providing security for overseas diplomatic personnel. During that time, he lived and worked overseas on a nearly permanent basis. Most years during that period, Applicant qualified for exemption from federal income tax of the first \$97,000 of his annual income. Each year he used a certified public accountant (CPA) to prepare and file his returns and to assist him in resolving any discrepancies that might arise with regard to his

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

federal and state income taxes. Applicant has always timely complied with his income reporting and payment obligations. (Answer; GX 1; GX 2; Tr. 34 – 35, 38, 40 – 41)

In 2014, the IRS audited Applicant's taxes for the 2012 and 2013 tax years. Based on that audit, the IRS retroactively disallowed large portions of Applicant's claimed overseas income tax exemptions and determined that he owed the taxes alleged in SOR 1.a and 1.b. Applicant contacted his CPA and they notified the IRS of their intent to appeal the audit findings in federal tax court. After being given a court date, a deadline was set for submitting information in support of Applicant's appeal. At the time the court date and filing deadlines were established, Applicant had been in the United States on medical leave for about two months. However, the notice of his court date and the filing deadline were sent to his overseas address. By the time Applicant became aware of the deadline, he was unable to timely submit the necessary information. As a result, his appeal was denied. Subsequently, the IRS perfected a single lien of \$50,342 against Applicant to preserve the IRS' claim against him. The lien was obtained in September 2016, but Applicant did not become aware of it until January 2017. (Answer; GX 1; GX 2; Tr. 26 – 28, 30 – 33, 45 – 46)

Applicant's finances are otherwise sound. Available information shows that he is currently carrying more credit card debt than he would prefer, he attributes those expenditures to unexpected repairs needed on a home he and his wife recently purchased. Aside from the liens documented in his credit report, all of his debts are in good standing. Applicant averred that the only reason the IRS obtained these liens is that he missed his filing deadline through no fault of his own. He is confident they will be resolved in his favor, but cannot say when that will happen. In response to the IRS' action, Applicant and his CPA have been working to resolve Applicant's tax debts through the Taxpayer Advocate Service (TAS) within the IRS. One of the TAS representatives advised Applicant on March 8, 2018, that Applicant's case had an estimated resolution date of May 22, 2018. On October 4, 2018, Applicant's case was still pending and another TAS representative advised that additional time would be needed to resolve the case and that Applicant would be notified of the status of his case by November 1, 2018. No additional information has been forthcoming from TAS. (Answer; AX B; Tr. 35 – 37, 51 – 52)

Applicant believes that the IRS does not plan to levy any of his pay or assets to enforce the liens against him. In the event he does not prevail in having the liens released and the debts extinguished, Applicant will pursue one of two paths to resolve any remaining debt. He might negotiate a settlement for a lesser amount he could pay off in monthly installments. Alternatively, in most of the years he worked overseas, he received per diem benefits that were not taxable. Nonetheless, he declared that money as income out of a sense of obligation. In order to reduce his tax obligations for 2012 and 2013, his CPA has suggested that he could refile those returns without the previously declared per diem so as to reduce his overall tax for those years. Theoretically, this would reduce his tax debts that would be subject to the results of the 2014 audit. Regardless of which resolution he might pursue, available information shows Applicant has sufficient income

and monthly net cash flow to resolve the liens, should a final determination be made against him. (Answer; GX 2; Tr. 29 – 30, 39 – 40, 46 – 48)

Applicant excelled in his work overseas between 2005 and 2015. He now works in the United States and has continued his outstanding performance. He returned from overseas in September 2015 after being injured, and he does not plan on returning to overseas assignments with his current employer. (Answer; Tr. 33 – 35, 44)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,² and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG).³ Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security

² See Directive. 6.3.

³ The current adjudicative guidelines were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters 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 one who will protect the national interests as his or her 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.⁶

Analysis

Financial Considerations

The Government established that in 2016, the IRS obtained a lien against Applicant for \$50,342 for unpaid taxes from 2012 and 2013. Available information also documented an unpaid \$1,605 medical debt attributed to Applicant; however, that debt was timely resolved. Because the tax lien has not been resolved, available information reasonably raised a security concern about Applicant’s finances that is articulated at AG ¶ 18:

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. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

More specifically, available information requires application of the disqualifying condition at 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*). In this case, there is no indication that Applicant has ever failed to file his returns; rather, the focus is on an alleged failure to pay what he was obligated to pay.

The debt in question is based on a 2014 audit of Applicant’s 2012 and 2013 federal income tax returns. Specifically, the IRS retroactively disallowed significant claims for exemptions based on Applicant’s residence and work status for two of the ten years he

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

spent employed by a federal contractor overseas. The lien for those taxes was obtained after Applicant missed a filing deadline for appealing the results of the audit. The IRS has not levied the lien against Applicant's income or assets, and Applicant has been negotiating in good faith with the IRS to resolve the status of his 2012 and 2013 taxes to the best of his ability. That process is still ongoing and it does not appear that a final decision has been made that Applicant will have to pay the amounts specified in the lien. Even if he is ultimately determined to be liable for those taxes, he has the means and a plan for resolving such a debt. All available information about Applicant's finances shows they are sound and that he will resolve any tax liabilities in a prompt and reasonable manner. All of the foregoing supports application of the following AG ¶ 20 mitigating conditions:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), 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 and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Additionally, I considered the applicability of the mitigating condition at 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*). Strictly speaking, it is premature to apply this mitigating condition, because Applicant has always filed his returns as required, and it as it has not yet been determined what taxes, if any, Applicant has to pay. But consistent with his ongoing contacts with the IRS and with my previous observations about the strength of his current finances, it is reasonable to conclude that he will comply with any future arrangements needed to resolve this matter. On balance, I conclude the record as a whole is sufficient to mitigate the security concerns raised in the SOR.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Of note is the positive information about Applicant's performance and reputation in the workplace. Applicant was candid about his efforts to resolve his tax lien, and his explanation of what occurred was plausible. A fair and commonsense assessment

of the record evidence as a whole shows the security concerns about his finances are mitigated.

Formal Findings

Formal findings 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: FOR APPLICANT

Subparagraphs 1.a - 1.c: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge