



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



In the matter of:)	
)	
)	ISCR Case No. 12-10736
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

05/17/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 5, 2012. The Department of Defense (DOD) issued Applicant an undated Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOD acted under Executive Order 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 DOD for SORs issued after September 1, 2006.

Applicant’s notarized answer to the SOR was dated January 21, 2013. By letter dated February 18, 2012, Applicant requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on April 8, 2013. I convened a hearing on May 8, 2013, to consider whether it is

clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced 15 exhibits, which were marked Ex. 1 through Ex. 15 and entered in the record without objection. Applicant testified, called no witnesses, and introduced 11 exhibits, which were identified and marked as Applicant's Ex. A through Ex. K and entered in the record without objection. DOHA received the hearing transcript (Tr.) on May 16, 2013.

Findings of Fact

The SOR contains six allegations of financial conduct that raise security concerns under Guideline F, Financial Considerations (SOR ¶¶ 1.a. through 1.f.) In his Answer to the SOR, Applicant admitted the allegations at ¶¶ 1.a., 1.b., 1.d., and 1.f. He asserted that the allegation at SOR ¶ 1.c. repeated the allegation at SOR ¶ 1.a. and included additional amounts of assessed interest and penalties. He also asserted that the allegation at ¶ 1.e. repeated the allegation at ¶ 1.b. and included additional amounts of assessed interest and penalties. Applicant's admissions are entered as findings of fact.

Applicant is 60 years old. He married for the first time in 1991. He and his first wife divorced in 1996. He married again in 2006. He has one adopted child and two stepchildren from his second marriage. All three children are adults. Applicant provides between \$500 and \$1,000 a month to his adopted child, who is disabled. (Ex. 1; Tr. 35-36.)

Applicant serves as the chief technology officer and chief scientist for a company which has employed him since 1995. The company is a limited liability company (LLC). Applicant is one of 15 members in the firm and participates in the company's annual revenue.¹ He seeks renewal of his security clearance. (Ex. 1; Ex. F; Tr. 56-57.)

In June 1992, Applicant completed a questionnaire for public trust positions (Standard Form 85P). Question 20 on the questionnaire asked if, in the previous five years, Applicant had been subject to a tax lien. In response to Question 20, Applicant answered "Yes," and reported that he had received a federal tax lien from the Internal Revenue Service (IRS) in 1989 and a state tax lien in 1990. At the time the liens were levied, Applicant was employed as an executive vice-president of an LLC, which filed for Chapter 11 bankruptcy in June 1992. At his hearing, Applicant stated that the 1989 federal tax lien and the 1990 state tax lien were the first tax liens he had ever received.

¹ An LLC is a business entity that combines the personal liability protection of a corporation with the tax benefits of a partnership. Owners of an LLC are designated as "members," and they are considered to be self-employed. All profits and losses of an LLC are passed through the business to each member of the LLC. Members of the LLC report profits and losses on their personal federal income tax returns. The LLC that employs Applicant pays him a monthly salary, and, as a minority member of the LLC, he receives a proportional distribution of the company's profits and losses once a year. (Ex. F; Tr. 55-57; See also www.sba.gov/content/limited-liability-company-llc.)

He reported that the liens occurred when he received his share of the LLC profits and lacked the financial resources to pay the required federal and state taxes. (Ex. 14; Tr. 42.)

In 1992, Applicant's employer was bought by another LLC, and Applicant became a member of the successor LLC. In 1993, Applicant was served with another federal tax lien for failure to pay federal taxes on his share of the LLC income distributed to him. (Ex. 11; Tr. 44-45.)

After affiliating with his current employer in 1995, Applicant's financial difficulties increased. In 1997, another federal tax lien was filed against him. Applicant stated that lien payments are directed by the IRS to the oldest lien first, and subsequent liens are addressed chronologically in the order they were filed. Even though a debtor is paying one lien, liens incurred later remain unsatisfied until the earlier liens are paid, and they continue to accrue interest and penalties. (Tr. 44-47.)

Applicant's federal income tax return was audited in 2002. In 2004, Applicant provided an affidavit stating that the company's accountant "incorrectly used deductions and tax credits when filing the company's tax returns." The accounting errors resulted in a finding that the company owed an additional \$180,000. Applicant's share of this amount was 27% or \$48,600. (Ex. 10; Tr. 47-51.)

Applicant further testified that after the 2002 audit, he was personally assessed federal income tax liens of \$156,000. He contested the amount he owed, and in 2005, he and the IRS agreed on a settlement amount of \$126,000, which he paid in full in 2005. (Tr. 52-54.)

The federal tax liens levied against Applicant between 1989 and 2005 are alleged at SOR ¶ 1.f. In his answer to the SOR, Applicant acknowledged the tax liens and asserted that they had been paid in full. He asserted that the liens resulted from "major changes in my ownership percentage of the Limited Liability Corporation coupled with changes in the accounting methods used for those periods." Applicant further explained that he had re-filed all of his federal tax returns from 1989 to 2005, negotiated a settlement with the IRS, and paid the settlement in full. (SOR; Answer to SOR; Tr. 44, 53.)

The SOR alleges at ¶ 1.a. that Applicant is indebted to the IRS for an unsatisfied federal tax lien that was entered against him in April 2009 for \$30,275. This debt, identified as owed for tax year 2008, is shown as unpaid on Applicant's credit bureau reports of May 12, 2012, November 20, 2012, and April 18, 2013. However, an IRS account transcript for the tax year ending on December 31, 2008, dated November 29, 2012, shows a zero balance owed. At his hearing, Applicant acknowledged that his federal tax lien for tax year 2008 had been paid in full. (Ex. 1; Ex. 2; Ex. 4; Ex. 5; Tr. 59.)

At his hearing, Applicant provided an IRS account transcript for tax year 2009, dated November 29, 2012, which reflects an account balance, including accrued

interest and penalties, of \$43,862.19. This debt is alleged at SOR ¶ 1.c., and Applicant admitted that it was unsatisfied. (Ex. 2; Ex. 5; Ex. A; Tr. 59-60.)

The SOR alleges at ¶ 1.b. that Applicant is indebted to the IRS for an unsatisfied federal tax lien entered against him in August 2011 for approximately \$46,619. The lien is listed on Applicant's credit bureau reports of May 12, 2012, November 20, 2012, and April 18, 2013. The tax period for which the lien is levied is not specifically identified in the record documents.² (Ex. I; Ex. 4; Ex. 5.)

At his hearing, Applicant provided an IRS account transcript for tax year 2010, dated November 29, 2012, which reflects an account balance, including accrued interest and penalties, of \$66,177. This debt is alleged at SOR ¶ 1.d. At his hearing, Applicant asserted he had made a \$13,000 payment on the 2010 federal tax lien in April 2013, but he provided no proof of payment. (Ex. 2; Ex. B; Tr. 59-60.)

Applicant provided documentation establishing that he had a payment agreement with the IRS for satisfying the liens for tax year 2009 and tax year 2010. According to Applicant's testimony and documentation, he would make monthly payments to the IRS of \$1,600 until the liens were satisfied. The first payment under this payment plan was due May 20, 2013. (Ex. D; Tr. 63-64.)

At his hearing, Applicant estimated his total tax obligation for the two liens he is paying would total no more than \$136,000. He explained that when a payment agreement was reached, the Government lowered the ongoing interest and penalty rates accruing to the two liens. (Tr. 87.)

Applicant also provided an IRS account transcript for tax year 2011, dated November 29, 2012, showing that Applicant owed an unpaid tax debt of \$70,755. This debt is alleged at SOR ¶ 1.e. At his hearing, Applicant stated that the tax debt had been paid in full. However, he failed to provide proof of payment. He also stated that his 2012 federal income taxes had been paid in full. (Ex. 2; Ex. C; Ex. D; Tr. 61-62.)

Applicant provided documentation establishing a payment plan with his state taxing authority to satisfy a state tax debt of \$36,348.³ His payment plan began in May 2012 and consists of monthly payments of \$1,500 for 25 months. He provided documents showing he had made eight \$1,500 payments. (Ex. K; Tr. 74-76.)

Applicant also provided documentation establishing that he had made four estimated tax payments to the IRS for his 2012 federal income tax obligation. His estimated tax payments totaled \$23,311.55. (Ex. J.)

² Because the tax period for the debt alleged at SOR ¶ 1.b. is not identified in the record, I conclude that the debt has not been established.

³ This debt was not alleged on the SOR.

Applicant reported that his net take-home pay each month is \$7,000. His wife's monthly net take-home pay is \$3,200. (Tr. 76.)

Applicant reported the following monthly expenses: home mortgage payment, \$5,000; \$500 to \$1,000 for support of his disabled adult child; credit card payment, \$400; utilities, \$100; internet and telephone service, \$150; \$50 car insurance; food, \$600; \$1,600, IRS payment plan; \$1,500, state tax payment plan. Applicant's monthly net remainder is approximately \$50. (Tr. 76-79.)

Applicant reported that his home has an assessed value of \$722,000. He testified that he did not have a savings account. He also stated that he had exhausted his 401(k) account to pay his tax debts. The record does not reflect that Applicant has had financial credit counseling. (Tr. 80-82.)

When asked at his hearing why he permitted his tax delinquencies and financial vulnerability to continue for so many years, Applicant responded that his work as a member of an LLC provided him with professional visibility and status. He also stated that he enjoyed the creative aspects of his work and accepted the financial risks of his employment. (Tr. 83-85.)

The facility security officer for Applicant's LLC provided a letter of character reference on his behalf. He stated that he had known Applicant since 1966, and he considered Applicant's conduct to be above reproach. He recommended that Applicant be awarded a security clearance. (Ex. E.)

The president of Applicant's company also provided a letter on Applicant's behalf. He explained that the LLC was a small company and struggled to maintain its cash flow. Often, he stated, the company showed a profit at year's end but lacked the cash resources to distribute those profits to its members, a situation that resulted in large tax burdens for some members of the LLC. He stated that, despite these difficult circumstances, Applicant has "consistently exhibited the highest standards for professional behavior, personal behavior, and good judgment." (Ex. F.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider and apply the revised adjudicative guidelines (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, the administrative judge applies these 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 access to classified information will be resolved in favor of 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, 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 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 protect or 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 Executive Order 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 or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes two conditions that could raise security concerns in this case. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant has a history of federal tax liens dating to 1989. Despite repeated experiences with financial shortfalls related to his membership in LLCs, he has not developed a plan for meeting his income tax responsibilities in a timely manner. His ongoing financial vulnerability is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's financial delinquencies. Unresolved financial delinquency might be mitigated if it "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." (AG ¶ 20(a)) Additionally, unresolved financial delinquency might be mitigated if "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, or a death, divorce, or separation), and the individual acted responsibly under the circumstances." (AG ¶ 20(b)) Still other mitigating circumstances that might be applicable include evidence that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" (AG ¶ 20(c)) or "the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." (AG ¶ 20(d)) Finally, if "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 of the dispute or provides evidence of options to resolve the issue," then AG ¶ 20(e) might apply.

Applicant admitted a history of financial difficulties and unpaid federal tax liens over a period of 23 years. His federal tax delinquencies continue to the present. He estimates that he will pay approximately \$136,000 in federal tax debt to the IRS for tax

years 2009 and 2010.⁴ While he has a plan in place to make payments of \$1,600 each month to the IRS on those federal tax debts, he had not yet made the first payment under that agreement at the time of his security clearance hearing. Additionally, the IRS account transcript for tax year 2011 shows that Applicant owes an additional tax debt of \$70,000. While Applicant stated he had paid that tax debt, he failed to provide proof of payment.

To his credit, Applicant provided documentation showing that in May 2012, he established a plan to pay a state income tax debt of \$36,000. He also provided documentation establishing eight monthly payments of \$1,500 on this debt, which was not alleged on the SOR.

Applicant attributed his series of federal tax liens to the conditions of his employment as a member of an LLC. The president of the LLC that employed Applicant provided a letter of character reference that attributed Applicant's federal tax liens to the limited cash flow problems of the LLC and the company's inability to distribute to Applicant the actual profits attributed to his interest in the LLC. While this may have been a condition beyond Applicant's control, it was within his control to define his role in the company in a manner that did not expose him to excessive financial liability year after year. Failure to take such action was not to behave reasonably under the circumstances.

Applicant's current financial picture reflects ongoing financial difficulties. He has not set money aside in savings, and he drained his 401(k) account to pay his many ongoing federal tax debts. Each month, he and his wife have a net family income of \$10,200. Their monthly expenses, including his payment of his state tax debt and his projected monthly payment on his IRS debt, total approximately \$10,150, leaving a net monthly remainder of \$50.⁵

Applicant's failure over a period of many years to resolve the cycle of financial vulnerability caused by his unpaid federal tax debts reflects a lack of good faith. DOHA's Appeal Board has explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.'

⁴ This figure includes interest and penalties that will accrue throughout the repayment period.

⁵ Applicant reported that he provided between \$500 and \$1,000 each month to his disabled child. For the purposes of this discussion, I have computed a monthly average of \$750 for the support of his disabled child.

(ISCR Case No. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001))).

Applicant's ongoing cycle of recurring federal tax debts also shows lack of judgment and unreliability. His current financial situation suggests that he may not have sufficient monthly income to follow through on the payment plan he has negotiated with the IRS to resolve his 2009 and 2010 tax debts. Additionally, it does not appear he has planned for or has set aside the resources to make quarterly estimated tax payments in anticipation of the additional tax that would arise in the current year as a result of his annual distribution from the LLC. It does not appear that Applicant has had financial counseling, and there is no evidence that his financial situation is under control. I conclude that AG ¶¶ 20(a), 20(b), 20(c), and 20(e) do not apply in mitigation to the facts of Applicant's case. I also conclude that Applicant's payment plan with his state taxing authority demonstrates a good-faith effort to resolve that debt, and, therefore, AG ¶ 20(d) applies in part.

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 an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. Applicant is a mature person of 60 years. For almost 25 years, Applicant, as a member of LLCs, has been served with federal tax liens. Some of these liens arose when the LLCs attributed profits to Applicant's membership interest but did not provide him with the actual money the profits represented. Others arose when Applicant failed to set aside sufficient cash reserves to pay the additional taxes that arose when he received end-of-year distributions. As a member of an LLC with an ownership interest, Applicant was responsible for paying income taxes on the profits attributed to him. Knowing this was how he would be compensated, he failed to develop a timely plan to address these

cyclical obligations when they were due. As a result, year after year, he consistently fell behind in timely paying his federal income taxes.

Applicant's current financial situation remains uncertain and unresolved. At his hearing, he stated that he has a payment plan in place with the IRS to address his delinquent tax debt for tax years 2009 and 2010, and he estimates that those payments will total approximately \$136,000. He failed to provide documentation to establish that a \$70,000 delinquent debt for tax year 2011 has been resolved. His monthly expenditures exhaust all but \$50 of his net family income each month. His unsatisfied financial obligations continue to raise security concerns about his judgment and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies.

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.:	For Applicant
Subparagraphs 1.c. - 1.e.:	Against Applicant
Subparagraph 1.f.:	For 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge