



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



In the matter of:)	
)	
)	ISCR Case No. 09-07916
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

February 17, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant owes approximately \$163,000 in unpaid taxes for tax years 1999, 2000, and 2001. Applicant has failed to rebut or mitigate the security concerns under financial considerations. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on May 17, 2010, detailing security concerns under financial considerations.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On July 9, 2010, Applicant answered the SOR and requested a hearing. On August 12, 2010, I was assigned the case. On August 25, 2010, DOHA issued a Notice of Hearing for the hearing held on September 16, 2010.

The Government offered Exhibits (Ex.) 1 through 6, which were admitted into evidence without objection. Applicant testified on his own behalf and submitted Exhibits A through C, which were admitted into evidence without objection. Applicant's accountant testified telephonically. (Tr. 46) The record was held open to allow additional information from Applicant. On September 23, 2010, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. D. On September 24, 2010, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he asserted his IRS debt was an error. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 65-year-old president and CEO of a company employing between five and seven people. (Tr. 34) He is applying for a security clearance.

Applicant's July 2009 (Ex.2), February 2010 (Ex. 5), and September 2010 (Ex. 6) credit bureau reports (CBR) list two federal tax liens. In September 2001, a \$21,008 federal tax lien was filed and an \$85,659 federal tax lien was filed in April 2004. In September 2009, Applicant had a personal subject interview concerning his finances. (Ex. 3) At that time, he acknowledged he owed the IRS approximately \$120,000 in taxes, interest, and penalties. His plan was to continue paying the debt until the full amount was paid. (Ex. 3) As of September 2009, his only delinquent debt was the IRS debt. If he had the ability, he would like to pay his IRS debt. (Tr. 33, 35)

In 1998, Applicant was divorced. (Tr. 27) In 1999, Applicant withdrew funds from his 401(k) account. Normally funds are placed into a 401(k) or similar qualified retirement plan with dollars that have not been taxed. If so, the entire amount of the disbursement is taxable. If some of the contributions were not tax deferred, only a portion of the funds received would be taxable. Applicant should have received a Form 1099 indicating the taxable portion of the funds received. Copies of the Applicant's tax returns for 1999, 2000, and 2001 are not part of the record. It is unknown if Applicant filed as an S Corporation for these years.

In 2000, Applicant started his own business as an adjuster handling insurance claims following catastrophic events such as hurricanes and floods. (Ex. 3) To start the company, he loaned the company \$80,000 from his 401(k) account. In 2001, the IRS notified him he owed between \$60,000 and \$70,000 in taxes for tax year 2000. He asserted his accountant made a mistake by including the 401(k) funds not as a loan to the business, but as income. (Tr. 29) He never addressed why the withdrawal of 401(k)

funds from a retirement account should not have been included in his personal income in the year they were withdrawn.

Applicant asked his accountant to establish a repayment agreement with the IRS. He asserted that in 2002 or 2003, the IRS offered to settle the amount owed for a lump-sum payment of \$26,000. Applicant did not have funds to accept the offer and asked that monthly payments be allowed. His accountant told him the IRS would not accept monthly payments. (Ex. 3)

Applicant asserted he started making \$165 monthly payments to the IRS in 1999.² (Tr. 28-29) In 2002, the IRS started monthly garnishments of Applicant's Social Security payments. (Tr. 30) In response to written interrogatories, he attached IRS forms showing various amounts were taken from his monthly Social Security payment. The IRS letters document one payment of \$220 in 2006; three payments of \$227 in 2007; two payments of \$232 in 2008; seven payments of \$241 and one payment of \$227 in 2009; and, in 2010, six payments of \$239. (Ex. 4 and Ex. B)

Applicant hired a second attorney who worked on his returns for three months before suffering a heart attack. (Tr. 30-31) In 2004, he hired his current accountant. (Tr. 31) He asserted that his current accountant told him the 401(k) funds should not have been shown as a loan to the business and not as income. The accountant said an Offer in Compromise, Form 656, was made to the IRS. (Tr. 47) No copy of that offer was included in the record. No compromise was achieved by that offer. (Tr. 48)

In 2009, the IRS changed its rules concerning Offers in Compromise. Instead of looking at a taxpayer's income for the previous four or five years to determine if a settlement offer is reasonable, only the taxpayer's current income is considered. (Tr. 48) In July 2009, Applicant's accountant submitted a new Offer in Compromise, to the IRS offering to pay \$20,000 on his tax debt. The amount was to be paid in monthly installments of \$1,000. In the offer, he stated he would borrow the money from friends to make his payments. (Ex. C) Applicant's accountant provided a letter dated September 14, 2010, anticipating resolution of the claim in November or December 2010. (Tr. 50, Ex. C) No additional information related to the resolution was received.

In 2002, following Hurricane Allison, Applicant "made up nearly what we had lost, but by the time we paid everyone and paid all of our bills, we were back in the same circumstances." (Tr. 30) In March 2004, Applicant closed the business, but maintains the company's name. (Tr. 43, Ex. 3) In August 2004, he started working as a claims adjuster for various insurance companies investigating claims following Hurricane Charlie. In 2007, he returned to his present location.

For the tax period ending December 31, 1999, Applicant owed \$22,226 as of July 2008. (Ex. 4) For that tax year he owed \$8,722 in interest. (Ex. 4) It is not clear from the

² Applicant's tax liability for the tax year ending December 31, 1999 would have been due until April 15, 2000. He did not explain, nor was he asked, why he started the payments prior to the tax being due.

documents if the interest amount is included in the amount of taxes owed or is an additional amount. For the tax period ending December 31, 2000, Applicant owed \$119,562 as of July 28, 2008. He owed \$34,634 in interest on that year's taxes. (Ex. 4) For the tax period ending December 31, 2001, Applicant owed \$12,544 as of July, 2008. From April 15, 2002 (when his 2001 taxes were due) until July 2008 the interest on his tax debt for tax year 2001 was \$3,767. (Ex. 4)

At the hearing, Applicant provided IRS documents indicating he owed \$18,356 for tax period ending December 31, 1999, on which there was \$10,571 in interest. (Ex. A) He owed \$130,862 for tax period ending December 31, 2000, on which there was \$45,933 in interest. (Ex. A) He owed \$13,730 for tax period ending December 31, 2001, on which there was \$4,737 in interest. (Ex. A)

In July 2009, when Applicant submitted his Offer in Compromise to the IRS, he owned two vehicles: a 1999 Mercedes and a 2000 Chevrolet Suburban. He owed \$183,000 on his home purchased in 2000 for \$257,000 which had a fair market value of \$330,000. His total monthly family income was \$9,224, which included \$2,224 in his Social Security payments, \$1,021 from his IRA, \$2,789 from his S Corporation,³ and his spouse's wages of \$3,190. (Ex. D) He asserted his wife worked for only 12 months ending in April 2010. (Tr. 37) He has no credit cards and no car payments. (Tr. 44) He has a \$29,000 loan, which he used to pay for his vehicles. (Tr. 44) He has never had any financial counseling. (Tr. 44)

There is a ten-year statute of limitations on the collection of taxes from the date of assessment. Date of assessment is the later of the yearly due date or when the taxpayer filed his return. Applicant's 1999 taxes were due on April 15, 2000. If he filed on the due date, and there is no documentation showing when the 1999, 2000, or 2001 returns were filed, the taxes would be barred as of April 15, 2010. Any garnished funds would have been applied to the 1999 tax debt, it being the oldest tax debt.

For Applicant's 2000 taxes, if they were filed by the due date of April 15, 2001, the statute of limitations would bar collection as of April 15, 2011. For his 2001 taxes, if filed by the due date of April 15, 2002, collection would be barred as of April 15, 2012. The IRS garnishment of his monthly Social Security payments is not an agreement to extend the statute.

Applicant's accountant sees no reason to push the matter. (Tr. 49) He believes the 1999 taxes are now barred from collection, the 2000 taxes will be barred in April 2011, and the 2001 taxes barred in April 2012. (Tr. 49)

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.

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 must 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 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 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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems. At the hearing, Applicant presented documentation from the IRS indicating that as of July 2008, he owed \$18,356 for tax year 1999, \$130,862 for tax year 2000, and \$13,730 for tax year 2001. Together these past-due federal tax obligations total approximately \$163,000. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Five 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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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 of the dispute or provides evidence of actions to resolve the issue.

Under AG ¶ 20(a), Applicant's federal tax problems arose in tax years 1999, 2000, and 2001. He asserted an accounting error led to his 2000 tax year tax debt. He offered no explanation as to the \$32,000 owed for tax years 1999 and 2001. Since the taxes remain unpaid they cannot be considered remote in time even though they were for the tax years stated. Failing to pay \$163,000 in past-due taxes casts doubt on Applicant's current reliability, trustworthiness, and good judgment. The mitigating factors in AG ¶ 20(a) do not apply.

Applicant divorced in 1998, but the tax debts were not incurred for the year of the divorce, but for the three following years. Applicant started a business in 1999 and closed that business in 2004. However, in 2002, he was able to pay everyone and pay all of his bills. The business ended more than six years ago. I find his failure to pay his taxes were not the result of financial problems beyond his control. The mitigating factors in AG ¶ 20(b) do not apply.

Applicant has not received financial counseling and the taxes remain unpaid. The mitigating factors in AG ¶ 20(c) do not apply. The IRS has been garnishing his monthly Social Security payments, but this does not constitute a good-faith effort to repay creditors. The mitigating factors in AG ¶ 20(d) do not apply.

Applicant has provided documentation showing approximately \$5,000 was garnished from his Social Security payments between 2006 and September 2010. If the IRS garnished his Social Security payments during a given year then the garnishment would have continued the entire year. If the garnishment started in 2006, which is the first document provided by Applicant, the IRS has garnished approximately \$13,000. If the garnishment started in 2002, then an additional \$10,000 would have been garnished. The garnishment reduces the amount of taxes he owes, but the debt continues to accrue interest on the unpaid balance of at least four per cent annually as shown by the documents in Ex. A and Ex. 4. The interest generated annually on a tax liability of \$163,000 at four per cent is \$6,520, which is more than twice the amount being garnished from his Social Security payments.

In 1999, Applicant withdrew 401(k) funds. When a taxpayer withdraws 401(k) funds the amount withdrawn normally constitutes income the tax year the funds are

received. These funds were then loaned to his company. The loan of the funds to the company does not make the funds income to the company, but this does not address the initial withdrawal of the funds from his 401(k) retirement plan. Nothing presented by his accountant addresses the withdrawal of the 401(k) funds. His accountant simply states the loan of those funds did not make the funds income to the company.

Applicant would like to pay his taxes and has offered to pay \$20,000 at a rate of \$1,000 per month. He would borrow the money from friends to make his monthly payments. His accountant is simply waiting for the statute of limitations to bar recovery of the funds. Applicant's 1999 tax obligation may be barred by the statute if he filed that year's return by the April 15, 2000 deadline. The statute of limitation starts when the return is filed by the taxpayer or by the IRS, or by the April 15 due date, whichever is later. There is no documentation showing when the 1999 return was filed. Therefore, I cannot find the \$18,000 tax debt is barred from collection.

Neither the tax year 2000 nor tax year 2001, which total in excess of \$144,000 are barred by the statute of limitations.

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. Applicant's owes \$163,000 in past-due taxes. He asserted, but failed to document, that \$18,000 of the debt is barred by the statute of limitations. He would like to pay the debt and has made a \$20,000 offer in compromise. However, the debt still exists and his accountant's solution is to silently let the statute of limitations run.

The issue is not simply whether all his debts are paid – they are not – it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Applicant would like to pay this debt, but the only payment being made is a garnishment of his Social Security, which fails to pay the interest being generated on his tax obligations. 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 security concerns arising from his financial considerations.

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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a –1.c: 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge