



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



In the matter of:)	
)	
)	ISCR Case No. 10-00158
)	
Applicant for Security Clearance)	

Appearances

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

June 29, 2011

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to pay his federal and state income taxes for tax years 1990, 1991 and 1993, and did not pay his federal income taxes from tax years 2002 through 2007. Although he has recently been satisfying his back taxes through payment plans, it is too soon to conclude he has mitigated the financial considerations security concern given the recurrent nature of the problem and the amount that remains *in arrears*. Clearance is denied.

Statement of the Case

On November 10, 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 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 December 1, 2006.

Applicant answered the SOR on December 30, 2010, admitting all of the allegations. He requested a hearing, and the case was assigned to me on February 24, 2011. On March 4, 2011, a notice of hearing was issued scheduling the case for March 24, 2011. The hearing was conducted as scheduled. I received six Government exhibits, marked as Government Exhibits (GE) 1 through 6, 22 Applicant exhibits, marked as Applicant's Exhibits (AE) A through U, and Applicant's testimony. DOHA received the transcript (Tr.) on March 31, 2011. At the conclusion of the hearing, I left the record open at Applicant's request to submit additional exhibits. Within the time allotted, he submitted 12 exhibits that I admitted as AE V to AE GG.

Ruling of Procedure

At the close of the hearing, Department Counsel moved to amend the SOR as follows:

1.j You are indebted to the IRS for unpaid federal income taxes for tax years 2002-2007 in the approximate amount of \$26,000.00. As of March 24, 2011, these debts remain unpaid.

1.k You are indebted to the IRS for unpaid federal income taxes for tax year 2008 in the approximate amount of \$224.00. As of March 24, 2011, this debt remains unpaid.

Applicant did not object, and I granted the motion. Applicant admits both of these allegations.

Findings of Fact

Applicant is a 54-year-old married man with four children. Two are adults and two are teenagers. A previous marriage ended in divorce in 1985. All of Applicant's children are from his second marriage.

Applicant earned a bachelor of science degree in computer science and mathematics in 1978. He has taken some postgraduate courses in mathematics. (Tr. 29) Applicant has spent his career performing contract work for various companies as a software engineer. (Tr. 31) His tasks range from "engineering design verification testing to software development." (AE T) With the exception of one brief layoff, he has worked with the same company since January 2009. According to Applicant's main client, he "is a well-respected member to the team for development, test and support tasks throughout the projects in which he [is] involved." (*Id.*)

Applicant did not pay his federal income taxes for tax years 1990 and 1991. By June 1992, when the U.S. Internal Revenue Service (IRS) filed a lien against Applicant's property, the delinquency had accrued to approximately \$36,000. (Answer; GE 3 at 8) Applicant also did not pay his federal income taxes for tax year 1993. By June 1994, the delinquency had accrued to approximately \$11,200. (AE L at 2) The record is unclear

whether Applicant paid any federal income tax due in 1992. During an interview with an investigator, he said that he did not pay his 1992 federal income taxes, but none of the documentary evidence establishes that he owed any taxes that year.

Applicant did not pay his state taxes for 1992 and 1993. (AE D) The original amounts due were \$803 and \$515, respectively. (*Id.*) By December 2010, these debts had collectively accrued, with penalties, to \$6,226. (*Id.*)

Applicant attributes his failure to pay his taxes during the early 1990s to a severe job downturn that hampered his ability to maintain full-time employment and compelled him to relocate. (Tr. 51) Because an earthquake had destroyed the municipal infrastructure surrounding his home, he was unable to sell it.¹ (Tr. 49) Consequently, Applicant's bills mounted. (Tr. 51)

Applicant relocated and obtained a full-time job in 1995. However, he did not earn enough to pay his income tax delinquencies. (Tr. 54) Applicant did contact the state revenue authority once in the mid-1990s to resolve his delinquent state income taxes; however, it was unwilling to negotiate a monthly payment arrangement.

In the early 2000s, Applicant changed careers for approximately two years, and started a handyman/painting business. (Tr. 54; Exs. 2-3) The business was lucrative. (Tr. 106) Applicant failed, however, to set aside enough money in escrow to pay his income taxes. Consequently, he owed approximately \$28,000 of federal income tax in tax years 2002 and 2003, which he was unable to pay. (AE V; Tr. 64)

Applicant returned to the engineering field in approximately 2004. He continued not to pay his federal income taxes. By 2008, he collectively owed \$36,200 for tax years 2002 through 2005, and 2007. (AE V) He attributes his failure to pay his income tax to confusion in reporting income and expenses stemming from his out of state contract work. (GE 3 at 8)

According to Applicant, the statute of limitations for the IRS to collect any of the delinquencies from the 1990s expired in 2007. (Tr. 57, 85) Consequently, he does not intend on making any payment arrangements.

In 2008, Applicant began attempting to resolve his remaining federal income tax delinquencies. It has been "a very lengthy and painful process." (Tr. 71) Initially, he filed amended returns from tax years 2002 through 2007, and requested a collections due process proceeding (CDP). (Tr. 65) The process "dragged on for months and months." (Tr. 66) The IRS scheduled the first CDP, and ruled against Applicant after he failed to appear. (Tr. 88) Applicant then requested another CDP in December 2009, arguing that he was unable to attend the first CDP because it was not in the state where he lived. (Tr. 88) Although the IRS agreed to schedule another CDP, it had not done so as of December 2010. (Tr. 89)

¹Applicant ultimately executed a quitclaim deed and returned the home to the seller. (Tr. 43)

Applicant then retained a tax consulting firm in February 2010. (AE O) These consultants assisted Applicant with the resolution of both his federal and state income tax delinquencies. (*Id.* at 2) By August 2010, the consulting firm had negotiated a payment plan for Applicant to repay the state income tax delinquency. (AE F) Since then, Applicant has been paying \$200 per month. (*Id.*; AE J) The money is automatically withdrawn from his checking account.

As of the hearing date, Applicant and his tax consulting firm were still attempting to execute a payment plan. They had begun in July 2010, but were delayed because Applicant had two open cases in the IRS tracking system, the one he initiated in 2008, and the case the tax firm initiated in February 2010. It took the IRS approximately six months to close the first case and authorize Applicant's payment plan through the second case. (Tr. 90-96)

The tax firm advised Applicant not to start satisfying the delinquency until the IRS closed the first case. Applicant submitted a post-hearing exhibit indicating that on April 18, 2011, he began repaying the federal income tax delinquency with a \$150 payment. (AE FF) Applicant anticipates satisfying the federal income tax delinquency in five years. (Tr. 70)

Applicant testified that he owed unpaid federal income taxes for tax year 2008 in the amount of \$224. Upon contacting the IRS, he discovered that he failed to list an education credit when filing the return. When included and recalculated properly, Applicant owed no money for tax year 2008. (AE GG)

Applicant filed his 2009 federal and state income tax returns on time. He received a \$4,100 federal income tax refund and a \$2,300 state income tax refund. (AE Q) The record is unclear as to whether the refunds were applied to the income tax delinquencies.

The SOR lists three delinquent medical bills (¶¶ 1.a, 1.b, 1.g) Subparagraph 1.a totals \$37. It covers emergency medical services received in 2007. (AE C at 2) Applicant paid it in December 2010. (AE B) Subparagraph 1.b totals \$2,400. It stems from a surgery Applicant underwent in approximately 2006. As of March 2011, Applicant had made three \$150 payments under a payment plan he arranged in January 2011. (Tr. 22 ; AE C at 1-2) Subparagraph 1.g totals \$305. Applicant arranged a payment plan in July 2010, and had satisfied it by October 2010. (AE M)

Applicant maintains a budget. (AE R) Together with his wife, who works part-time, Applicant earns approximately \$175,000 per year, and has \$2,050 of after-expense monthly income. Applicant's budget includes \$800 set aside monthly in an escrow account to satisfy his income tax delinquencies. (*Id.* at 1) Applicant's salary includes a significant raise he recently negotiated. (AE P; Tr. 45)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines. In addition to introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions.

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. 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."

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 for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, "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" (AG ¶ 18). Applicant satisfied his medical delinquencies listed in subparagraphs 1.a and 1.b, and has been making steady payments toward the satisfaction of the medical delinquency listed in subparagraph 1.g. Therefore, I resolve these allegations in his favor.

Applicant's longstanding and recurrent income tax delinquencies trigger the application of AG ¶¶ 19(a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations."

The following mitigating conditions are potentially applicable under 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;

(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.

From 1990 to 1993, Applicant accrued approximately \$47,000 of federal income tax delinquencies and more than \$6,000 of state income tax delinquencies. Although he attributed his failure to pay his income taxes to difficult financial circumstances, he made no effort to pay these delinquencies even when his finances were in good shape, such as when he operated a handyman/painting business in the early 2000s.

Compounding the seriousness of the security concern, Applicant accrued additional, significant tax delinquencies over a six-year period, from 2002 to 2007. Currently, he still owes \$25,000 to the IRS and approximately \$6,000 in delinquent state income taxes from 1991 and 1992. He no longer owes any delinquent federal taxes stemming from the 1990s not because he satisfied them, but because they are no longer legally collectible. Neither AG ¶¶ 20(a), nor 20(b) apply.

Applicant has been attempting to resolve his delinquent income taxes for the past three years. When efforts stalled, he retained a tax consulting firm. With the consulting firm's help, he has arranged payment plans for both his delinquent state and federal income taxes. He has been making monthly payments on the state plan since August 2010, and on the federal plan since January 2011. Since 2007, he has filed his returns on time, and has not accrued any additional delinquencies.

Applicant maintains a budget. He has ample income to adhere to the tax payment plans, in part, because of a significant raise he negotiated with his employer. AG ¶¶ 20(c) and 20(d) partially apply.

Whole-Person Concept

Under the whole-person concept, 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.

Applicant's inability to pay his income taxes in the early 1990s was triggered in part by a natural disaster and job instability. However, as his circumstances improved in the early 2000s, he took no action to resolve these delinquencies. Also, he again accrued delinquent income taxes, failing to pay his income taxes every year between 2002 and 2007. The nature, extent, and seriousness of the conduct is significant, and any mitigation generated by the surrounding circumstances of the early 1990s tax delinquencies is undercut by the recurrence of additional tax delinquencies ten years later.

There is a significant presence of rehabilitation. Applicant's finances are organized, he has arranged payment plans to which he has been adhering, and he sets aside an ample amount of money each month to pay his tax delinquencies. However, Applicant continues to owe approximately \$25,000 to the IRS, and never made arrangements for an additional \$47,000, which is now legally uncollectible, from earlier tax years. Under these circumstances it is too soon to conclude Applicant has mitigated the financial considerations security concern.

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.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h-1.j:	Against Applicant
Subparagraph 1.k:	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 continue Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge