



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



In the matter of:)	
)	
)	ISCR Case No. 11-12358
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray Blank, Esq., Department Counsel
For Applicant: *Pro se*

07/30/2013

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has yet to address \$90,000 in past-due taxes for tax years 2003 – 2006, 2009, 2010, and 2012. He failed to mitigate the financial considerations security concerns. Clearance is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on February 8, 2013, the DoD issued a Statement of Reasons (SOR) detailing security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On March 12, 2013, Applicant answered the SOR and requested a hearing. On May 23, 2013, I was assigned the case. On May 31,

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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.

2013, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on June 12, 2013. I admitted Government's Exhibits (Ex) 1 through 7 and Applicant's Exhibits A through V, without objection. Applicant testified at the hearing as did two other witnesses on Applicant's behalf. The record was held open to allow Applicant to submit additional information. Additional material (Ex. W) was submitted and admitted into the record without objection. On June 20, 2013, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, Applicant admitted filing for bankruptcy protection and being indebted to the Internal Revenue Service (IRS), but denied owing the six additional debts. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 53-year-old senior systems field support engineer who has worked for a defense contractor since March 2011, and seeks to obtain a security clearance. (Tr. 42) From 1979 through 1984, he served on active duty in the U.S. Air Force. (Tr. 55) Applicant's co-workers, supervisors, and friends state: Applicant is an open, honest, trustworthy individual and a committed, dedicated worker. He is hard-working, conscientious, dependable, and reliable. (Ex. H - N, P - R, Tr. 32 - 52)

In June 2001, Applicant suffered a stroke that caused him to miss work and incur medical debts not paid by his insurance. (Ex. 3, Tr. 17, 56) Following his stroke, he had to learn to walk and talk again. (Tr. 57) In November 2001, his divorce from his first wife was finalized. (Ex. 3) He was unemployed from September 2002 through January 2003, February 2004 through September 2004, and October 2010 through March 2011. (Ex. 1, 2, 3) Following his stroke and while unemployed, he started using funds from his tax-deferred retirement account to pay medical expenses and to meet living expenses. (Ex. 3) In 2006,² he and his wife purchased a home for \$649,000, which was 100% financed with an adjustable rate mortgage. (Ex. 3) The monthly mortgage payments totaled \$5,000. (Ex. 3) He stated his monthly mortgage payment increased from \$3,000 to \$6,800. (Tr. 58) In June 2011, a short sale was executed on the home selling it for \$450,000. (Ex. 3)

In April 2003, Applicant solely in his name, and not with his wife, filed for Chapter 13, Wage Earner's Plan bankruptcy protection. (Ex. 3) In July 2004, when the creditors sought payment from his wife, he asked that the action be dismissed so a joint filing could be made. In October 2004, a joint filing was made. Monthly payments of \$1,125 were made in accord with the Chapter 13 until April 2006, when he cashed in his retirement accounts and paid the remaining balances due his creditors under the wage

² During the June 2011 personal subject interview, Applicant stated the house was purchased in 2004. However, the adjustable rate note on the house was dated April 2006. (Ex. 3)

earner's bankruptcy plan. (Ex. 3) In April 2006, the bankruptcy was discharged.³ No tax obligations⁴ were included in the bankruptcy. (Tr. 67)

In 2005, Applicant's mother-in-law moved into his home. (Tr. 57) She suffered from senile dementia. Her treatment cost \$2,000 monthly. (Ex. 3) Applicant did not provide any documentation showing how much of the monthly treatment cost he paid. In 2012, his mother-in-law died. (Ex. 3, Tr. 82) His mother had previously died in 2011. (Tr. 59)

In June 2008, Applicant purchased a timeshare property for \$27,914. (Ex. 6) In December 2012, he asserted, but provided no documentation, that he was attempting to sell a timeshare property, and the creditor had suspended his \$960 monthly payments on the timeshare. (Ex. 3) He anticipated the timeshare would be sold in January or February 2013. He provided no documentation that the timeshare has been sold or the forbearance on the debt continues.

In August 2011, a state filed a \$2,285 income tax lien against him, which he has admitted. (Tr. 85) In February 2010, the state garnished his wages. (Ex. 3) The garnishment has stopped and he is working with the state attempting to address this matter. Starting in 2009, the IRS levied four tax liens against him in the amounts of: \$12,368, \$29,432, \$23,693, and \$11,551, (Tr. 68) The four federal tax liens total approximately \$77,000. As of June 19, 2013, he owed \$90,699 for tax years 2003 – 2006, 2009, 2010, and 2012. (Ex. G, W) His 2003 income was \$68,000 and in 2004 it was \$93,258. (Tr. 75) In 2011, his salary was approximately \$80,000. His wife currently is not working. (Tr. 79)

In June 2011, the tax liens were released to allow the short sale of Applicant's home. (Ex. 3) In June 2011, Applicant was asked about his finances during a personal subject interview. (Ex. 3) He stated his attorney was attempting to negotiate a settlement with the IRS, and he would begin monthly payments once a payment plan was established. (Ex. 3)

In August 2012, Applicant obtained a different law firm⁵ to facilitate the resolution of his delinquent federal tax debt. (Ex. E) In December 2012, the IRS and Applicant agreed to an installment agreement, which required \$1,300 monthly payments starting in February 2013. (Ex. E, Tr. 61) He did not make the required payments. In June 2013, an Offer in Compromise was submitted whereby he offered to settle the \$90,000 debt for \$50 and he submitted a \$10 check and paid \$150 for the Offer in Compromise filing

³At the hearing, Department Counsel moved to change the wording of ¶ SOR 1.b to indicate the 2004 bankruptcy had been "discharged" and not "dismissed." (Tr. 15) Applicant did not object to the change and the wording was changed.

⁴ Taxes for tax years 2006, 2009, 2010, and 2012 were not due as of April 2006, when the bankruptcy was dismissed.

⁵ Applicant indicated he had three attorneys and spent \$10,000 to \$12,000 in attorney fees attempting to address the IRS debt. (Tr. 130)

fee. (Ex. E, F, G) There is no documentation that the IRS has accepted the Offer in Compromise.

In October 2011, Applicant and his wife planned to attend a financial workshop. (Ex. 3) A year and a half later, in May 2013, they received a certificate showing completion of a nine-week study course in finances. (Ex. B, Tr. 60, 104)

In April 2012, Applicant enrolled with a credit service. (Ex. 3, W) As a result of the credit service's efforts, the \$3,100 debt (SOR 1.i) was deleted by one credit reporting agency. (Ex. W) The credit service is attempting to have the \$676 (SOR 1.j) debt removed from his credit reports. (Ex. W) He asserted, but failed to document, that he had previously hired two companies to help him address his financial problems. (Tr. 57, 127) He asserted, but failed to document, that the companies provided no benefit to him after he had spent "several – tens of thousands of dollars" with the companies. (Tr. 57)

Applicant received a traffic ticket and the \$518 debt (SOR 1.m), which was being collected by a debt collection company. Applicant asserts he has paid this debt and the collection company has promised to provide proof of payment, but has failed to do so. (Ex. 3, Tr. 87) The credit service's efforts indicated the debt was deleted from two credit reporting agencies. (Ex. W) The two remaining SOR debts (SOR 1.k, \$216 and SOR 1.l, \$69) together total less than \$300.

As of December 2012, his monthly net gross income was \$5,200, his monthly expenses were \$4,420, and he was paying a \$471 credit union obligation, which left a net monthly remainder of approximately \$300. (Ex. 3) At the hearing, he said he had approximately \$220 in net remainder. (Tr. 99) He has \$7,000 in a 401(k) retirement plan and his wife has approximately \$3,500 in hers. (Tr. 85)

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 interests of 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 (EO) 10865 provides that 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 *a/so* 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. Applicant has more than \$90,000 in unresolved tax debt. 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.

Applicant does not fully meet any of the mitigating factors for financial considerations. His financial difficulties are both recent and multiple. His financial problems started in 2001 when he experienced both a stroke and divorce. In April 2006, his debts were discharged⁶ in bankruptcy. His finances had a fresh start, but he now has more than \$90,000 in unaddressed, delinquent federal income tax debt and more

⁶ Applicant's bankruptcy did not discharge his federal income tax debts. Returns for tax years 2003, 2004, and 2005 were due at the time of the April 2006 discharge of creditors, but there is no showing the federal or state delinquent tax obligations were included in the bankruptcy, that the amount owed to the IRS was known at the time of discharge, or that that the tax returns had even been filed at the time of the discharge for those three years.

than \$2,000 in delinquent state income tax debt. He has known of the government's concern about his finances since his June 2011 personal subject interview. He asserts he hired two credit companies that failed to help him and has hired three attorneys and spent more than \$10,000 in attorney fees to address his tax debt.⁷

In the two years since being questioned about the garnishment of Applicant's wages to meet a past-due state tax obligation and asked about his unpaid income tax, he has documented he has paid a \$150 filing fee and made a \$10 payment to address his \$90,000 tax debt. This is insufficient to find he has made a "good-faith effort" to satisfy his debts. Because Applicant has multiple delinquent debts and his financial problems are continuing in nature, he receives minimal application of the mitigating conditions listed in AG ¶ 20(a). Applicant's handling of his finances, under the circumstances, casts doubt on his current reliability, trustworthiness, and good judgment.

Applicant did experience factors beyond his control. Before his 2006 discharge of debts, he experienced unexpected health problems, a stroke, in 2001 as well as a divorce that year. He had also experienced two periods of unemployment, September 2002 through January 2003 and February 2004 through September 2004, prior to the discharge of his debts. The impact of these factors on his current financial picture is lessened because they occurred nine to eleven years ago and occurred before his debts were discharged.

Following the discharge of his debts, Applicant again experienced a period of unemployment from October 2010 through March 2011 and experienced additional unexpected medical issues in the caring for his mother-in-law who suffered from dementia. Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, it must still be determined whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.⁸

The mitigating condition listed in AG ¶ 20(d) does not apply because, to date, Applicant's actual payment on his delinquent taxes has been minimal. He has documented the payment of only \$10 and a \$150 filing to address is significant federal income tax past-due obligation. As previously stated, this fails to show he has acted responsibly under the circumstances.

In May 2013, Applicant completed a nine-week financial course providing him with insight and guidance in addressing his past-due obligations. From the documentation provided, it is too soon to assess the value he has received from this guidance. AG ¶ 20(c) only partially applies. He has received counseling, the results of

⁷ Applicant did not provide any documents to back up his assertions as to the two credit companies or the money he has spent in attorney fees to address the past-due tax obligation.

⁸ ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

that counseling have yet to be determined, and there are no clear indications that the problem is being resolved or is under control.

In December 2012, Applicant entered into an installment agreement in which he agreed to pay the IRS the entire amount of past-due taxes. However, he has made no payments in accordance with the agreement. He was to start making \$1,300 monthly payments in February 2013, but failed to do so. He now hopes to enter into a compromise with the IRS, but there is no showing the IRS has agreed to any compromise.

AG ¶ 20(d) does not apply. A good-faith effort to repay overdue creditors or otherwise resolve debt requires more than an agreement. It requires action to implement that agreement. It requires payment in accordance with the agreement. Good-faith requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Applicant signed an installment agreement to pay his past-due taxes, but has not made the payments the agreement requires.

Applicant appears to be sincere in his promise that he will ultimately address his past-due tax obligation. However, a promise of future performance, no matter how sincere, is insufficient to demonstrate a track record of meeting financial obligations. Without evidence of steps taken to implement a plan to resolve indebtedness, a good-faith effort cannot be substantiated.

Other than the past-due tax obligation, there are six additional debts that the SOR alleged were unpaid, which total approximately \$4,600. The efforts of Applicant's current credit service resulted in the removal of two debts (SOR 1.i, \$3,100 and SOR 1.m, \$518) from his credit reports. The other four debts total less than \$1,000. Neither the remaining four debts nor having had to resort to bankruptcy protection nine years ago, raises concerns about his current reliability, trustworthiness, or good judgment.

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. There is some evidence in favor of mitigating Applicant's conduct. He had many co-workers and friends submit letters and testimony as to his outstanding work. Following the discharge of his debts in 2006, he was unemployed for six months in 2010 and 2011. In March 2011, he started his current employment. He has initiated effort to address his past-due tax obligation by hiring an attorney to help him.

The disqualifying evidence under the whole-person concept is more substantial. The tax debt goes back to April 2004, when his 2003 federal income tax was required to be filed and taxes owed to be paid. When those taxes were not paid, the IRS instituted a tax lien. Additional tax liens were issued, which were removed when his home sold at a short sale for less than what was owed on the mortgage. It has been nine years since the 2003 taxes were due and they have yet to be paid. He owes more than \$90,000 in delinquent state and federal income tax. Having been employed full-time since March 2011, he has documented payment of a \$150 filing fee and a \$10 payment on the tax debt.

Applicant's long-standing failure to repay his past-due taxes, at least in reasonable amounts, or to make payments in accord with the installment plan he agreed to in December 2012, reflects traits which raise concerns about his fitness to hold a security clearance. Without a track record of actual resolution of debts, it is unknown whether the debts will, in fact, be resolved in the future.

The concept of "meaningful track record" includes evidence of actual debt reduction through payment of debts. However, an applicant is not required to establish that he has paid off each and every debt listed in the SOR. All that is required is for him to demonstrate he has established a plan to resolve his delinquent debt and has taken significant action to implement that plan. I must reasonably consider the entirety of Applicant's financial situation and his actions in evaluating the extent to which that plan is credible and realistic.

The issue is not simply whether all Applicant's debts have been paid – they have 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 his delinquent taxes, but there is no established compromise agreement with the IRS with a track record of payments on his tax obligation.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a lifetime

occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, a clearance is not recommended. Should Applicant be afforded an opportunity to reapply for a security clearance in the future, having paid his delinquent tax obligation, established compliance with a repayment plan, or otherwise substantially addressed his past-due taxes, he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

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.b:	For Applicant
Subparagraph 1.c – 1.g:	Against Applicant
Subparagraphs 1.h – 1.m:	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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge