



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



In the matter of:)
)
) ISCR Case No. 09-05493
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

March 22, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 2, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 20, 2010, and requested a hearing before an administrative judge. The case was assigned to me on December 14, 2010. DOHA issued a notice of hearing on January 11, 2011, and the hearing was convened as scheduled on February 2, 2011. The Government offered exhibits (GE) 1 through 16.

GE 1 through 6 and 8 through 16 were admitted without objection. Applicant objected to the admission of GE 7. The objection to the report of investigation (ROI) contained within GE 7 was sustained. The remainder of the exhibit was admitted. Applicant testified and submitted exhibits (AE) A through J, which were admitted without objection. The record was held open until March 15, 2011, for Applicant to submit additional information. Applicant timely submitted documents that were marked AE K through O and admitted without objection. Department Counsel's memorandum forwarding Applicant's exhibits is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on February 10, 2011.

Findings of Fact

Applicant is a 54-year-old employee of a defense contractor. He served on active duty in the United States military from 1975 until he was honorably discharged in 1979. He is applying for a security clearance. He held a security clearance in the past, but it lapsed. He has a bachelor's degree, and he is attending school for a master's degree. He has been married more than 30 years. He has four adult children.¹

Applicant started a company in about 1998. The company was a limited liability company (LLC) in one state.² He incorporated it as a Subchapter S corporation in another state in 2000.³ He owned 66% of the stock of the corporation. Applicant moved to dissolve the corporation at the end of 2001. Applicant stated that he paid the other shareholder in the corporation \$35,000 to dissolve the corporation. He discovered afterward that the corporation owed state and federal taxes, including payroll taxes for its employees. The state sued him for \$5,725 in unpaid taxes in 2002. He paid the taxes owed to the state in 2004. In February 2003, the Internal Revenue Service (IRS) filed a federal tax lien of \$33,459 against the corporation for taxes owed from tax year 2001. The IRS filed a federal tax lien of \$7,255 against him in October 2003. Applicant paid the taxes related to the \$7,255 lien, and it was released in March 2006.⁴

¹ Tr. at 40-41, 71-72, 85; GE 1, 4; AE G.

² A limited liability company is a business structure allowed by state statute. LLCs are popular because, similar to a corporation, owners have limited personal liability for the debts and actions of the LLC. Other features of LLCs are more like a partnership, providing management flexibility and the benefit of pass-through taxation. . . .The federal government does not recognize an LLC as a classification for federal tax purposes. An LLC business entity must file as a corporation, partnership or sole proprietorship tax return. See www.irs.gov/businesses/small/article/0,,id=98277,00.html.

³ S corporations are corporations that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income. See www.irs.gov/businesses/small/article/0,,id=98263,00.html.

⁴ Tr. at 59-68, 70-71, 80-82; Applicant's response to SOR; GE 2, 3, 5, 11, 13-15; AE E, F.

Applicant stated that he had difficulty, even with an accountant, contacting the IRS to settle the corporation tax debt. He stated he and his accountant went to an IRS office in about 2001 to resolve the debt, but could not find an agent assigned to his case who would handle the matter. He stated they called the IRS several times over the next few years attempting to resolve the matter to no avail. After that, he decided to wait until the IRS came after him for the taxes, but that never happened.⁵

Applicant learned in about 2003 that the IRS filed a tax lien against the corporation. He submitted a security clearance application (SF 86) in March 2004. He listed the \$7,255 federal tax lien filed against him in October 2003.⁶ He wrote in the comments section:

Lien was attached due to a failed business partnership (2000) for which I paid alot to get out of and am still making payment on the taxes. Since then I have paid ALL my taxes and continue too as a W-2 employee. (emphasis in original)⁷

Applicant provided a statement for his background investigation in February 2005. He discussed his finances and the taxes owed from his company. He wrote that he was the “sole owner of the company.” He admitted owing the IRS for unpaid taxes from his company:

I have been trying to make a settlement of this tax bill since September of 2001. I have not had an IRS agent assigned to this case, and I have not been made aware of the steps to take to resolve this matter. I have made numerous personal phone calls with my accountant, [name, company, and phone number] and have not been made aware of the steps to take to resolve this issue. When I am made aware of the money I owe, I plan on refinancing my home again to pay off the tax lien in one lump sum.⁸

Applicant submitted a questionnaire for national security positions (SF 86) in August 2007. He listed a \$3,800 state tax lien from “05/2005 (Estimated).” He added: “Failed company I started – taxes paid in full.”⁹

In October 2008, Applicant responded to DOHA inquiries about the federal tax lien. He wrote about his efforts in the early 2000s to have the IRS work with him and his accountant on settling the debt. He also wrote:

⁵ Tr. at 60-64, 77-78; Applicant’s response to SOR; GE 11.

⁶ Tr. at 75-76; Applicant’s response to SOR; GE 1.

⁷ GE 1.

⁸ GE 3.

⁹ GE 4.

In short, I'd be glad to discuss this further with your investigative service. But I am not contacting the IRS to request a solution. I tried that many times when the interest and penalties were much less and they wouldn't assign anyone to it. Please note that this judgement is not against me, but the corporation. I have since filed all of my taxes and received back several personal tax refunds. My only action on this will possibly be that once the statute of limitation is up – to contact the IRS and then solicit a “donation to the treasury” for the unpaid taxes.¹⁰

In February 2009, Applicant sent a letter to DOHA stating:

I certainly would authorize DOHA to contact the IRS. While I have no desire to wake the sleeping giant that wouldn't awake when it was advantageous for me – I recognized when I applied for an updated clearance that I was giving any investigators full permission to look anywhere and everywhere into my past – that would include the IRS.¹¹

In May 2010, Applicant sent a letter to the IRS, seeking to settle the debt from his company:

[A] court settlement was initiated by the IRS without any discussion or negotiation with me. It is on the record to this day, I believe, as \$33,459.00. I'd argue that the judgment should have been against the corporation, not me personally. But I would still feel that the fundamental taxes are my responsibility.

I do not know the company's tax ID any longer, but my SSN is [Applicant's SSN]. I'd like to show due diligence in resolving the amount I was trying to pay back in 2001 – the actual principle due the IRS from [Corporation], had it been paid at the time it was due.

Could I set up an appointment with a local IRS agent and see about getting a solution; then setting up a payment plan to pay it off.¹²

Applicant wrote in his response to the SOR:

I am personally not liable to the IRS. A company that I ran was – and that information is fully known by your office and that in fact has passed the statute of limitations and was never correctly placed against my person – as it was an S Corporation. But I do feel responsible and as such I contacted the IRS many times over the years and am still awaiting a reply.

¹⁰ GE 11.

¹¹ *Id.*

¹² *Id.*

Applicant had not paid the federal tax as of the date of the hearing. He stated the IRS never responded to his May 2010 letter. He stated that he would like to wait until the debt passed the 10-year statute of limitations and then negotiate a reasonable settlement with the IRS before he pays it.¹³ He testified:

I'm doing it because they didn't come to me when it was convenient for me to make a resolution. And so now I'm going to go to them when it's no longer convenient for them, is my position. Right or wrong. Whether you agree with it or not, that's [what] my position has been.¹⁴

Applicant submitted IRS Form 656-L (Offer in Compromise (Doubt as to Liability)) on February 15, 2011. He offered to pay \$4,500 to resolve his tax debt. The IRS has not responded. He stated in his post-hearing response that he is "in open discussion with the IRS to find a resolution to the [Corporation] tax liability. There is nothing contentious about the discussion – I will resolve it according to whatever agreement we reach."¹⁵

In addition to the federal tax lien against Applicant's corporation, the SOR alleges five delinquent debts and that Applicant was past due \$2,042 on his mortgage. Applicant successfully disputed the five delinquent debts and the mortgage is now current.¹⁶

Except for his unpaid taxes, Applicant's finances are sound. He earns a six-figure salary. He stated that he is not "financially overextended." He can afford to pay the IRS for his back taxes but wants to pay it on his terms.¹⁷

Applicant submitted character letters attesting to his excellent job performance, work ethic, professionalism, honesty, trustworthiness, and moral character.¹⁸

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 to be used in evaluating an applicant's eligibility for access to classified information.

¹³ Tr. at 64-66, 78-80; Applicant's response to SOR; GE 9.

¹⁴ Tr. at 80.

¹⁵ AE K, M.

¹⁶ Tr. at 50-53, 56-58; Applicant's response to SOR; GE 11; AE I-L.

¹⁷ Tr. at 48-54, 65-68, 72-74, 79-84; Applicant's response to SOR; AE D, H.

¹⁸ AE N, O.

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 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 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 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 several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has not paid his 2001 tax liability from his corporation. The evidence is sufficient to raise the above disqualifying conditions. Applicant successfully disputed the other five delinquent debts alleged in the SOR, and his mortgage is now current. No disqualifying conditions are applicable to SOR ¶¶ 1.a through 1.e and 1.g, and those allegations are concluded for Applicant.

Four Financial Considerations 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant blamed the tax liability for his corporation on the minority shareholder. Actions by the minority shareholder may have been outside Applicant's control. However, as a majority shareholder of an S corporation, in which tax liability flows through to the shareholders, Applicant was personally responsible for ensuring that his taxes were paid. In the early 2000s, Applicant and his accountant contacted the IRS on several occasions to attempt to resolve his tax debt. After that, he simply ignored the debt, waiting for the IRS to contact him. After several DOHA inquiries about the status of the tax debt, he sent the IRS a letter in May 2010. He took no other action until February 15, 2011, when he submitted an Offer in Compromise, seeking to settle the debt for \$4,500. The IRS has not yet responded. I find that Applicant has not acted responsibly under the circumstances. His failure to resolve his tax liability casts doubt

on his current reliability, trustworthiness, and good judgment. There are no applicable mitigating conditions to the concerns raised by Applicant's unpaid taxes.

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(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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's honorable service in this country in the U.S. military and his favorable character evidence. Applicant is not "financially overextended." He has known since at least 2005 that his unpaid taxes have been a concern to the Department of Defense. He can afford to pay his taxes but has not done so.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated 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.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	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.

Edward W. Loughran
Administrative Judge