



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



In the matter of:)
)
) ISCR Case No. 13-01303
)
Applicant for Security Clearance)

Appearances

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

10/30/2014

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not file timely federal and state income tax returns and or pay the taxes owed for tax years 2009 through 2012. He has retained the services of a tax professional to file his delinquent returns and asserts that his past-due federal taxes have been paid. However, there is no documented progress toward resolving his delinquent tax filing and payment obligations. Clearance is denied.

Statement of the Case

On December 30, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F (Financial Considerations), and explaining why it was unable to find that it is clearly consistent with the national interest to grant or continue his security clearance.¹ The DOD CAF took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance*

¹ The SOR was transmitted to Applicant by letter dated April 11, 2014. (Item 2.) It is unclear what led to the delay.

Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on April 28, 2014. On May 1, 2014, Applicant indicated that he wanted a Defense Office of Hearings and Appeals (DOHA) administrative judge to make a decision based upon review of the written record. On May 22, 2014, the Government submitted a File of Relevant Material (FORM) consisting of nine exhibits (Items 1-9). On May 27, 2014, DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on June 12, 2014. Applicant did not submit a response by the July 12, 2014 deadline.

On September 11, 2014, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

After reviewing the file, I reopened the record on October 7, 2014, giving Applicant and the Government until October 21, 2014, to submit evidence that could shed light on the current status of Applicant's delinquent tax returns and tax liabilities alleged in the SOR. On October 20, 2014, Department Counsel indicated that the Government had no additional evidence to present on the issues. Applicant did not respond by the deadline. Accordingly, the decision was based on the evidence in the FORM.

Findings of Fact

The SOR alleges under Guideline F that as of December 30, 2013, Applicant had not filed his federal and state income tax returns or paid the taxes owed for tax years 2009 through 2012. (Item 1.) Applicant provided a detailed Answer to the SOR allegations, explaining that he "went exempt on [his] taxes both Federal and State," to catch up on debts incurred partially for his home. After considering the Government's FORM, including Applicant's Answer (Item 4), I make the following findings of fact.

Applicant is a 49-year-old security guard, who has worked for the same defense contractor since October 2002. He is currently employed as a shift supervisor and has a secret-level security clearance. (Items 4, 6.) Applicant has never been married, although he has a 23-year-old daughter and a 16-year-old son. (Item 4.) Applicant pays \$449 per month in child support to the mother of his son. (Item 7.)

Applicant moved to his present area in January 2002. He lived with one of his sisters until October 2003 and then rented a place before returning to his sister's residence in August 2004 to save funds to buy his own home. (Item 6.) Applicant hired a realtor, and he did not anticipate some of the costs associated with home purchase, such as title search and inspections. With second thoughts but not wanting to lose what he invested, Applicant opened a balloon mortgage of \$196,000 in July 2006. His monthly payments were \$1,539 at that time. He also took on a second mortgage of \$49,000.² (Items 4, 8, 9.)

² Available information does not include the amount of Applicant's monthly payment on his second mortgage.

Applicant rented a truck to move his furniture that was in storage in another state, and two of his sisters helped move his belongings. Applicant took advantage of credit offers, including a cash loan from a bank, to buy items for the house, such as an alarm system and a weed trimmer. He also paid some bills on credit. When Applicant completed his tax returns in 2008, he discovered that he owed taxes.³ Applicant adjusted his tax withholdings to increase his take-home pay. After his mortgage obligation increased by approximately \$300 a month, he took on a second, full-time job as a security officer in June 2008.⁴ (Item 4.)

Applicant's health suffered due to the stress of working two full-time jobs and his mounting debt. He gave up his second job in October 2009. Applicant worked overtime for his defense contractor employer when he had the opportunity, and he began selling some personal items to cover his debts. He fell behind in his payments to his homeowner's association, and in April 2010, a \$1,453 lien was filed against him. (Items 4, 8, 9.) On September 2010, a \$2,552 judgment was filed against him for an unpaid medical debt. (Items 4, 8.) The judgment was paid in March 2011. (Items 8, 9.) Applicant told an investigator for the Office of Personnel Management (OPM) in October 2013 that his wages were garnished to repay his debt to the homeowner's association. (Item 7.) In his Answer to the SOR allegations, Applicant indicated that he borrowed from his 401(k) to pay off the debt. (Item 4.) The lien was released in November 2012. (Item 9.)

Applicant was 90 days late in his mortgage payments eight times. He was behind 60 days as of September 2011, when he obtained some mortgage relief. Through a modification agreement, his mortgage lender transferred his primary loan and cancelled his second mortgage. (Items 4, 8.)

Applicant was consistently late in making his new mortgage payments of \$1,389 per month during the first half of 2012. By August 2012, he was again 90 days past due, although by September 2013, he was paying his mortgage and other debts on time. In December 2012, he settled a \$3,367 collection debt, which was apparently a loan taken out to cover costs associated with his home purchase. (Items 7, 8.)

Applicant did not file timely federal or state income tax returns for tax years 2009 through 2012. (Items 4, 6.) He felt some shame, but he had other debt obligations that for him took priority. In addition to the mortgage, he allowed his sister to borrow his vehicle for a few days. When she returned it, the engine seized. He obtained rides to work from friends and neighbors until he bought a 1995 model-year vehicle from his niece for \$500. He also had the air conditioning system in his home repaired. (Item 4.)

³ Applicant indicated in his detailed Answer (Item 4) that after he completed his 2008 taxes, he discovered he owed taxes. He decided to "go exempt," to have less money taken from his paycheck. As bills piled up and his mortgage obligation increased, he began working a second job. (Item 4.) However, he indicated on his e-QIP that he worked a second job from June 2008 to October 2009. (Item 6.) If the sequence of events is accurate, then he would have adjusted his tax withholdings around the spring of 2008, after he filed his 2007 tax returns.

⁴ Applicant indicated on his September 2013 Electronic Questionnaire for Investigations Processing (e-QIP) that he held this second job from June 2008 to October 2009 full time. (Item 6.)

On September 10, 2013, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP). In response to whether he had failed to file or pay federal, state, or other taxes when required within the last seven years, Applicant indicated that he had not paid his state taxes for 2009 on time, but he made payment arrangements to satisfy a \$1,455 tax delinquency for that year.⁵ He also disclosed that he had not filed federal and state returns, or paid taxes owed for 2010 through 2012. He estimated his tax liabilities at \$1,350 for 2010, \$1,260 for 2011, and \$1,750 for 2012. Applicant indicated that he had either to pay his taxes or be homeless, but with the help of a government program, he was able to reduce his mortgage payment and could now address his tax situation with the help of a professional tax resolution business. (Item 6.)

On October 16, 2013, Applicant was interviewed by an authorized investigator for the OPM, partially about his unfiled and unpaid income tax obligations. While he had hired a tax professional to address his delinquent returns, he had not yet filed them. He expressed his intent to pay his tax debts. Additionally, he indicated that with the lowering of his monthly mortgage obligation, he has been able to pay his other debts on time. (Item 7.)

On December 30, 2013, the DOD CAF issued an SOR to Applicant, alleging that he had failed to file federal and state income tax returns and pay federal and state income taxes for tax years 2009 through 2012. When he answered the SOR on April 28, 2014, Applicant stated, in part:

I still was exempt on my taxes and I finally meet [sic] with someone that prepared taxes. So I collected all tax papers that I owed for the years from 2009 to 2012. And now I can proudly say that my Federal taxes have been paid and I am in the process of taking care of my State taxes that I owe. And to note that this is a learning experience for me and I will take care of any money I may owe the State. I want to do the right thing and make this right for both parties.

Applicant added that he would attend a hearing if needed “to clear up any loose end on this situation.” (Item 4.)

On April 30, 2014, DOHA asked Applicant directly whether he wanted a hearing. Applicant chose a decision based on the written record. (Item 5.) In its FORM, the Government pointed out to Applicant that he had submitted no documentation supporting his assertions that he was engaged with a tax professional to establish repayment plans toward his tax delinquencies and that he had resolved his federal tax liability. Noting that Applicant appeared to be moving in a positive direction to resolve his taxes, Department Counsel urged the benefit to making a security clearance determination in his case of any documentation regarding his tax resolution:

In total, it will be very helpful in examining mitigation for Applicant to outline his efforts, with documentation, with his mortgage company, as [sic] Federal

⁵ Concerning whether he failed to file returns or pay taxes or both, Applicant checked only failure to pay with respect to tax year 2009. For subsequent years, he checked both. (Item 6.)

and state tax authorities, and any other relevant materials regarding resolution of his financial issues.

Absent such evidence in mitigation, it remained the Government's position that it was not clearly consistent with the national interest to grant or continue Applicant's security clearance eligibility. (FORM.)

There is no evidence that Applicant filed any rebuttal to the FORM. The Government presented no evidence apart from Applicant's disclosures to show the extent of Applicant's outstanding federal and state tax liabilities. It is unclear whether Applicant timely filed federal and state income tax returns for tax year 2013. On October 7, 2014, I reopened the record for the parties to submit documentation to clarify the issues. Neither party presented any additional information by the October 21, 2014 deadline.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 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 the 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 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 concerns about financial considerations are 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.

To address mounting mortgage debt and other bills, Applicant had less money withheld for taxes from his wages. After he filed his returns for 2008 and discovered that he had underpaid his income taxes, he chose not to file timely federal and state returns for tax years 2009 through at least 2012, as alleged in SOR 1.a and 1.b. When Applicant completed his e-QIP in September 2013, he indicated that he had owed state taxes of \$1,455 for 2009, and state and federal income taxes totaling \$1,350 for 2010, \$1,260 for 2011, and \$1,750 for 2012. Three disqualifying conditions under AG ¶ 19 apply:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant’s failure to comply with his income tax filing and payment obligations is too recurrent and recent to apply mitigating condition AG ¶ 20(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.” Applicant indicated on his e-QIP that he had arranged to repay his delinquent state taxes for 2009. As of his October 2013 interview with an OPM investigator, Applicant had not filed his delinquent tax returns or satisfied his delinquent tax liabilities.

AG ¶ 20(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances,” is implicated in that child support compromised his ability to meet his financial obligations. Applicant also suffered some health consequences working

two full-time jobs to cover his debts. Yet, his financial problems were largely the result of his own actions. The primary financial stressor was the increase in his monthly mortgage obligation, and he signed onto a loan with terms disadvantageous to him. He then incurred consumer credit card debt for household items and equipment to maintain his property. The tax debt is a direct consequence of his decision to claim exemptions that would give him more money in each paycheck to pay his debts, such as his mortgage and credit card debts, and he chose not to comply with his income tax filing obligations for at least four consecutive years. Applicant did not act responsibly with regard to his income tax obligations.

Applicant has taken some steps to resolve his financial stress. A lien filed against him by his homeowner's association was paid, albeit through garnishment of his wages. In March 2011, Applicant paid off a \$2,552 judgment for medical debt. After his home loan was modified, he was consistently late in his payments during the first half of 2012, although he brought his mortgage current as of September 2013. He settled a \$3,367 collection debt in December 2012. Nonetheless, it is difficult to fully apply AG ¶ 20(c), "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," or AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," without some proof that he has filed his late federal and state returns and is making payments on his past-due taxes. When he answered the SOR, he indicated that he had paid his past-due federal taxes and that he was in the process of paying his delinquent state taxes. In the FORM, Department Counsel stressed the importance to Applicant of showing good faith with regard to complying with his income tax obligations. If Applicant was working through a tax resolution firm, he should have been able to present some corroboration. He elected to respond neither to the FORM nor to my request of October 7, 2014, for documentation proving he had filed his delinquent returns and resolved his federal tax matters. Furthermore, without knowing whether Applicant filed timely income tax returns in 2014 for tax year 2013, I cannot be assured that Applicant can be counted on to comply with his income tax filing obligations and with paying any taxes owed in the future. The security concerns raised by his disregard of his income tax obligations for some four years are not fully mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).⁶

⁶The factors under AG ¶ 2(a) are as follows:

- (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.

Applicant brought on his financial problems in that he signed onto a mortgage that he could not afford when the interest rate rose. He relied heavily on consumer credit to equip his home and maintain the property. In his favor, he took on a second, full-time job for the income to address his debts. It was also responsible of him to pursue a modification of his home loan to lower his monthly payment.

Applicant is not required to resolve all of his delinquent debts before he can be granted security clearance eligibility. Assuming the tax debts reported on his e-QIP were accurate, his total liability amounted to less than \$10,000. At the same time, the evidence shows that his financial problems went beyond the tax issues alleged in the SOR. Those financial strains led him to disregard his income tax filing obligations for at least four years. His knowing failure to comply with such an important obligation is antithetical to the good judgment that must be required of those persons entrusted with the Nation's secrets. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.). For the reasons noted above, based on the facts before me and the adjudicative guidelines that I am required to consider, I am unable to conclude that it is clearly consistent with the national interest to continue Applicant's security clearance eligibility at this time.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge