



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-00870
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: John V. Berry, Esq.
Alison R. Willis, Esq.

10/13/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by his financial circumstances. He incurred a sizeable tax debt about five years ago and, despite earning a considerable amount in compensation through his employment as a federal contractor over the past few years, he has yet to establish a payment plan or otherwise resolve the tax debt, which currently stands at over \$230,000. Notwithstanding the presence of some extenuating circumstances and other favorable information, Applicant failed to meet his heavy burden of persuasion for continued access to classified information. Clearance is denied.

History of the Case

On August 7, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline.¹ Applicant answered the

¹ This action was taken under Executive Order (E.O.) 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 September 1, 2006.

SOR and requested a hearing to establish his eligibility for continued access to classified information.

On November 23, 2015, Department Counsel was ready to proceed and requested an administrative judge be assigned to hear the case. On March 3, 2016, I was assigned the case and, after coordinating with the parties, scheduled the hearing for April 28, 2016.²

The hearing was convened as scheduled, and the exhibits offered by both sides were admitted in evidence without objection.³ Applicant chose to testify and called his girlfriend as a witness. The hearing transcript (Tr.) was received on May 6, 2016.

After the hearing, Applicant submitted three additional exhibits that were admitted in evidence without objection.⁴ The last post-hearing exhibit was submitted on July 8, 2016. No additional evidence was submitted by either side thereafter and, thus, the record closed on July 8, 2016.⁵

Findings of Fact

Applicant, who is in late thirties, is a key officer of a company that has been awarded a number of federal contracts. He has an ownership stake in the company and runs its day-to-day operations. Applicant and his company have received numerous awards and recognition for their work. Applicant earned over \$210,000 in total compensation in 2015, consisting of a base salary of approximately \$175,000 and a bonus of about \$35,000. He recently received corporate distributions totaling over \$65,000. He anticipates his total compensation package will increase to between \$300,000 and \$500,000 in 2017. Applicant lives with his girlfriend and they share living expenses. He estimates that his recurring monthly expenses are between \$1,700 and \$2,000 a month.⁶ Applicant testified that after paying expenses, legal fees, and setting aside money to pay his taxes, he has “almost nothing” left over each month.⁷

² Prehearing scheduling correspondence, the notice of hearing, and case management order are attached as Hearing Exhibits (Hx.) I – III, respectively.

³ Government exhibits (Gx.) 1 – 6 and Applicant’s exhibits (Ax.) A – W. The exhibits attached to Applicant’s Answer were identified as Enclosure (Encl.) 1 – 3 and Attachment (Atch.) A – I, and were also admitted in evidence without objection. (Tr. at 11-13)

⁴ Ax. Y - AA. (There is no Ax. X.) See Hx. IV and V (motions to supplement and Government response.)

⁵ Applicant anticipated his rental property would be sold by August 2016. He expected to receive a windfall of approximately \$150,000 from the sale of the property, which he would then use to reduce his sizeable tax debt. Applicant’s post-hearing exhibits relate to the deletion of inaccurate information appearing on his credit reports. Applicant did not provide any post-hearing documents regarding the sale of the property, nor evidence that he entered into an installment agreement with the IRS or made payments to satisfy the outstanding tax debt for tax years 2003-2007 totaling over \$230,000,

⁶ Tr. 15-18, 25-26, 62-63, 99-100, 113-117, 142-145, 151; Ax. T; Ax. V; Ax. U.

⁷ Tr. 115.

From 1997 to 2002, Applicant served in the U.S. military. He then served as a U.S. Government (USG) contractor in Iraq from 2003 to 2007. Applicant was advised that his earnings were excluded from U.S. income taxes, because he was directly supporting the U.S. mission in a designated combat zone. Applicant testified that he earned from \$400 to \$1,000 a day as a USG contractor in Iraq. In 2010, Applicant found out that his earnings were subject to U.S. income taxes. In the spring of 2011, the IRS informed Applicant that he owed approximately \$150,000 in back taxes for 2003 – 2007. The tax debt has increased to over \$230,000, and the IRS has filed tax liens against Applicant's rental property in State A. Two of the federal tax liens are referenced at SOR 1.f and 1.g, and remain unresolved.⁸

When Applicant returned to the United States, several matters beyond the tax issue negatively impacted his finances.

1) Applicant's first wife left him shortly after he returned to the United States in 2008. She absconded with most of their savings, including about \$100,000 that Applicant had managed to save. Applicant and his first wife were married in 2008, and divorced in 2009.

2) Applicant experienced a decrease in income after leaving his overseas USG contract position. He then lost his job in about August 2009, and "went five months without a paycheck."⁹ His gross income for 2009 was approximately \$135,000. After losing his job, Applicant and his two partners purchased the company that he now runs. Applicant's starting annual salary was approximately \$100,000. He routinely used his income to pay company expenses. By 2012 or 2013, the company was turning a profit and Applicant's salary was increased to \$160,000. He now earns an annual salary of over \$175,000.

3) In 2009, in the midst of his financial trouble, Applicant looked to sell a home he owns in State A. He was unable to sell the property, which he had purchased in 2006; because it had lost a significant amount of its value due to the collapse of the U.S. housing market. He rented out the property and lived off the rent for some time, but received no rental income for about 18 months. He fell behind on his mortgage payments and other financial obligations. As of the hearing, Applicant was renting the property to a reliable, long-term tenant who had expressed interest in purchasing the property. He brought the primary mortgage on the property current, contacted the lender holding the charged-off second mortgage to negotiate a settlement, and addressed the non-tax-related debts appearing on the SOR. He recently hired a debt verification firm to help him dispute certain debts and remove inaccurate information appearing on his credit reports. Applicant resolved or is resolving the non-tax-related SOR debts.

⁸ Tr. 26.

⁹ Tr. 17-22, 35, 52-64, 70-72, 96, 126-127, 107-113, 116, 138-140; Answer, Atch. D; Atch. E at 2, 8-10.

4) In 2010, shortly after starting his present company, Applicant married his second wife. He subsequently discovered she had been unfaithful and they divorced in 2012. Applicant was left financially responsible for some of the marital debt from his second marriage.¹⁰

In 2010, Applicant retained a tax attorney. Applicant initially hired the attorney to help him address a state tax debt. State B started garnishing Applicant's pay for the taxes he had not paid while working overseas as a USG contractor. He resolved the state tax debt through a loan from his company.¹¹

In 2011, the IRS notified Applicant that he owed about \$150,000 in federal income taxes for tax years 2003 – 2007. Applicant discussed with his tax attorney the possibility of submitting an offer in compromise, but did not pursue this option.¹² Instead, after some negotiations, the IRS placed Applicant's account in an uncollectible status based on his then yearly salary of \$100,000. Notwithstanding that Applicant's compensation has more than doubled in the past five years, he remains in an uncollectible status. He does not have an installment agreement with the IRS.¹³

Applicant initially testified that he made voluntary payments to the IRS to pay down his federal tax debt. He then corrected his testimony to note that he had not forwarded any payments to the IRS in the past five years, because it would result in his account going from uncollectible to active repayment status. He further stated that if he were on an IRS repayment plan, he could not satisfy his financial obligations on the monthly stipend of about \$1,800 that the IRS would allow him to keep.¹⁴

Applicant also initially testified that in the past five years the IRS had intercepted his income tax returns and applied the refunds against the balance due on his federal tax liability from 2003 – 2007. After being questioned by Department Counsel, Applicant corrected his testimony to note that he had not had a tax refund in several years.¹⁵

During his May 2014 security clearance background interview, Applicant told the investigator that he was working with the IRS, through his tax attorney, to resolve the federal tax debt. He promised to resolve the debt within two years. He provided no documentation of having made any payments, whether voluntary or involuntary, towards the satisfaction of the more than \$230,000 federal tax debt and associated tax liens.¹⁶

¹⁰ Tr. 19-51, 73-95, 106-107, 114-125, 128-134; Answer, Atch. B – C; Ax. A – E; Ax. L – T.

¹¹ Tr. 21-22, 65, 68-69, 112, 141.

¹² Tr. 134.

¹³ Tr. 107-108.

¹⁴ Compare, Tr. 110-111, with, 125-128, 135-136.

¹⁵ Compare, Tr. 111-112, with, 116, 138-140.

¹⁶ Gx. 2 at 10.

Applicant testified that his current plan to resolve the federal tax debt is to sell the rental property in State A and use the sale proceeds to pay down the debt.¹⁷ Applicant anticipated the property would be sold in “July or August of this summer.”¹⁸ He expected the sale would generate on the “low end” \$150,000.¹⁹ He would then forward the sale proceeds to the IRS “no later than September [2016].”²⁰ He further expected, based on likely bonuses, distributions, and the sale of the property to fully satisfy the federal tax debt by April 2017.²¹ Applicant’s plan is contingent on maintaining his security clearance.²² He presented no evidence post-hearing updating the status of the sale of the property in State A and the federal tax debt. During his testimony, Applicant noted that once he started to repay the tax debt, the IRS would reassess the amount he owed. He estimates the tax debt has increased to about \$250,000.²³

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 eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, 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 commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is

¹⁷ Tr. 39-44; Ax. H; Ax. I.

¹⁸ Tr. 108.

¹⁹ Tr. 62-63.

²⁰ Tr. 43.

²¹ Tr. 63.

²² Tr. 109; Ax. G.

²³ Tr. 125-126.

not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). 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, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "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.

Analysis

Guideline F, Financial Considerations

The financial considerations security concern is explained 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.

The security concern under this guideline is not limited to a consideration of whether an applicant with financial problems might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which an applicant's delinquent debts cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.²⁴ Accordingly, a judge "must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances." ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016).

Applicant's accumulation of a significant amount of delinquent consumer debt and back taxes raises the financial considerations security concern. The record evidence also establishes the disqualifying conditions listed at AG ¶¶ 19(a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations."

²⁴ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

Once disqualifying conditions are established, the burden shifts to Applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision. ISCR Case No. 15-01208 at 4 (citing Directive ¶ E3.1.15). The guideline lists a number of conditions that could mitigate the concern. I have considered all the mitigating conditions, including the following:

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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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 mitigated the security concerns arising from the non-tax-related SOR debts. AG ¶¶ 20(d) and 20(e) apply to these SOR debts.

On the other hand, although AG ¶¶ 20(a) through 20(d) have some applicability in assessing the security concerns arising from the federal tax debt and associated tax liens, said mitigating conditions are insufficient to mitigate the serious security concerns arising from this longstanding and sizeable federal tax debt. In reaching this conclusion, I considered that the federal tax debt and associated liens arose from unusual circumstances. Namely, Applicant was provided bad advice that his earnings as a USG contractor working in a designated combat zone were not subject to state or federal income taxes. Furthermore, Applicant experienced several other life events after returning from overseas that were primarily outside of his control, which negatively impacted his finances. Additionally, he has resolved or is resolving other debts that became delinquent during the period of time he experienced financial trouble.

However, this and other favorable record evidence is undercut by the fact that it has been over five years now since Applicant was notified by the IRS of the sizeable federal tax debt. Before and after being notified of the tax debt, Applicant earned

significant compensation from his employment as a federal contractor. His salary as a federal contractor has never fallen below six figures. Even in 2009, when Applicant was out of work for a few months, his yearly income was approximately \$135,000. His income has more than doubled in the past five years, with reported 2014 and 2015 earnings of more than \$200,000.²⁵ Accordingly, the record evidence reflects that Applicant has had the financial means to start repaying his federal tax debt for some time, but has been unwilling to make the personal financial sacrifices necessary to start repaying the debt. Even after Applicant was made aware over a year ago when the SOR was issued that the federal tax liens raised a security concern, which could negatively impact his ability to continue in his present role with his company, he took no action to resolve the liens.

Instead of reaching out to the IRS to establish a payment plan to resolve his federal tax debt, Applicant has essentially made a promise to resolve the debt in the future. A promise that is contingent on Applicant maintaining his security clearance. Applicant's promise, no matter how sincere, is insufficient to rise to the level of responsible action contemplated by the second prong of AG ¶ 20(b). His promise is also insufficient to mitigate the serious security concerns raised by Applicant's longstanding and sizeable federal tax debt.²⁶

Additionally, as keenly pointed out by Department Counsel at hearing, it is unclear regarding the extent to which Applicant's current finances are under control.²⁷ Notwithstanding Applicant and his girlfriend's testimony about his modest and frugal lifestyle, Applicant failed to adequately explain how he spends approximately \$10,000 in net monthly income that leaves him with nearly nothing in discretionary income to address his federal tax debt. Applicant's testimony and the record evidence leave me to question whether he has truly reformed his past financial habits that, in part, contributed to his current financial circumstances. In short, Applicant failed to demonstrate that his current financial situation is under control and the security-significant issues present in this case are unlikely to recur.

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 all the relevant

²⁵ See Answer, Encl. 3, *Applicant's Affidavit* ("In 2014, my W-2 showed a salary of \$236,000 with an additional \$55,000 - \$60,000 in profit distributions."); Tr. 25-26; Ax. T at 3 (2015 earnings were more than \$210,000.)

²⁶ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information."). See *also*, ISCR Case No. 11-04176 at 2-3 (App. Bd. Dec. 17, 2012) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner).

²⁷ See Tr. 115-118, 153-155.

circumstances, to include the factors listed at AG ¶ 2(a). I hereby incorporate my comments under Guideline F and highlight some additional whole-person factors.

Applicant has honorably served this country, in and out uniform, since at least 1997. His service has included multiple long-term deployments to designated combat zones. He has held a security clearance without issue for nearly twenty years, and was upfront and candid about his financial problems, including his tax-related issues, from the start of the security clearance process. This and other favorable record evidence, including the character reference letter Applicant submitted from one of his business partners and the testimony of his girlfriend, raise favorable inferences regarding Applicant's character. However, after weighing the favorable record evidence against the serious security concerns raised by Applicant's longstanding and sizeable federal tax debt and the legal requirement that all doubts raised by the evidence must be resolved in favor of national security, I find that Applicant failed to meet his burden of proof and persuasion for continued access to classified information.²⁸

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 E (Personal Conduct)	AGAINST APPLICANT
Subparagraphs 1.a – 1.e, 1.h – 1.m:	For Applicant
Subparagraphs 1.f – 1.g:	Against Applicant

Conclusion

In light of the circumstances presented by the record in this case, 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

²⁸ AG ¶ 2(b). See ISCR Case No. 10-02803 at 6 (App. Bd. Mar. 19, 2012) (outstanding service to country insufficient to mitigate security concerns raised by applicant's delinquent debts). See *also*, ISCR Case No. 11-02803 at 3 (App. Bd. Mar. 20, 2012) ("prior favorable adjudications or a good security record are not dispositive of an applicant's security concerns. Even years of safeguarding national security information may not be sufficient to mitigate a history of ongoing, significant delinquent debt.").