



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 19-00091
)
)
Applicant for Security Clearance)

For Government: Eric Price, Esq., Department Counsel
For Applicant: Christopher Nuneviller, Esq.

10/28/2019

Decision

DAM, Shari, Administrative Judge:

Applicant failed to timely resolve Federal and state income tax liens and an educational debt. He did not mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On March 6, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on March 29, 2019, and requested a hearing before an administrative judge. On May 31, 2019, the Defense Office

of Hearings and Appeals (DOHA) assigned the case to me. On August 12, 2019, DOHA issued a Notice of Hearing setting the case for August 14, 2019, as agreed by Applicant's attorney and Department Counsel. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence. Applicant testified, and offered Applicant Exhibits (AE) A: Encl.1 through Encl.10; B: Encl.1 and Encl. 2; and C: Encl.1 into evidence. All exhibits were admitted. DOHA received the hearing transcript (Tr.) on August 23, 2019. The record remained open until September 3, 2019, to give Applicant an opportunity to submit additional evidence. Applicant timely submitted three exhibits that I marked as AE D: Encl. 1 through Encl. 3, and admitted without objection. Both parties proffered additional arguments in their post-hearing submissions.

Findings of Fact

Applicant admitted in part the allegation in SOR ¶ 1.a, and denied the allegations in SOR ¶¶ 1.b and 1.c (Answer).

Applicant is 61 years old. He has been married three times. He was married to his first wife from 1987 to 1990 and was married to his second wife from 1992 to 2007. He has been married to his third wife since 2010. He has two children from his first marriage and two stepchildren from his second marriage. In 1981, he earned a bachelor's degree and in 1997, he earned a master's degree. (Tr. 30; GE 1, GE 7) In 1999, he enrolled in a doctoral program. (Tr. 48; GE 6)

Applicant enlisted in the Army in 1981 and retired as a Major in 2001. After retiring from the Army, he worked for a defense contractor from 2001 to 2011. He obtained another contractor position where he worked until being laid off in 2013, due to a lack of work. He then started his own company and was self-employed until November 2014, when he began his current position with a defense contractor. In October 2016, he submitted a security clearance application (SCA). He held a security clearance while serving in the Army and continuously since retiring from the Army (Tr. 24-29, 58; GE 1, GE 7) Applicant worked as a part-time adjunct instructor for a local university from 2001 to 2007. (Tr. 64; GE 1, GE 7)

Applicant acknowledged he was fully employed from 2006 through 2012, and then experienced a year or two of unemployment and underemployment until November 2014. Since then, he has been gainfully employed. (Tr. 79) He reported an adjusted gross income (AGI) of \$173,532 for 2016. (AE A: Encl. 2) His AGI was \$150,374 for 2017. (AE A: Encl: 3) Applicant earned \$154,565 while working overseas in 2018. After excluding \$131,176 as foreign income for purposes of paying U.S. taxes, his AGI was \$43,963 for 2018. (AE A: Encl. 4)

Applicant owns two pieces of property in the United States. In 2007 or 2008, after his divorce, he purchased a home in State 1 for \$319,000. He thinks he has about \$150,000 of equity in that home. He and his wife own a home they purchased in 2012 for \$530,000 in State 2. It is on the market for \$700,000. He has about \$300,000 in equity in

that home. Both houses are being rented while he and his wife reside overseas. (Tr. 30, 60-62)

Since December 2017, Applicant and his wife have lived in Germany where he works. His employer pays his housing costs in Germany. (Tr. 59, 62-63)

SOR (1.a) 2006 Tax Lien

After Applicant and his second wife divorced in April 2007, he obtained an extension of time to file his 2006 Federal income tax return to October 2007. (Tr. 31; GE 1) He filed it in May 2008, as noted below. (AE A: Encl. 1)

In his October 2016 SCA, Applicant disclosed his unpaid 2006 Federal income tax debt that totaled about \$40,000. In March 2012, the Internal Revenue Service (IRS) filed a tax lien for \$64,688. During his August 2018 interview, Applicant told an investigator that he entered into an installment agreement with the IRS to pay \$350 per month on the debt in July 2012, around the time his income was decreasing. The agreement was suspended in mid-2013 because he did not have a steady income. He explained that he was subsequently apprehensive about entering into another agreement until he secured a steady contract. He also told the investigator that the IRS had applied about \$12,000 of tax refunds for tax years 2012 to 2015 to his 2006 tax debt. (GE 1) He stated that his tax liability for 2006 was about \$40,000, and fees and interest were about \$24,000. (GE 7)

The following information is listed on the IRS account transcript of Applicant's 2006 tax return (AE A: Encl. 1):

Applicant's adjusted gross income (AGI) for 2006 was \$143,360.

On November 19, 2007, the IRS sent Applicant an inquiry for "non-filing of tax return." Applicant testified he did not remember receiving this notice. (Tr. 68)

On May 29, 2008, Applicant filed a return and it was processed on June 23, 2008. Applicant testified that he had to refile it and make a change to his filing status due to his divorce. (Tr. 65-67)

On February 16, 2009, the IRS notified Applicant that he owed an additional \$34,948 in taxes, penalties, and interest charges related to the late filing of his 2006 return. Applicant testified that he does not remember receiving this notice. (Tr. 68)

On March 7, 2010, the IRS confirmed that it received Applicant's refiled return. Applicant testified that he remembered refiling the return at this time. (Tr. 32-34, 68-69)

On May 10, 2010, the IRS notified Applicant that it assessed a penalty for the late payment of his 2006 taxes. Applicant testified that he does not remember receiving

this notice. (Tr. 68) He acknowledged that he resided at the same home from 2007 through 2010. (Tr. 70)

On April 22, 2011, the IRS noted that Applicant filed an amended tax return for 2006.

Applicant testified that he did not become aware that he owed the IRS a significant amount of money until 2011, around the time he filed the amended return. (Tr. 71)

On May 9, 2011, the IRS issued Applicant a notice about reducing or removing the penalties for filing late and the late payment of his 2006 taxes.

On June 7, 2011, the IRS issued Applicant a notice of its intent to levy.

On June 15, 2011, the IRS confirmed that Applicant received the above levy notice.

On July 16, 2011, Applicant's attorney submitted an offer in compromise to the IRS to resolve the taxes.

On March 2, 2012, the IRS rejected Applicant's offer in compromise and filed a tax lien for 2006 in the amount of \$64,688 against Applicant. Applicant testified that this tax liability arose because he underpaid his 2006 taxes while in the process of divorcing. (Tr. 35, 74)

On January 4, 2013, Applicant's attorney submitted another offer in compromise to the IRS. It was accepted by the IRS on January 28, 2013.

On April 28, 2014, the IRS noted that Applicant's payment agreement was no longer in effect.

During his August 2018 interview, Applicant said he made payments on his first installment plan for several months. (GE 7) Applicant testified that he was laid off between 2013 and 2014, and stopped making payments because he could not afford them. (Tr. 36)

On September 15, 2014, the IRS noted that the tax balance was currently not collectible.

No installment payments are recorded in the IRS' account transcript from 2012 through 2015.

On June 20, 2016, the IRS noted that the account is currently collectible.

On April 15, 2017, the IRS credited Applicant's unpaid 2006 taxes with a two-dollar overpayment from his 2016 taxes.

On April 15, 2018, the IRS credited Applicant's tax overpayment of \$3,475 for 2017 to his 2006 tax liability.

On August 15, 2018, Applicant entered a second installment agreement with the IRS to pay his 2006 tax debt balance of \$22,654.

The IRS' transcript recorded payments of \$493 in October 2018 and \$600 in November and December 2018. It also recorded payments of \$1,200 from January through March 2019. Applicant presented evidence that he made payments of \$1,200 from April through July 2019. (AE A: Encls. 1, 5, 8, 9)

In July 2019, the IRS credited Applicant's 2018 tax overpayment of \$6,354 to his 2006 tax liability. (AE A: Encl. 7)

On August 9, 2019, Applicant made a \$1,200 payment on his 2006 tax debt balance of \$3,415, leaving about \$2,200 remaining unpaid. (Tr. 40-41; AE A: Encls. 9, 10)

Applicant testified that the first payment he ever made to the IRS on his 2006 tax debt was in October 2018, when he started the second installment payment plan. He clarified that he had not made payments on the initial installment agreement because he was laid off soon after he negotiated it. (Tr. 71-74) He stated that he purposely did not take exemptions for each year after 2012 because he wanted to create a refund that the IRS would credit to his 2006 unpaid taxes. His strategy was to overpay his taxes in a current tax year and apply that overpayment to the 2006 tax liability. (Tr. 73) No tax credits are recorded on Applicant's 2006 IRS account transcript for tax years 2012 to 2015. (AE A: Encl. 1)

During his August 15, 2018 interview, Applicant acknowledged that he recently contacted the IRS to establish a payment plan for his 2006 tax debt in order to avoid delaying his security clearance renewal. (GE 7) In fact, he and his wife signed that installment agreement with the IRS the same day as his August 2018 interview. (AE A: Encl. 5) While testifying, he again confirmed that this security clearance investigation prompted him to initiate the payment plan with the IRS to pay his \$22,654 outstanding 2006 tax debt. (Tr. 77-78)

Applicant stated that he was unable to pay his 2006 tax sooner because he did not have enough money and could not use equity in his property to do so. He said he could not obtain a home equity loan on either property he owned because his first residence decreased in value while he lived there between 2007 and 2011, and his second home did not increase appreciably. Additionally, his banks would not authorize a home equity loan for any residence that was not their primary home or being rented. (AE: D: Encl. 2)

SOR (1.b) 2017 State Tax Lien

In 2013, Applicant and his wife were notified by a state revenue agency that they had an outstanding tax liability for 2012. (Tr. 81) In May 2017, the state filed an \$8,106 tax lien for the unpaid 2012 taxes.

Applicant testified that he did not learn about this tax debt until he received the lien notice in May 2017. Subsequently, he did not monitor resolution of the tax debt because he thought his wife was addressing it through automatic deductions of \$250 from her salary. As a consequence, he believed he was not responsible for paying it although he understood it was a joint debt. He said that when the 2012 taxes were due in 2013, he was not fully employed, but his wife was working. He presented evidence that she made payments from October 2017 to April 2018, at which time their bank stopped making the automatic deductions, unbeknownst to her. He became aware that the taxes had not been paid when he received the March 6, 2019 SOR. (Tr. 44-45, 81-86; AE B: Encl. 1) On April 9, 2019, Applicant's wife withdrew money from their savings account and paid \$8,106 to the state, which was the final amount due on their 2012 state taxes. (Tr. 85; GE 5)

SOR (1.c) University Debt

In 1999, Applicant entered a doctoral program. He said he attended classes in the spring and fall of 2000, and then withdrew because he was transitioning out of the military into civilian life. He never returned to the school. He denied that he registered for classes after completing the 2000 fall semester and disputed any allegation that he attended after 2000. According to the university, Applicant attended classes from August through December of 2001, and January through March of 2002. In January 2003, the university wrote off the debt. He testified that he never received a bill from the university for the alleged amount. Applicant stated that he has gone through the security clearance investigations twice before this proceeding as a civilian, and this debt never arose during an investigation. (Tr. 48-52, 87-92; GE 6)

After learning of this debt when he received the March 2019 SOR, Applicant contacted the university's registrar for more information about it. He said the university registrar told him that the accounting system changed over the years, which made it difficult to accurately respond to his inquiry. He subsequently contacted his student loan company, which said all of his loans were paid. (Tr. 52-55) On August 21, 2019, post-hearing, he sent a letter and fax to the university inquiring about the debt and asking whether his student loans covered it this debt. (AE D: Encl. 1)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying and mitigating conditions, which are useful 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 AG ¶ 2 describing 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 the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that an adverse decision 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18:

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. 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.

AG ¶ 19 sets out disqualifying conditions that could potentially raise security concerns. Four are potentially applicable in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (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.

Applicant failed to timely pay his Federal income taxes for 2006, resulting in a tax lien being filed in March 2012. He failed to timely pay his state income taxes for 2012, resulting in a tax lien being filed in May 2017. He has an educational debt from 2001 that remains unresolved. The evidence establishes the above disqualifying conditions.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out six conditions that could potentially mitigate financial security concerns under this guideline:

- (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 from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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

(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.

In April 2019, Applicant resolved his 2012 state tax lien. He has not fully resolved his 2006 Federal tax lien. He has a large unresolved tuition debt from 2001 that he recently began to investigate. His extensive delays and protracted actions in addressing these matters cast doubt on his reliability and judgment. There is insufficient evidence to establish mitigation under AG ¶ 20(a).

Applicant did not provide credible explanations to demonstrate that his tax liens or tuition debt are attributable to circumstances beyond his control, or that he managed them responsibly under the circumstances. He testified that he did not become aware that he owed a tax liability for his 2006 Federal taxes until 2011, despite filing the original tax return in 2008, a revised one in 2010, and an amended one in 2011. That debt was not fully resolved by the time of his hearing, almost eight years later, although he has been steadily employed since November 2014, and earned significant salaries for 2016, 2017, 2018. His 2012 state taxes also went unresolved for six years. AG ¶ 20(b) does not apply.

Applicant has not participated in credit or financial counseling. He recently paid his 2012 state tax debt, and he has almost completed payments on his 2006 Federal tax debt. The alleged tuition debt remains unresolved. The evidence establishes limited mitigation under AG ¶ 20(c).

Applicant admitted that this security clearance investigation prompted him to resolve his tax debts. Although he acknowledged his unpaid 2006 Federal tax lien in his October 2016 SCA, he waited until August 2018 to establish a repayment plan with the IRS. Prior to that, he was relying on sporadic tax credits to pay his tax debt. He knew the state filed a tax lien in May 2017 for more than \$8,000 in unpaid 2012 taxes. Although some payments were made on it between October 2017 and April 2018, it was not resolved until after he received the SOR in March 2019. He learned of an alleged outstanding tuition bill in March 2019. Applicant's actions with respect to the two tax debts over the past seven or eight years did not demonstrate a good-faith effort to responsibly manage his legal obligations. The only evidence that Applicant presented to refute the alleged tuition debt was his testimony that he does not owe it, which does not sufficiently document a substantiated basis for disputing the debt. AG ¶ 20 (d) and (e) were not established to provide mitigation concerning the two tax allegations or the unpaid tuition allegation.

Applicant submitted evidence to document his compliance with a repayment plan with the IRS for his 2006 tax lien and a record of complying with it since 2018. This provides limited mitigation for that allegation under AG ¶ 20(g), given the lack of timeliness in consistently addressing the debt.

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(d):

(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) 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 national security eligibility must include 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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is an intelligent and articulate 61-year-old man, who retired from the Army in 2001 after serving over 20 years. Since then, he has worked for defense contractors and, for a short period, was self-employed as a contractor. Since November 2014, he has been steadily employed and earning a substantial salary. He has gone through the security clearance process as a soldier and a civilian.

During the hearing, Applicant discussed his history of unpaid taxes for 2006 and 2012. He recognized his responsibility to resolve those issues, but has not done so in a dependable and conscientious manner. He stated he did not learn of the 2006 tax debt until 2011, about four years after his taxes were due. He did not recall receiving notices from the IRS in June 2009 or May 2010. He had no knowledge of the 2012 state tax debt until May 2017. After he became fully employed in 2014, he did not contact the IRS to resume or establish payments on his debt. He disclosed his unresolved 2006 tax debt in his October 2016 SCA, but waited until the date he was interviewed by the government in August 2018 to execute an installment agreement with the IRS. He asserted that he was making payments on the tax debt through credits he received from the IRS for

overpayments of taxes each year after 2012. According to the record, he received credits for tax years 2016, 2017, and 2018. There are no credits in the record for the prior years of 2007 to 2015.

The Federal and state governments filed tax liens in order to initiate payments of monies owed. Despite those filings, Applicant did not demonstrate a prompt response to resolving his taxes, and instead allowed the debts to essentially languish until he learned his security clearance and employment were in jeopardy. Although he asserted he could not pay his 2006 tax debt between 2012 and November 2014 due to a lack of income, he admitted he has been steadily employed since then. Other than testifying that he does not owe his former university any money, he did not produce any tangible evidence to confirm his assertion.

Applicant has not established a sufficient record of responsibly following tax laws and managing related financial obligations. His actions to date are not sufficient to outweigh his dilatory compliance with a fundamental legal obligation to responsibly manage and pay his 2006 and 2012 taxes. The DOHA Appeal Board has held that, in regard to managing one's taxes:

Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.,* ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016)

The record evidence leaves me with doubt as to Applicant's judgment and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	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. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge