



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



In the matter of:)
)
 REDACTED) ISCR Case No. 11-05355
)
 Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: David P. Price, Esq.

03/29/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Financial Considerations concern. He has a lengthy history of not filing and paying his federal income taxes. He recently entered into a payment arrangement with the Internal Revenue Service (IRS) to resolve his substantial tax debt. He has a number of other delinquent debts dating back several years that he also recently started to address. However, Applicant’s recent efforts to resolve his past-due debts do not mitigate the security concerns raised by his history of financial irresponsibility. Clearance is denied.

Procedural History

On July 19, 2012, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline F (Financial Considerations). Applicant answered the SOR and requested a hearing (Answer).

On September 18, 2012, Department Counsel indicated the Government was ready to proceed with a hearing. The hearing was originally scheduled for October 25,

2012, but a delay was granted to allow Applicant time to retain counsel and gather documents to present at hearing. The hearing was rescheduled for January 15, 2013.

At hearing, Department Counsel offered Government Exhibits (Gx.) 1 through 4, which were admitted without objection. Applicant appeared at the hearing with his counsel and testified. He offered Applicant's Exhibits (Ax.) A – F, which were also admitted without objection. I granted Applicant's request for additional time to gather and present further documentation. DOHA received the hearing transcript (Tr.) on January 24, 2013. Applicant timely submitted documents post-hearing to supplement the exhibits that were previously admitted at hearing.¹ These post-hearing documents were also admitted without objection, and the record closed on March 8, 2013.²

Findings of Fact

Applicant is 48 years old. He is married and has three children, ages 11, 15, and 18. He served in the U.S. military for over 20 years from 1982 to 2003. He retired and received an honorable discharge. He started working for federal contractors shortly after retiring from the military, including serving as a U.S. contractor in Iraq from late 2003 to mid-2005. He has been with his current employer since 2005. His military and civilian performance evaluations reflect well on his duty performance. He has held a security clearance since about 1983.³

Applicant's financial problems started in 2001. Applicant and his wife were having marital difficulties, and he left the home for six to seven months. Applicant's wife had always taken care of the couple's finances, including filing their tax returns. After they separated, she stopped filing their returns jointly. Applicant claims he did not become aware of this situation until 2005, when he returned from Iraq.⁴ He hired counsel, but could not pay the estimated amount he was told he owed for tax years 2001 – 2004. He did not file his tax returns for tax years 2001 – 2004 until June 2010.⁵ Applicant also did not file his tax returns for tax years 2006 – 2008 on time. Applicant's IRS account transcripts reflect that the current balance for tax years 2004 and 2006 – 2008 is approximately \$80,000.⁶

¹ Hearing Exhibit (Hx.) I is Applicant's original exhibit list, while Hx. II is Applicant's supplemental list of exhibits. Applicant's post-hearing documents are reflected in bold on Hx. II.

² Applicant was also provided additional time to address a proposed SOR amendment. However, after reviewing the evidence and considering the arguments of counsel, I decided an amendment was not necessary because Applicant was provided fair notice of the concerns at issue. (Tr. at 83-85)

³ Tr. at 27-32, 47-49; Gx. 1; Ax. D – E.

⁴ Tr. at 32-34, 59-60, 64-69; Gx. 2 at 14. (Applicant initially testified that he did not become aware of his tax problems until 2008/2009. He later admitted, as he had previously stated during his background interview, that he became aware of his tax issues when he returned to the United States in mid-2005).

⁵ Tr. at 35-38, 60-62, 70-71; Ax. H.

⁶ Tr. at 61-62; Ax. A.1.a(4); Ax. A.1.a(6)-(8).

In approximately 2009, Applicant received a tax deficiency notice from the IRS.⁷ Applicant's wages were garnished to satisfy a tax levy of over \$102,000 for tax years 2001 – 2004 and 2006. Also, a federal tax lien for over \$98,500 was placed against both of Applicant's properties.⁸ Applicant attempted to negotiate with the IRS prior to the garnishment taking effect, but his efforts were unsuccessful.⁹

Applicant filed his 2009 tax return in June 2010 and his 2010 tax return in November 2012. He presented no documentation showing that he received an extension to file late. He owes approximately \$3,500 for tax year 2009.¹⁰

In October 2012, Applicant filed his federal tax return for tax year 2011. He presented no documentation showing that he received an extension to file late. His return indicates that he owed \$953 in taxes, which he did not pay.¹¹

In November 2012, the IRS released the tax levy. Applicant's account transcripts from the IRS for tax years 2001 – 2003 reflect a zero balance. The federal tax lien from 2009 for over \$98,500 remains in place, as does a subsequent tax lien filed by the IRS for over \$27,500 for tax years 2007 and 2009.¹²

In February 2013, the IRS accepted Applicant's offer to settle the amount he owes for tax years 2004, 2006 – 2009, and 2011. Per this agreement, Applicant was to make his first payment of \$400 on February 28, 2013.¹³ Applicant did not submit evidence of having made this first payment. Applicant's failure to timely file and pay his federal taxes and the \$98,500 tax lien against his primary residence are listed in SOR ¶¶ 1.a and 1.b, respectively. Applicant's federal tax debt remains unresolved.

In addition to his federal tax debt, Applicant admitted during his background interview that he has been repeatedly late in paying the mortgage on his primary residence. He submitted documentation at hearing showing that he currently owes over \$9,500 for late mortgage payments and fees. In September 2012, Applicant agreed to make monthly payments of approximately \$1,850 to bring his mortgage account current. His personal financial statement from June 2012 reflects that, after paying his expenses and debts, he purportedly had over \$2,200 each month in discretionary income, which

⁷ Tr. at 34, 59-60; GE 2 at 15. *But see* Ax. H (Applicant's tax lawyer states that he received notice of tax deficiency in January 2007).

⁸ Tr. at 54-56; Ax. A.1.a(12); GE 1 at 33; GE 2 at 2, 15; GE 3.

⁹ Tr. at 35-38; Ax. G – H.

¹⁰ Tr. at 61-64; Ax. A.1.a(9)-(11); Ax. G (tax professional hired to file 2008-09 tax returns in April or May 2010). *See also* Ax. A.1.b(1) (tax lien for over \$3,500 for tax debt owed for 2009 tax year).

¹¹ Tr. at 51-53; A.1.a(11).

¹² Tr. at 38-39; Ax. A.1.a(1)-(3); Ax. A.1.a(13); Ax. A.1.b(1).

¹³ Tr. at 38-39, 54, 56-57, 72; Ax. A.1.a(14).

would presumably allow him to make these payments. Applicant made only two payments per the agreement with his lender. He did not make the required payments in November and December 2012. He testified that, in January 2013, he made a payment of between \$3,000 and \$3,600 to bring the mortgage account current.¹⁴ He did not submit proof of such payment. Applicant's delinquent mortgage debt, which is listed in SOR ¶ 1.f, remains unresolved.

Applicant submitted documentation of having satisfied the past-due cable bill for \$44 referenced in SOR ¶ 1.d. He also submitted proof of having agreed to a payment plan to satisfy the judgment for \$726 in SOR ¶ 1.e. He submitted documentation showing that he made the initial payment per his agreement with the creditor. Applicant established that he has either satisfied or is in the process of resolving the debts listed in SOR ¶¶ 1.d and 1.e.

Applicant did not submit documentary proof to substantiate his claim that he paid the delinquent medical bill for \$276 in SOR ¶ 1.c. He also did not submit documentation to substantiate his claim that the debt for \$847 in SOR ¶ 1.g is a duplicate of the judgment referenced in SOR ¶ 1.e. At hearing, Applicant promised to pursue the resolution of this debt, but did not submit any documentation regarding this debt with his post-hearing submission.¹⁵ Applicant's debts listed in SOR ¶¶ 1.c and 1.g remain unresolved.

Applicant testified that his inability to pay his financial obligations relates to his move to State B in 2006 for his job. He purchased a home in State B, but was unable to sell or rent his primary residence in State A. Applicant and his wife were concerned about the educational system in State B and decided to place their three children in private school. Additionally, Applicant was caring for his ill father between 2006 and 2009. Applicant testified that the cost of paying two mortgages, private education for his three children, and caring for his ill father placed a great strain on his finances and he was unable to pay his bills.¹⁶ He also admitted during a background interview in 2011 and at hearing that once he became aware of the substantial amount of money he owed the IRS he felt overwhelmed and procrastinated in attempting to resolve his debts.¹⁷ He moved back to State A in 2009. He has been fully employed since 2001 and his tax returns for the past eight years reflect income of between \$74,000 and \$105,000.¹⁸

Applicant claims that he is now able to meet his financial obligations. He did not submit evidence of having received financial counseling, and his current personal

¹⁴ GE 2 at 10, 15-16; Tr. at 42-45, 57-58; Ax. A.1.f.

¹⁵ Tr. at 40-42, 45-46; Ax.A.1.d-f. See also GE 3 (current credit report reflects the \$276 medical debt and \$847 debt).

¹⁶ Tr. at 35, 42-45; GE 2.

¹⁷ Tr. at 59-60; GE 2 at 14.

¹⁸ GE 1; Ax. A.1.a(4)-(11).

financial statement indicates that he has a balance of over \$35,000 for a consumer loan and four credit cards.¹⁹

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

¹⁹ Tr. at 46-47; Ax. C.

Analysis

Guideline F, Financial Considerations

The security concern relating to financial problems is articulated at 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.

One aspect of the concern is that an individual who is financially overextended may be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Applicant's intentional failure to timely file his tax returns and pay his federal taxes over the past decade and failure to meet his other financial obligations raises this concern. This history of financial irresponsibility also establishes the following disqualifying conditions under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or financial analysis; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

An individual's past or current indebtedness is not the end of the analysis, because "[a] security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness."²⁰ Accordingly, Applicant may mitigate the financial considerations concern by establishing one or more of the relevant mitigating conditions listed 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;

²⁰ ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See also ISCR Case No. 09-07916 at 3 (App. Bd. May 9, 2011).

(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 and provides documented proof to substantiate the basis of the dispute.

AG ¶ 20(a) does not apply. Applicant repeatedly failed to timely file his federal tax returns and pay his taxes over a period of over ten years. He currently owes a substantial amount to the IRS going back to the 2004 tax year. I am not convinced that this behavior will not recur due to his lengthy history of tax evasion and recent decision not to submit payment with his return of the relatively small amount he owed for the 2011 tax year. He filed the return and decided not to pay his taxes when due several months *after* the SOR was issued. Applicant's finances continue to cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) does not apply. Although the added financial strain of caring for his ill father was a matter outside of his control, Applicant's financial problems were not caused by this situation. Instead, it was Applicant's intentional decision not to comply with the obligations of all citizens to file and pay their taxes. Furthermore, Applicant has been in a relatively stable financial position for several years and did not act responsibly in addressing his debts. He was fully aware of his substantial tax liability by at least mid-2005, but totally disregarded it and continued to not file and pay his federal income tax obligation. He did not start to address his tax debts until well after the IRS took action to make him pay.

AG ¶¶ 20(c) and (d) do not apply. Admittedly, Applicant paid a small \$44 debt and finally addressed a judgment debt. However, his recent efforts to address his longstanding debts pale in comparison to his overall history of financial irresponsibility. His satisfaction of the tax liability for the 2001 – 2003 tax years was only resolved through involuntary garnishment of his wages, which does not amount to a good-faith effort to resolve past-due debts. Furthermore, he provided no evidence of receiving financial counseling and his current financial situation is far from under control, as evidenced by his failure to follow through with the payment plan to resolve the delinquent mortgage account on his primary residence.

AG ¶ 20(e) does not apply. Applicant only disputes one of the debts listed in the SOR, a relatively minor \$847 debt to a creditor. Even after promising to pursue the resolution of this debt at hearing and being granted a significant amount of additional time to submit documentation of his efforts to resolve or dispute this debt, Applicant did not submit any such documentation.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).²¹ Applicant is a dedicated family man who has served this nation for over 30 years, including a two-year deployment to Iraq as a contractor. He has held a security clearance without issue since about 1983, including handling and safeguarding classified information in highly sensitive positions while in the military. However, an individual who has a history of failing to meet his financial obligations, especially the obligation of all citizens to file and pay their taxes, may similarly fail to discharge his security obligations. After weighing the favorable whole-person factors versus the security concerns at issue, I find that Applicant failed to meet his burden to mitigate the concerns raised by his finances. Overall, the record evidence leaves me with unresolved questions and doubts about Applicant's continued eligibility for access to classified information.²²

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a – 1.c:	Against Applicant
Subparagraphs 1.d – 1.e:	For Applicant
Subparagraphs 1.f – 1.g:	Against Applicant

²¹ The non-exhaustive list of adjudicative factors are: (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.

²² AG ¶ 2(b). See also *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("security-clearance determinations should err, if they must, on the side of denials"); ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012) ("Even years of safeguarding national security information may not be sufficient to mitigate a history of ongoing, significant delinquent debt").

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge