



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



In the matter of:)	
)	
)	ISCR Case No. 21-01406
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

07/28/2023

Decision

BENSON, Pamela C., Administrative Judge:

Applicant did not mitigate the financial considerations security concern. He failed to file federal and state income tax returns for multiple years, and he has a significant unresolved tax delinquency. He did not provide supporting documentation to demonstrate any good-faith efforts to remedy this matter. National security eligibility for access to classified information is denied.

Statement of the Case

On January 31, 2021, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations). The DOD acted 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 effective June 8, 2017 (AG).

Applicant answered the SOR (undated) and he requested a hearing before an administrative judge. (SOR response) The case was assigned to me on April 4, 2023.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 18, 2023, and the hearing was convened as scheduled on June 13, 2023.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. Applicant did not offer any documentation and did not object to the Government's submissions and all proffered exhibits were admitted into evidence. I held the record open until June 27, 2023, in the event either party wanted to supplement the record. I received the hearing transcript (Tr.) on June 21, 2023. I did not receive any documents from either party and the record closed on June 28, 2023.

Findings of Fact

Applicant admitted 11 of the 13 SOR allegations under Guideline F. (¶¶ 1.a-1.g, and 1.j-1.m) His admissions are adopted as findings of fact. After a review of the pleadings and evidence, I make the additional findings of fact:

Applicant is 67 years old. He served active duty in the Marine Corps from 1977 to 1994. After receiving his honorable discharge at the rank of lieutenant colonel, he served in the Marine Corps Reserve from 1994 to 2002. He retired in 2002 as a major. He earned a bachelor's degree in 1977, and a Master of Business Administration (finance) in 1989. Between 1975 and 1999 he was married and divorced three times. He married his current wife in 2007. He does not have any children. (Tr. 15-20; GE 1)

Applicant was employed by a government contractor from 2015 to 2020, and he had two months of unemployment in 2019. Since 2020, Applicant has been employed by a different government contractor as an acquisitions program manager. His annual salary is approximately \$115,000. He also receives about \$2,900 monthly from Social Security, and about \$3,000 monthly from his military pension. His wife is employed and earns approximately \$120,000 annually. (Tr. 15-20; GE 1)

Beginning in September 2007, Applicant was self-employed and was earning about \$15,000 to \$20,000 per month from one client that was essentially his only client in his business. The contract ended with this client, and from late 2010 to 2015, he experienced financial hardship due to a lack of business. For tax year (TY) 2011, he did not timely file his federal income tax returns or pay his federal taxes in the approximate amount of \$78,678. He testified that he chose to use whatever money he had to pay his mortgage and personal monthly expenses. He stated that was also the case for TYs 2012 (\$37,871); and 2013 (\$17,024). Although he did timely file his 2014 federal tax return, he did not pay his outstanding federal taxes of \$36,775, or his State A taxes of \$5,064. He said he has made payments to State A, but admitted it was not paid in full. He did not submit supporting documentation of his tax payments to State A, or documentation of the outstanding balance. (SOR ¶¶ 1.a, 1.b, 1.c, 1.d, and 1.i) (Tr. 23-25, 42; GE 1)

Beginning in February 2015, Applicant was employed by a government contractor. He timely filed his federal and state income tax returns for TYs 2016, 2017, and 2018, but he did not pay the federal taxes due for those years in the following

amounts - 2016 (\$8,131); 2017 (\$5,270); and 2018 (\$6,717). Applicant testified that he developed delinquent federal taxes because he did not have sufficient taxes withheld from his paychecks. He did not change his exemptions through the payroll office following his 2016 tax deficiency because he “just wasn’t smart enough to do that.” (SOR ¶¶ 1.d, 1.e, 1.f, and 1.g) (Tr. 25-27; GE 1; SOR response)

In 2015, Applicant hired a tax defense law firm after his attempts to resolve his delinquent taxes with the IRS were unsuccessful. His home went into foreclosure. The law firm assured him a much-reduced settlement with the IRS and state(s) would be expected. After seven years with little resolution, the law firm informed Applicant they were unable to lower his delinquent taxes, interest, and penalties below \$220,000. Applicant hired another tax defense law firm in November 2022. In his SOR response, he stated that this law firm had reduced his taxes to \$198,000, and they were working with tax representatives for an offer in compromise and a structured payment plan. Applicant testified during the hearing that he currently owed \$202,000 for delinquent federal taxes based on the most recent information he received from the IRS. In addition, recent discussions projected that he would be paying \$3,700 monthly in a tax repayment plan, but the plan most likely would not be drafted until July 2023. (SOR response; Tr. 29-31)

During the hearing, Applicant was asked why he allowed so many years to pass without his initial law firm making better progress in reaching a tax resolution. Applicant stated that as long as the law firm was in negotiation with the IRS, the IRS was not bothering him to collect money. He also admitted that he has not made any payments on his delinquent federal taxes over the years, and he will not do so until an agreement is reached. As of the date of the hearing, he did not have a repayment agreement in place with the IRS. (Tr. 31-32, 36-37)

SOR ¶¶ 1.h and 1.i alleged that Applicant failed to timely file his federal income tax returns for TYs 2019 and 2020, and as of January 31, 2023, these federal tax returns remained unfiled. He testified that he filed the 2019 tax return late and the 2020 tax return timely, but both tax returns were rejected, and he refiled them in July 2021. He provided tax transcripts with his interrogatory response, but the tax transcripts for TY 2019 and TY 2020 reflected that no tax returns have been filed. (Tr. 27-29, 37; GE 2)

The federal tax transcripts submitted with the interrogatory reflect the following:

TAX YEAR	RETURN FILED	DATE RTN FILED	AMOUNT OWED
2011	YES	3/28/2016	\$78,678
2012	YES SUBSTITUTE	10/27/2014	\$37,861
2013	YES	12/19/2016	\$17,024
2014	YES	6/08/2015	\$36,775
2015	YES	5/09/2016	0
2016	YES	6/05/2017	\$8,131
2017	YES	6/04/2018	\$5,270

2018	YES	5/27/2019	\$6,717
2019	NO TAX RETURN		-
2020	NO TAX RETURN		-

The SOR alleged that Applicant is indebted to State B for delinquent TY 2000 taxes in the amount of \$18,000, and delinquent taxes in the amount of \$5,000 for TY 2002. (SOR ¶¶ 1.j and 1.k) Applicant said that based on information provided by his law firm, State B cannot prove that he owes \$18,000 for TY 2000, but even in the event they did, the statute of limitations would prevent any collection of the tax debt. He believed the outstanding \$5,000 for TY 2002 was paid to State B. He did not submit supporting documentation of any payment while the record was held open. (Tr. 39-42)

SOR ¶ 1.m alleges that Applicant is indebted to a bank in the amount of \$56,014, for a second mortgage loan that was charged off. Applicant admitted this is the second mortgage on the home that was foreclosed. He testified that he sent the bank a letter informing them that he would not acknowledge the debt since the bank initiated the foreclosure on his home. During the hearing he stated he understood that he is legally obligated for the second mortgage loan, but he does not feel morally obligated to pay the debt because the bank failed to negotiate with him while he was unemployed. He also believed the statute of limitations has run on this debt and it is no longer collectible. He stated, “It’s not paid and it’s not going to be paid.” (SOR response; Tr. 42-46)

Applicant listed his tax issues on his March 2020 security clearance application (SCA). He testified that he has a monthly budget, and after paying all of his monthly expenses, he has a monthly net remainder of about \$6,000. Sometime soon, he expects about \$3,700 of his \$6,000 monthly net remainder will be used to resolve his delinquent federal taxes once the repayment agreement is in place. He intends to timely file all of his income tax returns in the future. (Tr. 47; GE 1)

Policies

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 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(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

AG ¶ 18 expresses the security concerns for financial considerations:

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.

The record evidence of Applicant's delinquent charged-off second mortgage, significant outstanding federal and state tax debt, and his history of not timely filing his income tax returns for multiple years establishes the following disqualifying conditions under AG ¶ 19:

(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.

AG ¶ 20 describes conditions that could mitigate security concerns. The following are potentially applicable in this case:

(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;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis or provides evidence or actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Even where tax problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant's trustworthiness in light of longstanding prior behavior evidencing irresponsibility. See e.g., ISCR Case No. 14-01984 at 5 (App. Bd. Aug. 2015) The Appeal Board has long held that the failure to file tax returns suggests a

problem with complying with well-established government rules and systems. See e.g., ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016) Moreover, the Appeal Board has reaffirmed that the timing of corrective action is an appropriate factor to consider in applying AG ¶ 20(g). See e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018) (citing ISCR Case No. 17-01807 at 3-4 (App Bd. Mar. 7, 2018)). In reversing favorable clearance grants to applicants who only begin to address their delinquent tax returns after having been placed on notice that their clearance may be in jeopardy may not comply with laws, rules, and regulations when their immediate interests are not imperiled. Applicant was on notice when he completed his March 2020 SCA, and during his April 2020 background interview. He was further prompted to provide proof of his tax filings after interrogatories were issued to him, and after he submitted the requested documentation in July 2021. He has not provided evidence of any delinquent tax payments.

Applicant bears the burden of production and persuasion in mitigation. He attributed his failure to pay taxes and timely file federal and state income tax returns for multiple years was due to his self-employment business decline. He has failed to provide supporting documentation to demonstrate his good-faith efforts to remedy this matter that spans more than a decade, and even after he eventually had the financial resources to do so. He admitted his federal tax debt totals \$202,000. He has not made payments to the IRS over the years because a repayment agreement is not yet in place.

Applicant failed to take responsible action to resolve his unfiled federal and state income tax returns and pay his tax delinquency for multiple years. He has refused to pay his second mortgage, although he admits he is legally responsible, because of personal reasons. Access to classified and protected information requires faithful adherence to the rules and regulations governing such activity. A person who fails to address concerns, even after having been placed on notice that his or her access or security clearance is in jeopardy, may lack the willingness to follow rules and regulations when his or her personal interests are at stake. 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 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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant 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.

I considered Applicant's military service, and other issues that hampered his ability to pay his federal and state taxes. However, his lack of priority in handling his tax issues over a multi-year period causes me to question his trustworthiness, reliability, and good judgment, and thus, his eligibility for access to classified information. While Applicant expressed a sincere intention to file his tax returns on time in the future, and his promise to pay his delinquent taxes once a repayment plan is drafted, it does not carry as much weight in reform as if he had been able to show a long track record of compliance with his tax-filing obligations, or good-faith payments on his delinquent tax debt.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations security concerns.

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.m:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge