



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:)
)
) ISCR Case No. 20-00389
)
Applicant for Security Clearance)

Appearances

For Government: Brian L. Farrell, Esq., Department Counsel
For Applicant: Stephen P. Kauffman, Esq., Terry Goddard, Esq.

06/28/2022

Decision

MASON, Paul J., Administrative Judge:

Applicant's evidence in mitigation is insufficient overcome his long history of failing to file his federal and state tax returns as required and failing to pay federal and state taxes as required for the years identified in the Statement of Reasons (SOR). Eligibility for access to a security clearance is denied.

Statement of the Case

On March 6, 2019, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. On May 7, 2019, he provided an personal subject interview (PSI) to an investigator from the Office of Personnel Management (OPM). After reviewing the results of a security background investigation, the Department of Defense (DOD) Defense Counterintelligence Security Agency (DCSA) could not make the

affirmative findings required to grant a security clearance, and issued to Applicant a Statement of Reasons (SOR), dated July 26, 2018, detailing security concerns under financial considerations (Guideline F). The action was taken under Executive Order (E.O.) 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 in the DOD on June 8, 2017.

Applicant provided his notarized answers to the SOR on December 4, 2020, and March 1, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 4, 2021, for a hearing on October 29, 2021. The hearing was held as scheduled. The Government's four exhibits (GE) 1-4 and Applicant's five exhibits (AE) A-E were entered into evidence without objection. Applicant was granted additional time to submit post-hearing documentation. He submitted AE F and G. AG F consists of several emails updating the steps taken by Applicant to resolve his delinquent federal and state tax arrears, and also a draft of a loan taken by Applicant against his home to resolve the delinquent federal tax balance. AE G contains Applicant's federal tax transcripts showing no tax liability. DOHA received the hearing transcript (Tr.) on November 9, 2021. The case closed on February 8, 2022.

Rulings on Evidence

During the hearing, the Government moved to amend ¶ 1.d of the SOR by replacing the posted amount of \$86,656 alleged in the subparagraph with the amount of \$145,000, to conform the SOR to the evidence presented. Applicant had no objection to the proposed amendment. The motion was granted. (Tr. 56-57) See, E3.1.17. of Directive 5200.6. References to the exhibits will cite handwritten page numbers located at the bottom-right of the page, unless indicated otherwise.

Findings of Fact

The SOR specifies five allegations: SOR. ¶ 1.a alleges that Applicant failed to file federal and state tax returns for tax years 2015 through 2019. In Applicant's initial December 2020 answer, he denied the 2015 to 2019 tax returns were not filed, but admitted that the 2015 to 2018 returns were filed late. In response to SOR ¶ 1.b, Applicant admitted his federal taxes from 2011 to 2015 were not paid when due. (The allegation reads "through 2016.") When he submitted his December 2020 and March 2021 answers, he was participating in a repayment plan with the Internal Revenue Service (IRS). In response to SOR ¶ 1.c, Applicant admitted that his state income taxes for tax years 2011 to 2015 were not paid when due. (The allegation reads "through 2015.") (Answer to SOR)

In Applicant's March 1, 2021 supplemental answer, he furnished responses to SOR ¶¶ 1.d and 1.e. He admitted SOR ¶ 1.d, and provided information about his participation in an IRS-installment agreement activated on November 24, 2020. He admitted owing the Federal Government \$145,000 in unpaid federal taxes. (Tr. 56-57)

He essentially admitted SOR ¶ 1.e, but noted that a payment plan started several years ago reduced the state tax balance substantially. (March 2021 supplemental answer to SOR)

Applicant married in 2007 and has two sons, 11 and 8 years old. He has lived in his current home since 2014. His 84-year-old mother-in-law lives with him. In June 1998, he received a certificate of completion in computer technology at a computer learning center. He has received several certifications in information technology (IT). (GE 1 at 9, 13, 18; Tr. 20, 24-25; March 2021 supplemental answer to SOR at 2)

Applicant has been employed as an IT exchange systems engineer since January 2017. From October 2015 to January 2017, he was a systems engineer. Between May 2012 and October 2015, he was a team leader. In previous jobs, he was a network engineer or a systems engineer. His other source of income is a rental property that he purchased in 2006. He has had tenants for the past ten years. Even though he currently receives \$1,400 a month in rent, after subtracting the monthly mortgage for the rental property, the monthly management fee, and the condominium fee, from the rent, he indicated that he loses \$400 to \$500 a month. (GE 1 at 13-24; GE 2 at 11-12; Tr. 64-71, 111)

From 2006 to 2012, Applicant worked two jobs during the work day, but taxes were not properly deducted. During the period, he worked full time as: a network engineer from April 2005 to April 2006; a systems analyst from April 2006 to April 2007; an exchange administrator from July 2006 to February 2008; a systems engineer from April 2007 to November 2008; an exchange administrator from November 2008 to May 2012; and an exchange team lead from May 2012 to October 2015. (GE 1 at 15-20). According to his e-QIP, his jobs appeared to overlap one another rather than indicate employment at two jobs simultaneously. Applicant contended that several employers regarded him as an independent contractor for their own benefit did not withhold any taxes from his earnings. This employment status caused Applicant and his wife to underpay his taxes. In late 2011, Applicant's wife's job was reduced to part-time work because of complications with the pregnancy of her first child. In January 2011, his wife lost her job while the child remained in the hospital for 12 weeks after birth. She lost her job in April 2018 for an unidentified period. (GE 2 at 13-14; Answer to SOR at 3; Tr. 25-28)

In 2012, Applicant quit his second job, but in February 2013, he resumed the second employment after his wife's medical bills related to her pregnancy, and other bills, began appearing in the mail. His wife became pregnant in 2013 and gave birth to a second child in November of that year. Working two jobs caused him to live at an apartment away from his home during the week. His normal work routine was to leave for work on Monday and not return home until late Friday night for a short weekend with his family. Applicant's wife resumed working at some time not indicated in the record. Then, her job was eliminated again in 2017 or 2018, before she found employment at her current job. (Tr. 27-31)

Applicant's tax returns were prepared by his wife and the tax preparer, with help from Applicant who then signed the returns. In 2015, he had his withholdings set at zero with his filing status as 'married filing jointly.' He thought his W-2 withholdings were sufficient to cover the federal and state taxes, but they were not. In the period between 2013 and 2017, his accountant advised him that his excessive earnings were the reason his taxes were so high. His federal tax problems were complicated when the IRS placed a tax lien on his rental property. Applicant learned from his attorney in the month before the hearing that although the withholdings that he and his wife set for their jobs appeared to be sufficient, their earnings pushed them into the higher tax bracket where their withholdings were insufficient to cover the taxes. (GE 2 at 14; Tr. 29-37)

Applicant testified that in 2017 or 2018, he discovered that his 2016, 2017, and 2018 federal tax returns were not filed. He claimed that he collected and reviewed a large quantity of tax-related documents and directed his tax preparer to get the returns ready for filing. In March 2019, Applicant disclosed his tax problems in his March 2019 security clearance application. He filed the 2016 through 2018 federal tax returns and presumably the other returns in June 2020. He has made 11 payments under IRS repayment plan, making several payments before the IRS activated the automatic withdrawal in October 2021. At some time, he negotiated a repayment plan with the state tax agency and began paying \$480 in monthly installments that have steadily decreased to \$288 a month by June 1, 2020. State tax records show that one tax lien imposed in January 2017 was released in February 2021. The other state tax lien imposed in March 2019 was released in March 2021. (GE 1 at 49; GE 2 at 9; Tr. 37-44, 47-49, 49, 51-53; AE D at 1-3)

Though Applicant was participating in an IRS payment plan beginning in November 2020, his objective was to take out a loan against his home to extinguish the delinquent IRS income tax balance. Applicant believed that the prime mortgage insurance (PMI) will disappear when he secures the loan against his home. To have the loan approved, Applicant indicated he satisfied a medical collection account and had two credit card accounts removed from his credit report. The financial actions resulted in a 130-point increase in his credit score to 680. Documentation reflects that Applicant has no IRS liabilities for federal tax years 2011 through 2020. (Tr. 53, 90, 92; AE F at 2, 5; AE G at 3-17)

During cross-examination, Applicant indicated that he filed W-2 forms for both 2010 jobs and filed the 2010 federal tax return within the extension period. He knew that he could not pay the \$7,000 in tax when he filed the 2010 return and agreed with his wife they did not have the funds to pay the tax. He believed he began a repayment plan at the time (circa 2011) and was paying \$400 to \$500 a month until 2018, but had to stop when the IRS sought to increase the monthly installment to \$1,500. He testified that at some point in 2012, the IRS reviewed the repayment plan and decided they wanted the entire amount (\$7,000) by the end of 2012. Applicant produced scant evidence of actual payments under any previous plan before the IRS plan that began in November 2020. (GE 2 at 6, 14; GE 3 at 3; Tr. 60, 61; AE G at 1-17)

For federal tax year 2011, Applicant owed about \$8,000. Because he was unable to pay the taxes due when he filed the return in April 2012, he contemplated adding the past-due taxes to the existing payment plan. He recalled he and his wife talked about increasing their income withholdings at a higher amount regardless of the exemptions that he claimed, but he did not act on increasing his withholdings. For federal tax year 2012, Applicant was aware when he filed the return that he owed \$9,800. (GE 2 at 6; GE 3 at 3; Tr. 62-63)

For federal tax year 2013, Applicant owed \$23,000. He recalled resuming his second employment during that year. He was a W-2 employee at both jobs and he was aware taxes were being withheld from both jobs. Applicant did not take any action at the time to change his withholding or exemptions to prevent the dramatic increase in tax liability, but he did not think his tax liability would be that high. Unable to pay the 2013 federal incomes taxes, Applicant and his wife decided to enroll in a repayment plan eventually. Despite entries that show installment plans were established for federal tax year 2013, the only plan with documented payments is the plan that began in November 2020. (GE 2 at 6; GE 3 at 3; Tr. 63-67)

Applicant owed \$69,000 in income tax for federal tax year 2014, because he obtained an early withdrawal of between \$100,000 and \$110,000 from his and his wife's 401(k) account to pay the down payment on his current home. He was unaware that the early withdrawal from his 401(k) account would be taxed as extra income. He thought that after you pay the taxes and penalties, there was no additional tax consequences. When he filed his 2014 federal tax return in 2015, he discovered that the 401(k) withdrawal was taxed as extra income. Again, Applicant mentioned an IRS payment plan. However, the only active installment plan was the one activated in November 2020. (GE 2 at 6; GE 3 at 3; Tr. 72-74)

Applicant surmised that the \$55,000 in federal taxes he owed for tax year 2015 was due to having two jobs and selling their first home in 2012 by a short-sale, and renting for two years before they purchased their current home. Applicant filed the 2015 federal tax return in January 2017. The reason for the late filing was because of the time he ended his work day at his second job. Though he also claimed that collecting tax documentation extended the time it took to prepare his 2015 return, he conceded that the documents he was seeking were provided to him electronically or by mail so that he could file his tax return on time. In 2016, Applicant advised his wife to file the 2015 tax returns, but because of her job, raising two children, and tending to their home, she was unable to prepare the 2015 return. (GE 2 at 6; GE 3 at 3; Tr. 74-80)

In 2017, Applicant did not file his 2016 federal tax return on time because his tax preparer indicated that to correct everything, the filing would cost Applicant \$10,000. He did not have the money so he began discussing his tax issues with a new preparer, but he still did not file his 2016 returns on time because he did not have the \$6,205 he owed the IRS and cost for tax services of the new preparer, and getting "everything" (presumably documentation) to him in anticipation of enrolling in an IRS payment plan requiring payments of about \$3,000 a month. (GE 2 at 6; Tr. 80-82)

Applicant filed the federal tax returns for 2016, 2017, 2018, and 2019 on June 30, 2020, because he knew the returns had to be filed. (GE 3 at 3) The reason for the delay was that he finally completed his review of the voluminous paperwork under the restrictions caused by the pandemic. He did not think that the delinquent federal taxes would be a problem as long as he had a repayment plan in place. He stressed his honest disclosures about the delinquent taxes to the OPM investigator. (If he was referring to the interview with the OPM investigator, the May 2019 PSI and June 2020 interrogatory answers were submitted before he entered the repayment plan in November 2020.) Apparently, the fact that he was going to receive a refund for federal tax years 2017, 2018, and 2019, instilled additional assurance that there would be no security clearance issue. He also testified about his desire to negotiate a payment plan with the IRS that called for more manageable payments of \$2,400, instead of \$3,000 a month installment package connected to his 2016 federal tax return. (Tr. 85-87)

Applicant filed his 2016 through 2019 state tax returns on June 30, 2020, the same day he filed his federal returns. He owed \$4,257 the state tax agency for tax year 2015 and \$7,644 for tax year 2014. He knew he owed the state income taxes when he filed the returns. Applicant claimed that the security clearance investigation was not one of the reasons he filed the state and federal returns in June 2020. (GE 2 at 8; Tr. 87-88)

Applicant's rental property, which he purchased for \$219,000, is currently worth about \$180,000. He is trying to sell the rental before the 15-year adjustable-rate-mortgage (ARM) becomes due in March 2022. (Tr. 88-89)

Concerning earnings for Applicant and his wife, he takes home about \$8,000 a month. His wife earns a little over \$5,000 a month. He and his wife still have \$105,000 in the 401(k) account he took an early withdrawal from in 2014. (Tr. 101-102)

Regarding Applicant's expenses, his mortgage is \$4,500 a month, which includes property taxes, insurance, and escrow. The first mortgage on the rental property is \$1,030 a month and the second is \$265 a month. He and his wife make monthly payments on four credit cards. Applicant's credit card balance is \$18,000, and he pays \$400 on the card every month. His wife's total balance on three credit cards is about \$17,500. Since he pays for all the credit cards, his monthly payments amount to \$900. He pays \$166 a month in car insurance for two cars. He has been paying \$700 a month on a time share since 2015. He purchased the timeshare in 2003 when the monthly fee was lower. Applicant has not used the timeshare in the last few years and has not taken any other vacations in the last two. (Tr. 95-104)

To prevent similar financial problems from recurring in the future, Applicant intends to remain employed with his current employer who offers no benefits like paid time off (PTO). He plans to forego future vacations as he has in the last few years. He receives a free meal for delivering meals to the elderly. Working under telework regulations since the beginning of the pandemic in March 2020, has reduced

expenses. Applicant believes he incurred the large tax dilemma because: (1) he was working two jobs; (2) he had limited to time to interact with his children; and, (3) he wanted to settle his family into a dwelling where his family had space to thrive. (Tr. 108-113)

Character Evidence

On October 20, 2021, reference JR indicated that she known Applicant for 27 years and taught him history in high school. In subsequent years, she observed him become as good husband, father, and citizen. His entire family is active in church. JR believes Applicant is security conscious. (AE E1) AE E2 contains a blank page followed a copy of JR's AE E1 reference.

In a statement dated October 21, 2021, RN expressed that Applicant attended her high school. In recent years they have resumed their friendship. RN knows that he is supportive of his children's sport and church activities. He has demonstrated his trustworthiness by caretaking her home when she is away. Applicant does not display a flashing lifestyle despite his good income. (AE 3)

Reference RW has known Applicant for 30 years, partially because he and RW's son attended the same high school. RW believes Applicant has always displayed goal-oriented behavior that has worked hand-in-hand with his dependability.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. These guidelines, which are not inflexible rules of law, should be applied with common sense and the general factors of 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(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Analysis

Financial Considerations

The security concerns of the guideline for financial considerations are set forth 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.

An applicant who seeks a security clearance with the Government must demonstrate that he has good judgment and is trustworthy. A gauge of his judgment and trustworthiness can be determined by an evaluation of how he manages his personal affairs. An applicant who has a history of financial irresponsibility in not filing or paying his federal and state taxes in a timely manner may also demonstrate irresponsibility in failing to comply with rules and regulations for safeguarding sensitive or classified information.

AG ¶19 describes conditions that could raise a security concerns and may be disqualifying include:

- (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 tax as required.

The pertinent mitigating conditions under AG ¶ 20 include:

(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.

AG ¶ 20(a) does not apply because Applicant still owes four of the five credit card accounts. He still owes an undetermined amount of money for the house that was foreclosed and sold in 2014. The lack of a plan to address the delinquencies continues to raise doubt about Applicant's reliability, trustworthiness, and judgment.

Whole-Person Concept

I have examined the evidence under the specific guideline (financial considerations) in the context of the nine general factors of the whole-person concept 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 access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant is 34 years old and married with three children. He exhibited good judgment in 2012 by enrolling in a debt consolidation service to pay off the credit card creditors in one monthly payment. Assuming he made payments under the plan, he displayed poor judgment two years later by abandoning the debt consolidation in favor of filing bankruptcy. He showed more poor judgment by dropping the bankruptcy idea in favor of using his funds to rent a home. Except for SOR 1.f, Applicant has not contacted the mortgage company and the credit card creditors in at least four years. He has never had financial counseling and has no plan to extricate himself from his financial woe. Considering the evidence as a whole, Applicant has not mitigated the security concerns arising from the guideline for financial considerations.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1e:	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 interests of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge