



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



In the matter of:)	
)	
)	ISCR Case No. 21-02351
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

02/15/2023

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 November 26, 2021, 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 (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.

On November 29, 2021, Applicant answered the SOR, and he requested a hearing before an administrative judge. The case was assigned to me on December 14, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 6, 2023. I convened the hearing as scheduled on January 25, 2023. The

Government offered exhibits (GE) 1 through 3. There were no objections and the exhibits were admitted into evidence. Applicant did not offer any documentary evidence at the hearing. The record was held open until February 9, 2023, to allow Applicant to submit documents. He provided Applicant Exhibits (AE) A through J, which were admitted without objection, and the record closed. DOHA received the hearing transcript on February 1, 2023.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.d and 1.e. He denied the allegation in SOR ¶ 1.c. I have incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 62 years old. He earned a bachelor's degree in 1982 and a master's degree in 2017. He has a 40-year-old child from a relationship. He married in 1984 and divorced in 2000. He has a 38-year-old child from the marriage. He remarried in 2004 and has two adult stepchildren from the marriage, ages 39 and 32. He worked for a federal contractor from June 2005 to June 2014. He changed jobs and worked for a different federal contractor from June 2014 until February 2018 when he was terminated from employment. He was unemployed until March 2019 when he began working for his present employer, also a federal contractor. He has held a top secret security clearance since 2008. His wife is employed as a school teacher. (Transcript (Tr.) 20-24, 51; GE 1)

In March 2019, Applicant completed a security clearance application (SCA) as part of his reinvestigation. He disclosed that in February 2018 he was terminated from his job with a federal contractor because he misused his corporate credit card for personal use. During his hearing, he testified that in 2013, while working for the same employer, he had misused his corporate credit card for personal use. He acknowledged that he was aware of the prohibition of using his corporate credit card for personal use. He had signed a document about the proper use of corporate credit cards and was aware that using it for personal reasons was in violation of the agreement. He received a written warning for the 2013 misuse. In 2018, he used the corporate credit card again for personal use. He was terminated from employment for the second violation. He testified he was aware he was not permitted to use the corporate credit card for personal use. Applicant explained that on both occasions, he repaid the amount owed in a short period of time. (Tr. 52-56; GE 1, 3)

When Applicant was terminated from his job, he was entitled to a pension for the years he had worked with the federal contractor. He chose to receive monthly payments, and he also withdrew \$50,000 from his 401k pension plan. He testified that an amount from the pension plan was used to pay the taxes owed for the early withdrawal. He testified that he used the lump-sum to pay down his federal tax debt. (Tr. 29-30, 55-59)

In his SCA, Applicant disclosed that he failed to pay his 2009 federal and state income taxes. He stated:

Upon relocation in 2014 from State A to State B, our federal tax debt was under an installment agreement. Coupled with the relocation and my wife not working, our debt grew. We always kept a rapport with the IRS and maintained an installment agreement to pay. (GE 1)

Applicant further stated regarding his current tax debt and years impacted, the following:

Federal (2009, 2011-2017); Adjusted withholding over the years to correct the problem of owing. A relocation in 2014 affected the Federal taxes owed. I am currently in negotiations with the IRS for an Offer-in-Compromise (OIC) estimated to conclude June 4, 2019 (set by IRS). Estimate: \$100,062; OIC TBD. [B] state (2015-2017); Also adjusted withholdings to avoid owing each year. Installment agreement in place for \$200 per month until debt satisfied. Estimate: \$8,000. (GE 1)

Applicant testified that his OIC to the IRS was to settle the tax debt for \$25,000. It was rejected in June 2019. The SOR alleges Applicant's income tax debt to the IRS at the time of the SOR was \$66,479 and to State B was \$20,767. Applicant testified that he currently owes the IRS \$73,491 and he owes \$22,502 to State B for delinquent income taxes. Post-hearing, Applicant provided documents from the IRS showing the total amount he owes for delinquent federal income taxes is \$71,651 and state income taxes is \$22,352. (Tr. 24, 65-66; AE A, H)

Applicant testified that over the years he has had installment agreements with the IRS and this is corroborated by his income tax transcripts. From at least 2012, as confirmed by tax year transcripts for tax years 2011 through 2017, an installment agreement would be repeatedly established, reflect it was pending, and then stopped and removed. During these years penalties and interest continued to accrue. Applicant testified that he was unaware that his installment agreement would be removed each new tax year when he failed to pay his income taxes on time. (Tr. 29-30; GE 2)

Applicant disclosed in his SCA that in 2018 a federal tax lien was entered against his residence for \$57,000 and State B entered a tax lien for \$5,744. He hired an attorney to address the liens. He stated in his SCA the following: "The federal tax lien was lifted due to soliciting the help from an attorney which we paid for their services, plus we are in negotiations with the IRS to settle our debt with an OIC." He stated the reasons for his tax issues were because his move from State A to State B was more costly than anticipated. His wife was unemployed from 2014 to 2017 and once she resumed working in the summer of 2017 their finances improved. He also stated that withdrawing money from his pension plan resulted in penalties and additional federal taxes owed which caused financial hardships. (Tr. 45-47; GE 1)

Applicant was interviewed by a government investigator in May 2019. He told the investigator that he always filed his income tax returns on time as required, but he owed federal income taxes for tax years 2009 and 2011 through 2017 and to State B for tax years 2015, 2016 and 2017. He explained that although he was earning a substantial

income, he was not having enough withheld from his paychecks, and he and his family needed the money to live. In addition, his wife was unemployed from 2014 to the summer of 2017. He also admitted that he and his family were spending more money than they should have, which caused his debts to grow. He withdrew some money from his pension plan to pay for his stepdaughter's college tuition, which had tax consequences. He said he would not have been able to pay his living expenses if he had paid his yearly tax bills. He said he deliberately made the decision to not pay his tax bills each year because he would not have been able to cover his living expenses. Instead, he contacted the IRS and State B to negotiate payment arrangements. He said, that at the time of the interview, none of his tax debts had been satisfied. He said he was able to make an arrangement with State B in January 2019 to pay \$200 a month and was in compliance. He anticipated that his tax debts would be resolved within the next five years. He said he had readjusted his withholdings and put his family on a budget. (Tr. 66-67; GE 2, 3)

Applicant's tax transcripts from December 2020 reflect his adjusted gross income in 2011 was \$193,491; 2012 - \$171,032; 2013 - \$170,859; 2014 - \$150,960; 2015 - \$191,631; 2016 - \$152,642; 2017 - \$173,586; 2018 - \$273,634; 2019 - \$204,099; 2020 - \$227,991; and 2021 - \$211,427. (Tr. 68-69; GE 2; AE C, D, E)

The tax transcripts from 2011 through 2014 show a zero balance owed each year. It appears a refund from tax year 2019 may have been applied to these tax years' balances. Tax transcripts from December 2020 show balances owed for 2015 - \$31,036; 2016 - \$10,578; 2017 - \$17,222; and 2018 - \$7,903. Post-hearing, Applicant provided his 2019 tax year transcript, which reflected a zero balance owed and a refund was applied to his delinquent 2015 tax debt. He also provided his 2020 and 2021 tax transcripts which reflect he owes \$8,673 for tax year 2020 and \$3,726 for tax year 2021. Applicant stated in his post-hearing letter that he was unable to obtain tax transcripts for years earlier than 2013 because the IRS only had the past ten tax years available. (GE 2, AE A, C, D, E)

Applicant testified that he had an installment agreement with the IRS sometime in 2020 to pay \$760. Based on documents he provided post-hearing, it appears this agreement started in March 2021 and continued to July 2021. He made the monthly payments. His 2020 tax transcript reflects that in March 2022 he established an installment agreement. His 2021 tax transcript reflects another installment agreement established in July 2022. He testified that in October 2022, he had a new installment agreement with the IRS to pay \$1,162 a month for five years. (Tr. 24-30, 34; AE A, C, D, E, F, G)

The SOR alleged that Applicant failed to timely file State A income tax returns for tax years 2010, 2011 and 2012. Applicant denied this and claimed he has always filed his tax returns timely. He provided a document from State A that shows his 2010 income tax return was filed and he made monthly payments toward the tax due. He was unable to produce the 2011 and 2012 returns. He provided a letter from the State showing he did not have any balance owed for taxes. I found Applicant's testimony credible. (Tr. 37, 48-49; GE 2)

The SOR alleged that Applicant owed State B \$20,767 for delinquent income taxes that remained unpaid. Applicant provided documents from his State B's department of revenue. The documents show the current balance owed is \$22,352 for delinquent taxes, and his 2021 refund was applied to the balance owed. He provided a history of past payments he made on his delinquent state tax debt. It appears that in 2017 he had a payment plan with State B. He did not provide a copy of it. From June 2017 to July 2021, he made a total of 36 payments, of which 29 were applied to his delinquent 2015 taxes and the remaining 7 payments were made in 2018, 2019, and 2020 and applied to his 2016 tax debt. Applicant also provided a document from February 1, 2023, showing he entered into an installment agreement with State B to pay \$419 a month for 60 months to resolve his debt. (Tr. 41; AE H, I, J)

Applicant has not had financial counseling. He said he had a financial planner in 2007 and 2008, and he should have continued their services. Prior to 2014, he prepared his own tax returns. After 2014, he had a professional prepare his tax returns. When he learned he would owe taxes each year, he would contact the IRS and State B to make payment arrangements. He said he was unaware of how installment agreements worked. He was unaware that if he failed to pay a subsequent year's taxes owed the installment agreement would likely stop. He testified that he did not pay his annual income taxes because he was unable to do so since he did not have the money. (Tr. 33, 59-62)

Applicant's current salary is \$185,000. He qualifies for bonuses and last year received one between \$10,000 and \$12,000. He and his wife have numerous credit cards that are current and have a cumulative balance owed of approximately \$30,000. They own a condominium in another state that they rent to his stepson and family. The mortgage is \$2,400 and they charge his stepson \$2,000. His monthly residential mortgage is \$2,700. He and his wife have three vehicles. Two are older models and paid for. His wife has a 2018 vehicle that they make \$982 monthly payments. He tithes approximately \$1,000 a month. Applicant and his sisters support their elderly mother who has serious medical issues. He provides \$1,172 of support each month and has been doing so for about two years. Applicant has approximately \$300,000 in his employer's pension plan and about \$7,000 in his savings. (Tr. 60, 71-80)

Any derogatory information that was not alleged in the SOR will not be considered for disqualifying purposes. It may be considered when making a credibility determination, in the application of mitigating conditions, and in a whole-person analysis.

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;
- (b) unwillingness to satisfy debts regardless of ability to do so;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust; 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 is indebted to the federal government for delinquent taxes in the amount of approximately \$71,651. He is indebted to State B in the amount of approximately \$22,351. Although, initially he may have been unable to pay his taxes on time because he failed to withhold sufficient funds, he was aware of the issue and each year continued his practice of not paying his federal and state income taxes on time. Applicant knowingly misused his corporate credit card in 2013 and again in 2018. There is sufficient evidence to support the application of the above disqualifying conditions.

There is insufficient evidence to conclude that Applicant failed to file State A income tax returns for tax years 2010, 2011, and 2012. I find for him for SOR ¶ 1.c.

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 continues to have a large federal and state income tax debt. His financial issues are recent and ongoing. Based on his long history of failing to timely pay his taxes, I am unable to find that future problems are unlikely to recur. Applicant knowingly misused his corporate credit card in 2013 and was given a written warning. Despite being aware of the rules and potential consequences, he repeated his offense in 2018 and was terminated from his job. Applicant's conduct cast doubts on his reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant attributed his tax problems to relocating to a different state. Applicant may have had added expenses with his move, but this did not create his tax problems. He was not paying his federal income taxes before his move and again after his move. Also, his wife's unemployment was beyond his control, but it also did not create tax problems as federal tax is based on income. There is insufficient evidence to find that Applicant's tax issues were beyond his control or that he acted responsibly under the circumstances. His repeated failure to withhold sufficient funds to cover his taxes or timely pay his taxes recurred over many years. Each year he failed to timely pay his taxes, he incurred additional penalties and interest. Despite being in contact with the IRS and having an installment agreement, he would then fail to pay his current year's taxes, which would exacerbate the issue. Applicant failed to act responsibly. AG ¶ 20(b) does not apply.

Applicant has not received financial counseling and there is not clear evidence that his financial problems are under control. There is evidence that Applicant has had installment agreements with the IRS in the past and had a payment plan with the state tax authority. However, he does not have a reliable financial track record of adhering to these agreements and satisfying his yearly tax obligation. AG ¶¶ 20(c) and 20(d) do not apply.

Applicant made an arrangement with the IRS to pay his delinquent taxes and made a recent arrangement with his state tax authority. As noted above, he does not yet have a reliable track record of adhering to his installment agreements. AG ¶ 20(g) applies to the extent that he has an installment agreement with the IRS and his state, but it is too early to tell if he will make consistent payments.

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.

Despite being aware that he had an obligation to plan for his tax liability, Applicant repeatedly failed to do so, increasing the amount he owed with penalties and interest. He also failed to pay his state income taxes. 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) (ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016.).

Applicant's history of non-compliance with a fundamental legal obligation to timely pay his federal and state income taxes raises serious concerns. Applicant's repeated failure to comply with rules related to the use of a corporate credit card also raises serious

concerns. 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.

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-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.e	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