



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-03898

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

10/24/2017

Decision

DAM, Shari, Administrative Judge:

Applicant failed to timely file and pay Federal and state income taxes for years 2008, 2009, 2010, 2011, 2012, and 2013. He also accumulated debts during that time, some of which remain delinquent. He failed to disclose many financial problems in his security clearance application. Resulting security concerns were not mitigated. National security eligibility for a security clearance is denied.

Statement of the Case

On April 24, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information*, (AG) effective within the DOD for SORs issued after September 1, 2006; and the AG effective within the DOD for SORs issued after June 8,

2017.¹

On May 21, 2016, Applicant answered the SOR, and elected to have his case decided on the written record in lieu of a hearing. (Item 1.) A complete copy of the Government's File of Relevant Material (FORM), containing eight Items, was mailed to Applicant on July 18, 2016, and received by him on July 25, 2016. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant timely submitted documents that he labeled as Items A through H. I marked his cover letter for those submissions as Item I. He also resubmitted the Government's Items 1 through 8, with comments. Those exhibits are labeled as Applicant Exhibits (AE) 1 through 8. Department Counsel did not object to Applicant's submissions. All Items and exhibits are admitted into evidence. On May 22, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant admitted the allegations in the SOR ¶¶ 1.f, 1.g, 1.p, and 1.r. He denied all other allegations, except that in SOR ¶ 1.q, which he neither admitted nor denied. His answer to that allegation will be construed as a denial. (Item 1.)

Applicant is 56 years old and married since 1997. They have one adult child. Applicant holds a bachelor's and master's degree. He served on active duty with the Air Force from 1978 to 2002, when he retired as a major. He held a security clearance during his service and subsequent to it. (Item 2.) He earned personal awards during his service. He was awarded an Air Medal for combat missions. (Item H.)

In January 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) for re-investigation. In it, he disclosed that he failed to file Federal income tax returns and pay owed taxes for years 2008, 2009, 2010, and 2011. He estimated that he owed \$40,000 for each year, totaling about \$200,000. (Item 2.) He did not disclose any information about his unfiled or unpaid state taxes, including state tax liens filed in 2007 and 2008 and unfiled state tax returns for 2004 and 2005. He did not disclose an automobile repossession in 2011 or other delinquent debts. (Item 2.)

During an interview in April 2013 with a government investigator, Applicant discussed his background and information in his e-QIP. Since 2008, he has been self-employed, working full-time as an independent consultant for defense contractors. He explained that he did not file or pay federal taxes for 2008 through 2011 because he did not pay estimated quarterly self-employment taxes during those years; he also experienced a loss of income for a period of time. After being confronted by the investigator, he acknowledged that he had state tax liens filed in 2004, 2005, 2007, and 2008. He said he did not disclose the 2004 and 2005 tax liens because they were outside

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same under either set of guidelines.

of the 7-year limitation stated in the question. He voluntarily discussed his unfiled state tax returns for 2008, 2009, 2010, and 2011, and taxes owed for those years. He stated his lawyer was working on the tax problems and resolving all outstanding returns, taxes, and liens. He said his failure to disclose information about his state tax issues was an oversight. When confronted with delinquent credit accounts, Applicant again stated that his failure to disclose them was his oversight, and he was unaware of some. (Item 5; AE 1.)

Applicant's wife submitted a letter stating that her erratic spending and gambling created their financial and tax problems. She said Applicant should not be held responsible for her mistakes. (Item 1.)

Based on Applicant's admissions and credit bureau reports (CBR) from January 2013, April 2015, and July 2016, the SOR contained allegations related to timely filing and paying Federal and state income taxes, and delinquent debts. These allegations arose between 2006 and 2015. (Item 6, Item 7, Item 8.) The status of the SOR allegations is as follows:

SOR ¶ 1.a: In December 2014, the Internal Revenue Service (IRS) filed a tax lien against Applicant for \$263,000. (Item 8.) During that same month, the IRS accepted a partial payment installment agreement for tax periods 2008, 2009, 2011, 2012, and 2013. The total tax liability was listed as \$372,445. Applicant was required to begin making monthly payments of \$468 on January 28, 2015. (Item 5.) In his May 2016 answer to the SOR, Applicant submitted a November 2015 letter from the IRS regarding his installment agreement, and included a billing summary as of November 18, 2015. As of that date, Applicant owed \$373,845 for those years, which amount included failure to pay penalties and additional interest. (Item 1.) According to an IRS account transcript for 2008, Applicant made monthly payments of \$468 from December 2015 through July 2016, seemingly on that agreement. (AE B.) Applicant will continue to make those payments until 2024. (AE 1.)

SOR ¶¶ 1.b, 1.c, 1.d, and 1.e: The four tax liens filed by State 1 between 2013 and 2014 were paid and released in September 2015. The tax years underlying these liens are not listed. (Item 1.)

SOR ¶¶ 1.f and 1.g: These two tax liens filed by State 2 between 2007 and 2008 are unresolved. The tax years for the liens are not listed. (Item 1.)

SOR ¶ 1.h: Applicant is unfamiliar with this \$578 delinquent debt, but thinks it may be an account his wife opened without his knowledge. (AE 1, AE 7.) It is unresolved.

SOR ¶ 1.i: Applicant paid this \$502 delinquent debt. (Item 8.) It is resolved.

SOR ¶ 1.j: Applicant is unfamiliar with this \$473 delinquent debt, but thinks it may be an account his wife opened without his knowledge. (AE 1, AE 7.) It is unresolved.

SOR ¶ 1.k: Applicant paid this \$344 delinquent debt. (Item 8.) It is resolved.

SOR ¶ 1.l: Applicant stated that he paid this \$502 delinquent debt, but the credit report has not reported it yet. (AE 1.) It is resolved.

SOR ¶ 1.m: Applicant is unfamiliar with this \$472 delinquent debt, but thinks it may be an account his wife opened without his knowledge. (AE 1, AE 7.) It is unresolved.

SOR ¶ 1.n: Applicant paid this \$27,576 delinquent debt for a repossessed car. (Item 6.) It is resolved.

SOR ¶ 1.o: Applicant paid this \$344 delinquent debt. (Item 9.) It is resolved.

SOR ¶ 1.p: Applicant submitted IRS account transcripts for tax years 2008, 2009, 2010, 2011, 2012, and 2013. All of his Federal tax returns for those years were filed late. (Item B.)

SOR ¶ 1.q: Applicant failed to timely file State 2 income tax returns for tax years 2004 and 2005. (AE 1.)

SOR ¶ 1.r: Applicant failed to timely file State 1 income tax returns for tax year 2011. (AE 1.)

Applicant did not provide evidence of financial or credit counseling. According to the IRS, Applicant reported an adjusted gross income of \$165,626 for 2007; \$141,561 for 2008; \$165,816 for 2009; \$193,060 for 2010; \$218,796 for 2011; \$224,890 for 2012; \$226,752 for 2013; and \$228,499 for 2014. (Item B.) In July 2015, Applicant received an inheritance of \$431,000 from his father's estate, which he used to pay taxes, credit card bills, and living expenses for six months in 2015 when his work was unsteady. (Item 5.) He did not provide a budget from which to predict responsible management of his finances or continued payments of his taxes and any outstanding debts.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in determining an applicant's eligibility for a position of trust.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire

process is a conscientious scrutiny of applicable guidelines in the context 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 national security eligibility will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. According to Directive ¶ E3.1.15, “[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Finally, as emphasized in Section 7 of EO 10865: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure 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 or sensitive information. Financial distress can also be

caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 describes three conditions that could raise security concerns and may be disqualifying in this case:

- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to timely file Federal income tax returns for years 2008 through 2013. He failed to timely pay Federal income taxes for those years, despite earning high salaries. He failed to timely pay state income taxes for six years during that time frame. He also accumulated delinquent debts that he has been unwilling to fully resolve. The evidence raises the above security concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from financial problems:

- (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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant owes unpaid Federal taxes for six years: 2008, 2009, 2010, 2011, 2012, and 2013. His tax problems have been ongoing since 2008 and continue to cast doubt on his reliability. Some delinquent debts remain unresolved. Based on the extent of this problem, there is insufficient evidence to conclude that similar problems will not recur. AG ¶ 20(a) does not apply.

Applicant's tax problems arose because he failed to file quarterly estimated taxes as a self-employed individual. Those circumstances were within his control and responsibility. He did not begin to address his Federal tax issues until December 2014. His wife's gambling problems may have been beyond his control for a period of time; however, at some point during those years, he should have become aware of her gambling habits, and taken actions to responsibly manage their taxes and debts. There is insufficient evidence to establish mitigation under AG ¶ 20(b).

Applicant did not submit evidence that he participated in credit or financial counseling. He did not submit evidence proving that the state tax liens from 2004 and 2005 are resolved. His IRS payment plan will continue until 2024, which indicates the magnitude of his unpaid taxes. Some delinquent debts remain unresolved. There are not clear indications that his financial obligations are sufficiently under control to establish mitigation under AG ¶ 20(c).

Applicant resolved four state tax liens in 2015 and paid six delinquent debts subsequently. Those actions demonstrated a partial good-faith effort to resolve the debts alleged in SOR ¶¶ 1.b through 1.e, 1.i, 1.k, 1.l, 1.n, 1.o, and 1.p, and established some evidence of mitigation under AG ¶ 20(d) as to those debts. In January 2015, he started making payments on six years of unpaid Federal taxes that totaled over \$311,000. At this time, he has not established a sufficient track record of making payments or significant decrease in the amount owed to warrant full mitigation under AG ¶ 20(g) for his unpaid Federal taxes.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to

cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denied that he deliberately failed to disclose all unpaid taxes and unfiled returns, and other negative financial problems in his January 2013 e-QIP. While the state tax liens issued in March 2013 and December 2015 had not been filed when he submitted his e-QIP, he knew that he had not filed or paid state taxes underlying those liens. His defense that his failure to disclose requested financial information was an oversight, is not credible, given the amount of information he left out of his e-QIP. He deliberately failed to disclose requested information. The evidence establishes the above disqualifying condition.

AG ¶ 17 provides two conditions that could mitigate the security concerns raised under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

There is insufficient evidence to establish mitigation under either of the above mitigating conditions. Applicant did not make prompt efforts to correct all omissions on his January 2013 e-QIP during his April 2013 interview. The investigator, noted more than once, that he confronted Applicant about negative financial information that had not been disclosed. Although Applicant specifically disclosed unfiled Federal returns and unpaid taxes for years 2008 through 2011, he did not disclose prior unfiled returns and unpaid state tax liens, a repossession with a significant balance, or any of the multiple delinquent debts. His non-disclosure is a major offense and casts doubt on his good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(d):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility 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 pertinent facts and circumstances surrounding this case. Applicant is a 56-year-old man and retired military officer, who honorably served his country. Since leaving the service, he has successfully worked for defense contractors. That mitigating evidence weighs in favor of granting Applicant a security clearance in the whole-person analysis. However, the facts against granting him a security clearance are significant and outweigh those facts. For six years or more, Applicant failed to responsibly manage his taxes and finances. There is evidence that he did not begin to seriously address those issues until after he submitted his January 2013 e-QIP and was interviewed in April 2013. His unpaid Federal taxes will not be resolved until 2024, despite years of earning a high salary and receiving a large inheritance. The scope of his financial mismanagement is extensive. His lack of forthrightness during the security clearance process is also concerning. Applicant's actions to date are not sufficient to outweigh a history of non-compliance with a fundamental legal obligation to file and pay taxes. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).²

² ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

The record evidence leaves me with serious questions as to Applicant's eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations and personal conduct guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: **AGAINST APPLICANT**

Subparagraph: 1.a:	Against Applicant
Subparagraphs 1.b through 1.e:	For Applicant
Subparagraphs 1.f through 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Subparagraphs 1.k and 1.l:	For Applicant
Subparagraph 1.m:	Against Applicant
Subparagraphs 1.n and 1.o:	For Applicant
Subparagraphs 1.p through 1.r:	Against Applicant

Paragraph 2, Guideline E: **AGAINST APPLICANT**

Subparagraphs: 2.a and 2.b: Against 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. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge