



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



In the matter of:)	
)	
)	ISCR Case No. 21-00190
)	
Applicant for Security Clearance)	

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: Carl Anthony Marrone, Esq.

03/30/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 25, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. Applicant responded to the SOR on April 1, 2022, and requested a hearing before an administrative judge. The case was assigned to me on December 1, 2022.

The hearing convened as scheduled on February 3, 2023. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through FF (AE A through Z were attached to the SOR, and AA through FF were offered at the hearing), which were admitted without objection. A timeline of the events was offered and accepted as a demonstrative exhibit (Hearing Exhibit I). The record was held open for Applicant to submit additional documentary evidence. He submitted AE GG, which was admitted without objection.

Findings of Fact

Applicant is a 50-year-old vice president, part owner, and facility security officer (FSO) of a defense contractor, where he has worked since 1999. He seeks to retain a security clearance, which he has held since about 2002. He has two associate degrees that he earned in 1994 and additional education. He married in 2013 and divorced in 2019. He has two children. (Transcript (Tr.) at 15-19, 53, 67-68; Applicant's response to SOR; GE 1, 2; AE F)

Applicant went through an extraordinarily difficult time starting in about 2014. In late 2014, his mother had a brain aneurism and became severely mentally and physically incapacitated. After his mother was released from the hospital and rehabilitation, he took her in to live with him and his family. She lived with Applicant until sometime in about 2016. After she stopped living with him, he visited her often and continued to deal with her condition until she passed away in 2021. His two young children made it more difficult. In 2017, Applicant suspected his wife was unfaithful. He hired a private investigator who confirmed his suspicions. (Tr. at 21-25, 35-42, 54-58, 85; Applicant's response to SOR; GE 2; AE C, S, AA)

Applicant is part owner of his company, which was a Subchapter S corporation. His interest was about 21.5% in 2016. In order to be competitive on a large contract, the company needed to bring in experienced workers. The company used partial ownership as a recruitment tool. As part of that process, in 2017, the company was converted to a limited liability company (LLC). Applicant's ownership was involuntarily diluted to about 6.5%, but he received \$3 million as compensation for his share of the company. He felt that he did not receive a fair deal. The \$3 million was to be paid in quarterly installments over several years, but the tax liability for the capital gains was completely in tax year 2017. He received payments of about \$900,000 in 2017, and the rest in later years. The company won a \$900 million contract. (Tr. at 26-35, 58-62, 66, 72-73; Applicant's response to SOR; GE 1, 2; AE D, E)

Applicant has a history of tax issues. He did not file his 2016 through 2019 federal and state income tax returns when they were due, and he failed to pay his 2016 through 2018 federal and state income taxes when they were due. The forms from his company that were necessary to file his returns were always late, but not to the extent that it justified how late his returns were. He had the means to pay the taxes when they were due, even in 2017 when the large capital gains tax was due. He does not excuse his failures, but the stress of dealing with his mother, his now ex-wife, his children, and the issues with his company, distracted him from resolving his tax problems. (Tr. at 42-47, 85; Applicant's response to SOR; GE 1-3)

2016

Applicant's and his wife's adjusted gross income for 2016 was \$389,798, and their taxable income was \$325,030 (hereinafter I will just refer to Applicant even though the taxes involve him and his wife). His tax liability was \$81,153. He made an estimated tax payment of \$8,000 in April 2016, and \$54,938 was withheld from his pay, leaving

\$18,245 in unpaid taxes, before penalties and interest were added for late filing and late payment.

The IRS received Applicant's 2016 income tax return in November 2019. He paid \$18,430 with the filed return and another \$9,918 in December 2019 to pay all federal taxes, penalties, and interest owed for 2016. (GE 2; AE G, H)

2017

Applicant's adjusted gross income for 2017 was \$3,873,840, and his taxable income was \$3,855,948. His tax liability was \$943,975, before penalties of \$169,623 and \$75,388 for late filing and late payment and \$80,255 in interest were added. He made an estimated tax payment of \$100,000 and another \$30,000 payment in April 2018, and \$60,095 was withheld from his pay.

The IRS received Applicant's 2017 income tax return in December 2019. He paid \$753,880 with the filed return. He paid \$86,222 in May 2020 and \$247,508 in October 2020 to pay all federal taxes, penalties, and interest owed for 2017. (GE 2, 3; AE I, J)

2018

Applicant's adjusted gross income for 2018 was \$2,272,867, and his taxable income was \$1,801,915. His tax liability was \$628,689, before penalties and interest of \$191,994 were added for late filing and late payment. He made an estimated tax payment of \$25,000 in April 2018 and \$54,237 was withheld from his pay.

The IRS received Applicant's 2018 income tax return in December 2019. He paid \$549,359 with the filed return. He paid \$43,957 in May 2020 and \$148,046 in October 2020 to pay all federal taxes, penalties, and interest owed for 2018. (GE 2; AE K, L)

2019

Applicant's adjusted gross income for 2019 was \$2,550,303, and his taxable income was \$2,005,948. His tax liability was \$788,862, before penalties and interest of \$27,917 were added for late filing and late payment. He made an estimated tax payment of \$600,000 in December 2019, and \$55,614 was withheld from his pay. He made a \$75,000 payment in July 2020.

Applicant received an extension to October 15, 2020, to file his return. The IRS received his 2019 income tax return in February 2021. He paid \$58,248 with the filed return. He paid \$27,917 in March 2021 to pay all federal taxes, penalties, and interest owed for 2019. In September 2022, the IRS decreased the failure to file penalty by \$13,105, which completely eliminated a failure to file penalty. The IRS also decreased the interest by \$163 and indicated that Applicant was due a refund of \$13,269. (GE 2; AE M, N, DD)

2020

Applicant's adjusted gross income for 2020 was \$2,919,262, and his taxable income was \$2,257,658. His tax liability was \$798,563, plus a \$8,176 penalty for not pre-paying tax. He made an estimated tax payment of \$150,000 in July 2020, and \$56,569 was withheld from his pay. He made a \$675,000 payment in May 2021.

Applicant received an extension to October 15, 2021, to file his return. The IRS received his 2020 income tax return in October 2021. A refund of \$76,855 was issued in April 2022. (AE P, BB)

State Taxes

Applicant filed his state tax returns at the same time he filed his federal returns. He owed about \$5,188 for 2016; \$173,000 for 2017; and \$3,725 for 2018. Those figures did not include all of the penalties and interest. The taxes were paid between November 2019 and January 2020. His state waived much of the penalties. He significantly overpaid his 2019 and 2020 state taxes resulting in large refunds. He donated \$13,000 from what would have been penalties to charity. (AE G, I, K, M, O, P, U, GG)

Applicant reported his failure to file his federal and state tax returns from 2016 to 2018 on a Questionnaire for National Security Positions (SF 86) that he submitted in April 2020. He wrote that the issues were satisfied in December 2019, with the comments, "The taxes and all associated interest were paid in full with two payments (one for tax and one once interest was calculated). I have written an abatement request letter to request relief from penalties which is pending." I misstated the evidence during the hearing and made inaccurate comments about Applicant's answers. I find that Applicant's responses on the SF 86 were correct, as the taxes and interest were paid, while the penalties, which were extensive, were paid later. (Tr. at 80-86; GE 1)

Applicant was interviewed for his background investigation in August 2020. He discussed his 2016 through 2018 federal and state taxes. He stated that he filed all of the returns in November 2019 and made all payments in full, as required. He stated that he had no issues with his 2019 tax filings. (GE 2) As indicated above, after submitting his SF 86 and completing his background interview, Applicant was late filing his 2019 federal and state income tax returns and paying the taxes owed.

Applicant admitted that as the FSO, he knew that he was required to report his tax issues to the DOD. He did not do so before the SF 86. He stated that if he became aware that an employee had similar tax issues, he would report the employee.¹ (Tr. at 89-90)

¹ The SOR did not allege that Applicant failed to report his tax issues. Any matter that was not alleged in the SOR cannot be used for disqualification purposes. It may be considered in assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

Applicant received marriage counseling, which has helped him in other aspects of his life. He has better tools and coping mechanisms to deal with emotional stress. He has systems and reminders in place with his accountant to prevent any additional tax issues. He stated that he will continue to file his tax returns and pay his taxes on time. (Tr. at 47-50, 76; AE CC, FF)

Applicant called witnesses, and he submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his trustworthiness, reliability, professionalism, and willingness and ability to protect classified information. (Tr. at 92-116; AE T, W-Y)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following is potentially applicable in this case:

(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 did not file his 2016 through 2019 federal and state income tax returns when they were due, and he failed to pay his 2016 through 2018 federal and state income taxes when they were due. AG ¶ 19(f) is applicable.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following is potentially applicable:

(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 accepted responsibility for his tax failures. He does not excuse his failures, but the stress of dealing with his mother, his now ex-wife, his children, and the issues with his company, distracted him from resolving his tax problems. All of the old returns have been filed, and all of his past-due taxes have been paid. AG ¶ 20(g) is applicable, but that does not end the discussion.

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01382 at 4 (App. Bd. May 16, 2018). This is true even when the returns are eventually filed and the taxes paid.

As a longtime clearance holder and FSO, Applicant knew that failure to adhere to tax laws could affect his security clearance. He knew that he had an obligation to report his tax issues to the DOD, but he chose not to for several years until he submitted the SF 86. He reported his 2016 to 2018 tax issues on his April 2020 SF 86, and he discussed the matters during his August 2020 background interview. He stated that he filed all of the returns in November 2019 and made all the payments in full, as required. He stated that he had no issues with his 2019 tax filings. After submitting his SF 86 and completing his background interview, Applicant was late filing his 2019 federal and state income tax returns and paying the taxes owed.

Applicant's failure to fulfil his duty to file his income tax returns and pay his taxes on time continues to raise doubts about his judgment, reliability and willingness to follow rules and regulations. The mitigation provided by the filed returns and paid taxes is insufficient to overcome the years of Applicant shirking his responsibility to file his tax returns and pay his taxes. Financial considerations security concerns are not mitigated.

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) 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 have incorporated my comments under Guideline F in my whole-person analysis. I also considered Applicant's character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations security concerns.²

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.h:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge

² The adjudicative guidelines give me the authority to grant conditional eligibility "despite the presence of issue information that can be partially but not completely mitigated, with the provision that additional security measures shall be required to mitigate the issue(s)." I have not done so as I have concluded a conditional clearance in this case is not warranted.