



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



In the matter of:)	
)	
)	ISCR Case No. 10-04061
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

05/03/2012

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

On October 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOHA acted 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 on September 1, 2006.

On November 15, 2011, Applicant answered the SOR and initially declined a hearing. On November 22, 2011, he requested a hearing. The case was assigned to me on January 23, 2012. DOHA issued a notice of hearing on January 25, 2012, and the hearing was convened as scheduled on February 14, 2012. Department Counsel offered exhibits (GE) 1 through 6 that were admitted into evidence without objection.

Applicant testified and offered exhibits (AE) A through G that were admitted into evidence without objection. On March 8, 2012, the record was reopened until April 9, 2012, to provide Applicant an opportunity to submit additional matters. He timely submitted AE H through Y that were admitted into evidence without objection. Department Counsel's memorandum indicating she had no objections to Applicant's post-hearing submissions was marked as Hearing Exhibit (HE) 1. DOHA received the hearing transcript (Tr.) on March 1, 2012.

Findings of Fact

Applicant is a 50-year-old real estate broker. A defense contractor is sponsoring him for a security clearance. His prospective employment with that contractor is contingent on him obtaining a security clearance. He received a bachelor's degree in 1984. He is married and has three children, ages 13, 14, and 18. His wife is a teacher. His oldest child is attending college. This is the first time that he has applied for a security clearance.¹

The sole SOR allegation asserts that Applicant is indebted to the Internal Revenue Service (IRS) in the approximate amount of \$71,979 for back taxes. He disclosed this debt on his security clearance application. In his Answer to the SOR, Applicant responded "not correct" to this allegation. He made that comment because he disagreed with the amount alleged. In his subsequent request for a hearing, he indicated that the amount he owed the IRS was approximately \$71,000.²

Applicant's credit reports dated January 27, 2010; November 9, 2010; and December 16, 2011; reflected that a federal tax lien in the amount of \$114,116 was filed against him in May 2007. He attributes this tax lien to being the victim of embezzlement. He was a partner with five other individuals in a limited liability company (LLC) involved in real estate development. The business purchased raw land, developed it, and sold it to builders. Applicant was the partner who managed the LLC's real estate holdings, another partner handled its accounting and finances, and the remaining partners were investors. In about 2001 or 2002, the partner who handled the LLC's finances illegally took about \$400,000 from that enterprise. This theft eventually caused the LLC to dissolve. The LLC's real estate holdings were sold and the proceeds of those sales went towards paying off loans. None of the proceeds were distributed to the partners. Applicant was the partner responsible for disposing of the company's assets and he was paid for those services.³

Applicant claimed the IRS determined he made hundreds of thousands of dollars in income from the sale of the LLC's assets in 2003 and 2005. For those two tax years, he was eventually assessed taxes, penalties, and interest totaling more than \$250,000.

¹ Tr. 4-5, 31-32, 34-35, 46; GE 1.

² Tr. 8-9, 41-42; Applicant's Answer to the SOR; GE 4-6.

³ Tr. 16-20, 35-40, 43-44, 56-57; GE 2, 4-6; AE B.

He contends that he made about \$30,000 to \$40,000 in those years. He stated that the IRS based its determination on revenue the LLC received, instead of its profits. He consulted with an accountant who reportedly advised him these were “paper proofs” that made no sense and were unfair. Applicant stated that up until this tax issue he always paid his taxes and debts on time.⁴

The LLC’s partners hired a law firm to institute action against the partner who embezzled the funds. They expended about \$50,000 in attorney fees attempting to resolve this issue. In about February 2005, the suspected perpetrator was deposed and, according to that law firm, admitted “most everything” during the deposition. The law firm presented the deposition to the local district attorney who was planning to prosecute the suspected perpetrator. However, because the suspected perpetrator had three young children and hired an attorney to possibly sue them, the other partners decided to drop the charges and not pursue any other legal action. The suspect signed over his share of the LLC to the other partners before they dissolved the LLC.⁵

In the intervening years, Applicant has been working with the IRS to resolve this tax issue. He claimed that he paid the IRS about \$208,202 from October 2003 to December 2009. He provided documentation showing that his tax liability was reduced by at least \$189,033 from October 2003 to April 2010. This reduction was the result of Applicant making payments to the IRS totaling \$125,901, the IRS withholding his tax refunds totaling \$54,579, and, as discussed in more detail below, the IRS abating penalties totaling \$8,553. In July 2008, he sold a commercial lot so that he could pay \$124,782 to the IRS. As a result of the payments, withholdings, and abatements, his taxes due for 2003 have been paid, but a portion of those due for 2005 remain unpaid. In May 2008, the IRS released a tax lien filed against him for \$24,017 (not the tax lien in SOR ¶ 1.a). He also provided documentation showing that he paid \$39,274 to state tax authorities to resolve a related-tax assessment.⁶

In December 2008, a tax attorney submitted a Penalty Appeal Protest to the IRS on his behalf. This document contested the penalties assessed against him for failing to pay his income taxes in 2003 and 2005 and for the late filing of his 2005 income tax return. The protest explained that Applicant’s tax liability for 2003 and 2005 arose due to circumstances beyond their control, *i.e.*, the suspected embezzlement of nearly \$400,000 of LLC’s funds; that the proceeds from the sale of the LLC’s assets went

⁴ Tr. 16-20, 35-40, 43-44, 56-57; GE 2, 4-6; AE B.

⁵ Tr. 35-38; AE B, C.

⁶ Tr. 30-31, 40-41, 43-46, 53-54; AE B, D, G, J, K, L, M, P, Q, R, S, U, V, W, X, Y. These exhibits reflect that Applicant paid the IRS \$419 in October 2003 (AE V), \$50 in October 2004 (AE W), \$150 in April 2005 (AE U), \$500 in November 2007 (AE R, S, T), and \$124,782 in July 2008 (AE M); that the IRS withheld tax refunds of \$786 in April 2004 (AE W), \$2,878 in April 2005 (AE W), \$18,784 in April 2008 (AE W), \$20,497 in July 2008 (AE L, X), \$7,670 in April 2009 (AE X), \$1,500 in April 2009 (AE X), and \$3,964 in April 2010 (AE X); and that the IRS abated penalties of \$4,528 in November 2006 (AE L) and \$4,025 in April 2010 (AE L). The payment of the \$124,782 in July 2008 is reflected in the IRS documents as two separate payments, *i.e.*, \$103,819 and \$20,962, on that date. See AE W, X.

towards paying outstanding bank notes; and that none of those proceeds went to Applicant. The protest also argued that Applicant exercised ordinary business prudence in providing for the payment of his taxes, but was unable to do so because he would suffer undue hardship. It also noted his 2005 tax return was mailed several weeks late because the suspected perpetrator of the embezzlement delayed release of the K-1 corporate income statements, which were necessary to complete his tax return. As soon as Applicant received the necessary documents, he filed his tax return. The protest also asserted that Applicant had an exemplary tax compliance history and had never failed previously to file tax returns or underpaid his federal taxes. In March 2010, the IRS notified him that “the penalty(s) will be abated (removed) in full.” Due to this adjustment, his tax liability was decreased to about \$70,000. The abatement, however, does not stop interest from accruing on the tax liability, which accounts for its continuing growth.⁷

In March 2011, the IRS responded to Applicant’s Offer in Compromise by stating he had a net equity in assets of \$545,485. Based on that determination, the IRS concluded he had the ability to pay the outstanding tax liability in full. Attached to the IRS’ response was an Asset/Equity Table (AET) that listed specific assets it claimed he held. He contends the IRS was crediting him with assets he did not hold. Specifically, the AET reflected that he owned a home (valued at \$55,920) in another state that he sold 20 years ago. It also incorrectly indicated that he owned a home (valued at \$293,578), which he has no knowledge of, and that he held a commercial lot (valued at \$104,000) that he already sold so that he could pay his back taxes. He indicated that he sent the IRS the corrected information and that they eventually determined that his net worth was about \$60,000 and placed him in a “currently non-collectable status.”⁸

Applicant testified that he expected the IRS would review his case in May 2012. He is hoping the IRS will forgive this debt. He indicated that, no matter what the IRS determines, he intends to resolve this outstanding tax issue.⁹

Applicant estimated that he and his wife earned about \$50,000 to \$54,000 in 2011. In responding to interrogatories in November 2010, he submitted a Personal Financial Statement that reflected his total net monthly income was \$4,703, his total monthly expenses were \$2,009, and his total monthly debt payments were \$2,063, which left him a net monthly remainder of \$631. He received financial counseling in about 2007. He indicated the counselor informed him that he was doing everything he needed to do and did not make any recommendations to him. He indicated he was financially stable and was meeting all of his financial obligations before his financial difficulties arose from the embezzlement.¹⁰

⁷ Tr. 29-31; AE B, F.

⁸ Tr. 26-31, 43-45; AE B, D, E. Applicant was placed in a non-collectable status as early as December 2008. See AE E.

⁹ Tr. 30-31, 42-44.

¹⁰ Tr. at 46-51, 55; GE 2

At the hearing, Applicant testified openly and honestly. I found him to be a credible witness. He indicated he was about five months delinquent on his mortgage payments, which was not a debt alleged in the SOR. He indicated that he could not refinance his mortgage because of the tax lien and was in the process of obtaining a loan modification. In his post-hearing submission, he presented a letter from the mortgage holder reflecting that he was presented with an offer to participate in the Home Affordable Trial Period Plan. He registered for that program. Under that program, he will undergo financial counseling and develop a household budget to qualify for a mortgage modification. Credit reports admitted into evidence also reflect that he had three other delinquent credit card debts. Two of those debts have been resolved, and he is apparently working to resolve the third.¹¹

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 that are to be 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, 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 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

¹¹ Tr. 20-21, 32-35, 46-53, 55; GE 4-6; AE I, O.

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 about 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* Executive Order 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 as follows:

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.

The IRS imposed a tax lien of \$114,116 against Applicant in May 2007. He currently owes approximately \$72,000 towards that tax liability. This evidence is sufficient to raise the above disqualifying conditions.

Several 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.

A security clearance adjudication is not a debt collection procedure. It is a procedure designed to evaluate an applicant's judgment, reliability, and trustworthiness.¹² An applicant is not required, as a matter of law, to establish that he or she has resolved every debt alleged in the SOR. An applicant need only establish a plan to resolve the financial problems and take sufficient action to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debt alleged in the SOR be paid first.¹³

Applicant and other partners in a LLC were the victims of embezzlement in about 2001 and 2002. As a result of that crime, the LLC was dissolved and its assets were sold. According to Applicant, the proceeds from the sale of the assets went towards paying bank notes. His Penalty Appeal Protest stated, "Although the money from the property liquidation never reached [his] personal bank account, the IRS considered the funds from the sales as income, and he was assessed taxes, penalties and interest for 2003/2005 totaling more than \$250,000." He could not afford to pay those taxes and the IRS eventually filed two tax liens, one for \$24,017 and the other for \$114,116, against him.

Applicant has taken significant steps towards resolving this tax liability. He provided documentation showing that, from October 2003 and April 2010, his tax liability was reduced by \$189,033 through payments, withholdings, and abatements. His largest payment occurred in July 2008 when he sold some real estate and paid \$124,782 to the IRS from the proceeds of that sale. In May 2008, the IRS released the tax lien of \$24,017. Throughout the years, he has maintained regular contact with the IRS in an effort to resolve this debt. In 2008, he hired a tax attorney to submit the Penalty Appeal Protest that contested the penalties assessed against him. The IRS agreed with that protest and abated over \$8,000 in penalties. He submitted an Offer in Compromise to resolve this tax liability. In denying the Offer in Compromise in March 2011, the IRS relied on inaccurate information about Applicant's net wealth. It claimed his assets were much greater than he

¹² See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

¹³ See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

actually owned. He has submitted correct information. Even though the IRS has placed him in a non-collectable status, he continues to work towards resolving this matter. He is now waiting for the IRS to review his case in May 2012.

The embezzlement of the LLC's funds was a condition beyond Applicant's control, and the resulting tax liability arose under unusual circumstances that are unlikely to recur. Since incurring this tax liability, Applicant has initiated good-faith efforts to repay the IRS. He has received financial counseling and has hired an accountant and tax attorney to assist him. He has remained in contact with the IRS and acted responsibly in taking various actions to resolve this debt. He credibly testified that he intends to resolve this debt and his past actions support that claim. This debt does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 20(a), 20(b), and 20(d) apply. AG 20(c) partially applies.

Applicant testified that he received no profits from the dissolution of the LLC. He indicated that his accountant informed him the tax assessments were based on "paper profits" and were unfair. While these tax assessments are perplexing, Applicant presented no evidence that he challenged them in tax court or through other avenues. He protested penalties arising from the tax assessments, but that protest does not specifically dispute the underlying tax liability. In the absence of documentation disputing the tax liability, AG 20(e) does not apply.

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 relevant 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.

Applicant lives a modest lifestyle and does not spend extravagantly. He is doing his best to recover from the financial fallout following the embezzlement of the LLC's funds, the LLC's subsequent dissolution, and the resulting tax assessments. In addressing these tax issues, he was paid over \$39,000 to state tax authorities and over \$179,000 to the IRS. While Applicant has not yet fully resolved the federal tax issue, it is clear that he takes this matter seriously and is determined to resolve it. Based on his documented actions, he has proven that he has taken significant steps towards resolving this debt and will continue to do so. Overall, the record evidence leaves me with no questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns under Guideline F.

Formal Findings

Formal findings 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge