



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01541
)
Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: William Savarino, Esq.

08/10/2021

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On October 28, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 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 June 8, 2017.

Applicant answered the SOR on November 14, 2019, and he requested a hearing before an administrative judge. The case was assigned to me on February 24, 2020, and the hearing was originally scheduled for April 9, 2020. Due to the COVID-19 pandemic restrictions it was postponed. It was rescheduled and the Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on June 11, 2021. I convened the hearing as rescheduled on July 1, 2021, via the Defense Collaboration Services (DCS) system. The Government offered exhibits (GE) 1 through 7. Applicant offered Applicant Exhibits (AE) A through R. There were no objections and the exhibits were admitted into evidence. Hearing Exhibits I through IV are administrative documents. The record was held open to allow Applicant to submit additional documents. He provided AE S, T1, T2, and U that were admitted without objection, and the record closed. DOHA received the hearing transcript on July 12, 2021.

Findings of Fact

Applicant denied the allegation in SOR ¶ 1.a, and partially admitted and denied the allegations in ¶¶ 1.b, 1.c, and 1.d. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 61 years old. He married for the third time in 2001. He and his wife share seven children ranging in ages from 39 to 18 years old. His wife is the president of a company and vice president of another company. Applicant has worked for his current employer, a federal contractor, since 2005. He is also self-employed part-time on the side as the owner of his own company. (Tr. 115-119; GE 1, 2)

Applicant and his wife purchased a house in 2001. Between 2005 and 2011, they experienced family emergencies that impacted their finances. This included caring for parents and children's health issues. In 2015, they experienced another health issue with one of the children that affected their finances. (Tr. 119, 181-183, 200)

Applicant and his wife acquired a \$40,000 home equity loan in 2008 that was used for home improvements and to pay credit card debts. Due to other unexpected family emergencies they began having difficulties making their mortgage payments in the later part of 2008. In 2013, they applied for mortgage relief to have the mortgage's interest rate decreased. Although it was decreased, it was not as helpful as they had anticipated, and they fell behind in their mortgage payments. They retained an attorney to help them negotiate a better term and prevent foreclosure. The attorney was unsuccessful. (Tr. 121-137, 183-186; AE A, B, C, D, E, F)

Applicant retained another attorney. The process of dealing with the mortgage company was long and cumbersome. Despite attempting to obtain a modification, the attorney eventually negotiated a "cash for keys" resolution. Applicant received \$4,500 in cash, and the mortgage company received the property and agreed to waive the deficiency balance, so there was no further financial obligation. The deficiency balance at the time was \$272,794. In Applicant's wife's affidavit, she stated that they lived in the house until 2019 when the transaction was finalized. Applicant admitted, to the best of his recollection, that for approximately three years, while he was seeking a mortgage loan modification, he did not pay the mortgage or the homeowner's fees, essentially living in the home rent-free. Applicant reported this financial issue to his facility security officers at

the time. Applicant now rents a home. (Tr. 121-137, 186-190; GE 5, 6, 7; AE A, B, C, D, E, F, G, H, I, J)

Applicant testified that beginning in 2001, after he and his wife married, she was responsible for filing their federal income tax returns because she was a successful businessperson who analyzed contracts and was experienced in finances. He said she filed their tax returns from 2001 through 2012, and there were no issues. He stated that he never inquired about whether their tax returns were timely filed. (Tr. 138-140)

Applicant's wife provided an affidavit. She stated that after they married she assumed the responsibility to file their federal income tax returns because of her business background. Applicant provided financial information to his wife. In her affidavit she said that Applicant would inquire "how it was going and if I needed anything." (Tr. 138-139; AE A) She further stated in her affidavit:

From 2001 to 2012, I prepared written returns that [I] filed with the IRS in paper form. The IRS received these returns. I started using Turbo Tax to prepare and file our returns beginning in 2013.

I recall preparing and timely filing our 2013-2018 tax returns using Turbo Tax. The IRS received our 2014 return, but they apparently did not receive our 2013, 2015, 2016, 2017, and 2018 returns. I am not certain as to the cause of the problem. I assumed that they were filed and received by the IRS until the IRS advised us that information in their possession indicated we owed taxes for 2013. I am not certain when we received this notice. [Applicant] hired an accountant who helped us get the 2013 return in the hands of the IRS. I am a bit fuzzy on the actual dates when this occurred.

I also prepared and e-filed our return for 2014, which the IRS received. I did the same for tax years 2015-2018, but as we found out sometime later, the IRS said it had not received them.

Each year when [Applicant] would ask me if the returns had been filed, I told [him] they had as I was sure that I had filed them properly. I did mention to [Applicant] from time to time that my business partnerships had complicated our returns, but that I still felt comfortable preparing them. (AE A)

Applicant completed his security clearance application (SCA) in June 2017. In it he disclosed that he failed to pay 2013 federal income taxes. He disclosed he was disputing the amount that the IRS claimed he owed and that he had hired an accountant, Mr. B, to determine the accurate amount before he began making payments. He noted that his wife's partnerships made it complicated to calculate the amount actually owed. At that time, he estimated they owed approximately \$25,000. He disclosed that his 2016 federal tax return had not yet been filed, and Mr. B had filed an extension. (Extensions past the April 15th filing date are due on October 15th.) He estimated he owed \$150,000

in unpaid income taxes. Applicant also noted in his SCA that he was attempting to refinance his home in lieu of foreclosure at that time. (Tr. 160-163; GE 1, 2)

Applicant's 2013 federal income tax transcript reflects there was an extension granted for filing the return, but the IRS did not receive the return until December 2014, which was late. However, the return was received, apparently through Turbo Tax, as Applicant's wife stated. Because it was filed late, penalties and interest were imposed. Originally Applicant received a refund for 2013. In May 2016, an additional amount of \$29,983 tax was assessed due to unreported income, along with penalties and interest. A notice to Applicant was issued in April 2016 about the additional assessment. The 2013 tax transcript shows Applicant had appointed a representative, Mr. B, in May 2016. A second notice was sent in July 2017 and again in November 2018. (Tr. 36-40, 87-93, 102-104, 141, 146-149; AE K)

In March 2019, an installment agreement was established and Applicant made sequential monthly payments of \$500 for seven months, one monthly payment of \$750, and one monthly payment of \$1,000 in February 2020. He failed to make another payment until July 2020, which was \$1,500. Applicant was making these payments to a collection agency after the debt was transferred by the IRS. Applicant testified that he stopped making payments on the advice of Mr. B because Mr. B was getting ready to file delinquent returns and it would automatically trigger the stop. He would then have a representative negotiate a payment plan with the IRS based on the total amount owed. The plan was terminated in December 2020. The tax transcript showed an account balance of \$28,608. It also showed that in March of 2016, the IRS noted there was unreported income for this tax year. (Tr. 36-40, 87-93, 102-104, 141, 146-149; AE K)

Applicant hired a tax expert accountant, Mr. H, in January 2021. Mr. H testified on behalf of Applicant. He explained that one of the reasons an IRS installment agreement might be terminated is when there is a new tax liability for a subsequent year or if a payment is missed. He stated that tax notices are sent by mail and addressed to the last known address of record. In Applicant's case, the notice would have been sent to where he lived in 2014. The same address he was at until he moved sometime in 2019 after he accepted a settlement with the mortgage company. The last notice of November 2018 indicated the debt was transferred to a private debt collector. (Tr. 19-22, 40-43; AE K)

Mr. H also explained that tax transcripts show a received date and a processing date. The received date is what determines whether the return was late. The processing date is the date that the return is considered filed. A request for an extension to file a tax return must be submitted by a form and the IRS acknowledges it in the transcript. (Tr. 43-44)

Applicant's 2014 tax transcript indicates that a federal income tax return was received in April 2015 and was timely. Tax year 2014 was the only year from 2013 through 2018 that an extension to file was not requested. Applicant received a \$6,737 refund. His 2015 tax transcript indicates Applicant filed for an extension for tax year 2015. It further indicated that his 2015 federal income tax return was received in June 2020. According

to Mr. H, the IRS does not immediately notify a person if their return is not timely filed. It may send a notice two to three years after the due date indicating the return was not filed or filed late, and the IRS may complete a substitute return. Applicant's tax liability for 2015 was \$31,183. As of June 2021, that liability has increased with penalties and interest to \$55,130. Applicant stated in his June 2019 answers to government interrogatories that the reason his 2015 tax returns were not filed was because his wife thought she mailed it. He testified that this is what his wife told him. This contradicts what she stated in her affidavit that the return was filed through Turbo Tax. (Tr. 31-33, 45-52, 96-98, 171-173; GE 3; AE K)

Applicant's 2016 tax transcript indicates that in April 2017 he filed for an extension to file his tax return. The IRS received his 2016 tax return in June 2020. He failed to timely file the return. He owed approximately \$13,269 at the time, but with penalties and interest, as of June 2021, he owed \$22,988 for tax year 2016. (Tr. 52-53, 98; AE K)

Applicant's 2017 tax transcript indicates that in April 2018 he filed for an extension to file his tax return. The IRS received his 2017 tax return in June 2020. He failed to timely file the return. He owed approximately \$7,993 with penalties and interest. The tax transcript notes that in July 2019, the IRS issued a notice that told Applicant to file his personal tax return immediately. Further it noted that in August 2019, Applicant had given a power of attorney to a representative to act on his behalf. This person was Mr. B. It is unknown why if Applicant had been working with Mr. B since completing his June 2017 SCA, his tax returns for 2017 and 2018 were not timely filed. Applicant said he was unaware until approximately late 2018 or 2019 that he had years of unfiled tax returns. Applicant testified that Mr. B asked Applicant's wife for proof that she had filed the delinquent returns, and she could not find copies for any of the years in question. Mr. B filed Applicant's 2015, 2016, 2017 and 2018 tax returns in June 2020. (Tr. 53-55, 86-87, 165-169, 194; AE K)

Applicant's 2018 tax transcript indicates that in April 2019 he filed for an extension to file his tax return. The IRS received his 2018 tax return in June 2020. He failed to timely file the return. The tax transcript shows that he owed \$6,036 taxes and with penalties and interest the balance was \$8,378, which he paid in January 2021. (Tr. 55-56; AE K)

Applicant's 2019 federal income tax return was received by the IRS in October 2020. It was timely filed due to the government extending the due date because of the pandemic. The tax owed was \$7,555, and it was paid in January 2021. Mr. H prepared Applicant's 2020 federal income tax return and it was timely filed. Applicant owed \$8,438, which included a small late penalty for not prepaying the taxes. It is paid. (Tr. 144-146; Tr. 56-60; AE K)

Mr. H testified that the total tax debt Applicant owed was approximately \$115,198 as of June 2021. In June 2021, Mr. H started the process of negotiating a payment plan with the IRS. In anticipation of the payment plan, Applicant made payments of \$1,600 in May and June 2021 to be applied to the 2017 tax debt. An additional payment of \$1,757 was made in July 2021 to be applied to the 2017 tax debt. Shortly after the hearing

concluded, Applicant provided confirmation of an installment agreement with the IRS, whereby he would make monthly payments of \$1,757 beginning in August 2021 over a period of six years or 72 payments, to be applied to balances owed for tax years 2013, 2015, 2016, and 2017. Applicant testified he can afford this amount of the payment. Mr. H testified that the IRS indicated that a tax lien would be filed once the payment plan commenced because of the amount owed. The lien would cover all assets Applicant and his wife own. Mr. H explained that basically the IRS owns the equity in anything Applicant and his wife own. Applicant also provided documents to show he paid his federal taxes owed for tax year 2020, and he made two estimated tax payments for tax year 2021. (Tr. 60-72, 93-96, 107-109, 149-157; AE M, N, O, P, Q, S, T1, T2, U)

Mr. H testified that he uses a professional grade tax filing software. He stated that he has not used Turbo Tax in the past ten years. He was previously aware that Turbo Tax will acknowledge a return is submitted and by email will indicate the IRS received the return. He stated that he is aware that if tax is owed and not paid, the IRS will send notices usually within 30 days after the return is filed. In response to Department Counsel's question, Mr. H stated that he would not be surprised to learn that Turbo Tax keeps copies of tax filings made by taxpayers. Neither Applicant, his wife, Mr. B nor Mr. H requested copies of Applicant's 2013 through 2018 Turbo Tax returns. After being hired, Mr. H used Applicant's official IRS tax transcripts and whatever information Applicant provided to address Applicant's tax problems. Applicant did not provide copies of tax returns his wife said were filed for the years in question. The IRS recommends maintaining copies of federal tax returns for three years. Mr. H recommends maintaining copies for seven years. (Tr. 25-31, 74-85, 99, 196-197)

Applicant owes taxes for tax years 2013, 2015, 2016, and 2017. Applicant testified that his wife never told him they owed taxes for those years. Applicant's wife's affidavit did not explain why, if she timely filed the federal tax returns as she stated, she and Applicant failed to pay the taxes when due as required. The tax transcripts do not support any payments were made. No documents were offered by Applicant to show he or his wife paid the taxes when they were due. Proof of payment would provide some corroboration that the tax returns were filed. (Tr. 201) I did not find Applicant's wife's affidavit credible.

Applicant provided a character letter from his supervisor. She described him as dependable, level-headed, and trustworthy. He complies with procedures and policies with regard to ethical business practices, information technology, and program security. He is respected by his peers, management and customers. (Tr. 157; AE R)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to 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 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

The security concern relating to the guideline for financial considerations is set out in 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.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (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's mortgage was past due for failing to make his required payments. Applicant failed to file, as required, federal income tax returns for tax years 2013, 2015, 2016, 2017, and 2018. He owes delinquent federal taxes of approximately \$115,000. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial 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; 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.

Applicant's tax liability for 2013, 2015, 2016 and 2017, is more than \$115,000. Based on Applicant's testimony and his wife's affidavit, she filed on time, but somehow the returns were not received or accepted electronically. The only return that was accepted was in 2014 when they received a refund. She also indicated she kept her husband apprised about her complying with filing their tax returns. Neither Applicant nor his wife indicated that when she told him that she had filed timely, she also told him that they owed \$31,183 for tax year 2015, \$13,269 for tax year 2016, and \$7,993 for tax year 2017. The evidence shows they were going through financial difficulties during these years as they were attempting to prevent their house from foreclosure. Based on all of the evidence, I did not find Applicant's wife's vague and incomplete explanations credible. Regardless of whether Applicant was aware of the extent of their tax problems, he is equally responsible for ensuring his tax returns are filed on time and the taxes paid.

AG ¶ 20(a) does not apply because Applicant's large tax debt for multiple tax years has only recently been enrolled in an installment plan with the IRS. Applicant's financial problems were impacted by family emergencies and medical issues that were beyond his control. These impacted his ability to pay his mortgage. They did not impact his ability to timely file his federal income tax returns and make payment arrangements with the IRS each year if he was unable to pay the tax at the time. Applicant did not act responsibly at the time. Although Applicant said his wife was completely responsible for their tax failures, he had an obligation to ensure the tax returns were filed and taxes were paid. It is not believable that he never inquired whether they were to receive a refund or owe taxes each year considering they were going through serious financial issues regarding their ability to pay their mortgage. The fact that he says he was unaware of what was happening does not absolve him of his legal duties. AG ¶ 20(b) has some application.

Applicant sought help from two accountants to resolve his tax issues and there are indications the problem is under control. AG ¶ 20(c) applies. Applicant has made payments toward his tax debt prior to having an installment agreement. He now has an agreement with the IRS to make monthly payments towards his tax debt. AG ¶ 20(d) has some application and AG ¶ 20(g) applies.

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 the 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) 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. 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 responsible for ensuring his federal income taxes are timely filed and paid. He was going through financial problems at the same time and attempting to save his house from foreclosure. I considered the IRS transcripts to be most probative. His wife's affidavit was vague with details and failed to explain many important facts. I did not find it credible. Applicant's delinquent tax returns are now filed and his installment agreement with the IRS has been approved. Applicant still owes a substantial debt and he has not yet established a financial track record of compliance.

The DOHA Appeal Board has held that:

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. August 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).¹

Applicant's history of non-compliance with a fundamental legal obligation to timely file and pay his federal income taxes raises serious concerns. Although there is some evidence of mitigation, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations.

¹ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.d:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge