



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



In the matter of:)
)
) ISCR Case No. 16-04053
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

06/19/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 23, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations). The action was taken under Executive Order (Exec. Or.) 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).¹

Applicant responded to the SOR on April 13, 2017, and requested a hearing before an administrative judge. The case was assigned to me on December 4, 2017.

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 18, 2017, scheduling the hearing for January 25, 2018. I convened the hearing as scheduled.

The Government's exhibit list and discovery letter were appended to the record as Hearing Exhibits (HE) I and II. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant objected to GE 3, which was a report of investigation of a background interview conducted on August 10, 2016. Pursuant to ¶ E3.1.20, GE 3 was not admitted in evidence. Applicant testified and submitted Applicant's Exhibits (AE) A through H, which were admitted in evidence without objection.²

At Applicant's request and with no objection from Department Counsel (DC), I kept the record open until February 8, 2018. Applicant timely provided additional documentation, which I marked collectively as AE I and admitted in evidence without objection. I appended to the record as HE III an email from DC indicating she did not have any objection to AE I. DOHA received the hearing transcript (Tr.) on February 2, 2018.

Findings of Fact

Applicant admitted all of the SOR allegations. He is 57 years old, married, and has one adult child. He graduated from high school in 1978, and he earned an associate's degree in 1982 and a bachelor's degree in 2005. He has owned his home since 1998, the value of which was around \$500,000 as of the hearing.³

Applicant formed his own company in October 2004, after his employment with a defense contractor terminated upon contract completion. He most recently worked as a project manager for a defense contractor, from mid-August 2017 until his project was completed in December 2017. He has since been unemployed. He was first granted a DOD security clearance in 1985.⁴

The SOR alleges Applicant's failure to timely file federal and state income tax returns for tax years 2004 through 2015, as required; two outstanding federal tax liens of \$286,526 from February 2011 and \$269,420 from November 2015; and an outstanding state tax lien of \$97,563 from August 2013. The allegations are established by Applicant's admissions. He also listed his tax issues in his May 2016 security clearance application, and his tax liens are reported in his June 2016 and January 2018 credit reports.⁵

² Tr. at 28-31.

³ Tr. at 7-16, 21-25, 81-84, 129; GE 1.

⁴ Tr. at 7-16, 21-25, 85-86, 125-128; GE 1. At hearing, Department Counsel indicated that she had confirmed Applicant's sponsorship for a security clearance on the Joint Personnel Adjudication System (JPAS) database. Tr. at 12-15.

⁵ Response to the SOR; Tr. at 21-25, 43-129; GE 1, 2; AE H.

Applicant's wife quit her job of 17 years and became a stay-at-home mom after the birth of their child in 1999. They subsequently began to fall behind on their debts. Their financial situation was exacerbated when Applicant started his own defense contracting business in October 2004. From mid-October 2004 to 2008, his company worked as a project management consultant for a defense contractor. He earned \$160,000 to \$180,000 annually, but he experienced multiple delays between completing various jobs and getting paid. From 2008 to 2015, he continued to earn approximately \$160,000 annually, though he recalled earning \$140,000 in one year and \$220,000 in another. He had to secure work with subcontractors on his own, and such work consisted of only short-term contracts of several weeks to several months in duration.⁶

Applicant testified that he timely filed his 2004 income tax return online through TurboTax. From mid-October 2004 through December 2004, he was a 1099 independent contractor and he earned \$160,000 to \$180,000 in tax year 2004. He determined through TurboTax that he owed \$9,000 in federal taxes for that year. He had fired the certified public accountant and tax preparer that he and his wife used since 1996, because he found it unusual that her fees always equaled the amount he was due to receive in refunds each tax year. He was also unhappy with her practice of repeatedly filing extensions or asking him for additional information. Upon filing his 2004 tax return, the IRS flagged it because he potentially owed more. He worked directly with the IRS and provided the requested information. At various times, the IRS calculated that he owed between \$27,000 and \$40,000 in federal taxes for that year. Ultimately, he testified that the IRS provided him with an amended tax return reflecting that he owed \$9,000--the same amount he had determined he owed through TurboTax. He testified that he paid the \$9,000 balance.⁷

Applicant testified that he filed his annual income tax returns in a timely manner or he requested an extension when necessary until 2005, when he became overwhelmed. He failed to timely pay his quarterly taxes, and he failed to timely file his federal and state income tax returns for 2005 to 2015. He hired a tax company in 2009 to assist him with filing his tax returns, he paid the company \$20,000, and he provided the company with the necessary business and expense information to file his returns. He testified that the company repeatedly told him they needed more information, they were checking on the status of his case with the IRS, and an IRS representative had not yet been assigned. Meanwhile, he was aware that his tax returns were not filed and that the tax company did not file extension requests. He followed the tax company's direction. At one point, he consulted another individual and paid her \$750 to begin his tax returns, but she was unresponsive.⁸

In February 2011, the IRS entered a lien of \$286,526 against him. In August 2013, the state tax authority entered a lien of \$97,563 against him. In November 2015, the IRS entered a second lien against him, for \$269,420. All three liens were placed

⁶ Tr. at 21-25, 43-129; AE E.

⁷ Tr. at 21-25, 43-129; AE E.

⁸ Tr. at 21-25, 43-129; GE 1; AE E.

against his home. In June 2016, the IRS entered a third lien against him, for \$247,587. He continued to consult with the tax company for assistance. In November 2015, after he received a letter from the IRS, he became more involved in trying to resolve his tax situation, though he was still working with the tax company. He testified that in January 2016, he filed his outstanding federal and state income tax returns with the tax company's assistance. He then submitted an Offer in Compromise (OIC) to the IRS in June 2016, for his outstanding federal taxes for tax years 2004 through 2015, based on his limited financial means to pay the full balance. He made a \$698 payment with his OIC submission. In July 2016, he dismissed the tax company and hired a tax attorney, with whom he was still working to resolve his tax issues as of the hearing. The tax attorney assisted him with responding to numerous requests from the IRS for additional information in connection with its review of his OIC submission.⁹

Applicant testified that the IRS offered him an OIC in December 2017. He testified that in January 2018, the IRS completed its evaluation of his financial information and offered him an addendum to the OIC. In its addendum, he testified that the IRS reduced his outstanding federal taxes from the third and most updated federal tax lien of \$247,587, to \$74,145, by waiving all penalties and interest and negotiating down the remaining balance. He signed the OIC addendum, returned it to the IRS, and was pending final confirmation of acceptance as of the hearing. Once accepted, Applicant expected a two-year, monthly payment plan of \$3,089, after which time he testified that his federal tax arrears, to include the liens, would be resolved.¹⁰

Terms of the OIC provide that all of Applicant's quarterly estimated tax payments for 1099 income must be paid by their quarterly due date, all federal income tax filings must be filed by their due date, and all federal income tax payments must be paid by their due date. Failure to abide by such terms would result in a reinstitution of any waived penalties and interest. Since June 2016 and while the OIC was pending final acceptance by the IRS, Applicant testified that he made 19 good-faith payments of \$750 monthly, for a total of \$12,750. He testified that he and his wife also made a one-time payment of \$67,945 in October 2016, with his wife's inheritance, but the IRS did not factor this payment into the OIC and instead applied it to his total outstanding balance.¹¹

As of his hearing, Applicant testified that he also paid his outstanding federal taxes for tax year 2005, and that he timely filed and paid his 2015 and 2016 federal income taxes. He expected to receive a \$7,000 refund for tax year 2017, which would go directly to the IRS separate from the OIC. On the advice of the IRS and his tax attorney, he has been conservative with his estimated tax withholdings since 2016, so that he does not owe a large amount at the end of every tax year. Whereas he previously paid 18% in taxes, he increased it to 25%. He also makes monthly, rather than quarterly, payments on his estimated tax payments as soon as he is paid for 1099

⁹ Tr. at 21-25, 43-129; AE A, B, C, D, E, H, I.

¹⁰ Tr. at 21-25, 43-129; AE A, B, C, D, E, I.

¹¹ Tr. at 21-25, 43-129; AE A, B, C, D, E, I.

work. He testified that his estimated quarterly tax payments for his company for 2016 and 2017 were current.¹²

Applicant testified that he filed his state income tax returns for 2004 through 2016 in January 2016, with the tax company's assistance, but the state authority did not update his tax information. He testified that he received a \$579 refund for tax period 2016, but he had not cashed it because he believed it should be applied to his outstanding state taxes. As of December 2017, he owed \$116,000 in state taxes. He asked his tax attorney to submit his updated state income tax returns to the state authority, at which time he expected his outstanding balance would be updated to \$67,000. From September through November 2017, Applicant was offered to participate in a state tax amnesty program to resolve \$72,000 in outstanding state taxes for tax periods 2004 through 2010 and 2015. Through the program, he resolved \$3,030 in outstanding state taxes for tax years 2005, 2010, and 2015, by paying an amnesty amount of \$1,122.¹³

Once an OIC was approved for his federal taxes, Applicant expected to begin resolving his outstanding state taxes through an OIC with his tax attorney's assistance. He testified that he made two monthly payments of \$300 in December 2017 and January 2018. He intended to make two more of such payments as a showing of good faith. Once an OIC was reached for his outstanding state taxes, he intended to make such payments simultaneous with his IRS OIC payments.¹⁴

December 2017 IRS account transcripts and copies of Applicant's federal and state income tax returns reflect that Applicant did not timely file his federal and state income tax returns for tax years 2004 through 2014. He timely filed for tax years 2015, 2016, and 2017. He received a \$133 federal refund for 2004, he owed around \$676,462 in federal taxes for 2005 through 2015, he did not owe for 2016, and he received an \$8,101 federal refund for 2017. He also owed around \$81,579 in state taxes for tax years 2005 through 2015 and 2017, and he received a \$1,326 refund for 2016. As of October 2017, the IRS completed a preliminary analysis of Applicant's OIC and concluded that his offer must be increased to no less than \$151,180 before it would consider acceptance of an OIC to resolve his case.¹⁵

In around 2010, Applicant's wife returned to work for the same employer for whom she previously worked, and she earned \$40,000. She earned \$50,000 as of the hearing. They reduced their health insurance costs through her health insurance. Applicant did not have a retirement plan, savings, or other assets. His wife had \$16,000 in savings which they have relied on until he is able to find work. As of the hearing, he was one month delinquent on his mortgage, but he expected to make a payment to

¹² Tr. at 21-25, 43-129; AE B, I.

¹³ Tr. at 21-25, 43-129; GE 1; AE F, G, I.

¹⁴ Tr. at 21-25, 43-129; GE 1; AE F, G, I.

¹⁵ AE I.

become current shortly after the hearing. He and his wife have a budget. He has not received financial counseling, but he has received tax advice from both the tax company and his tax attorney.¹⁶

Applicant acknowledged that he has to pay attention to and follow security rules and regulations in his role as a project server consultant, but he failed to do so with his taxes. He testified that he should have adjusted his personal financial obligations so that he could meet all of his obligations.¹⁷

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 are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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

¹⁶ Tr. at 21-25, 43-129.

¹⁷ Tr. at 21-25, 43-129.

extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

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

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (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 timely filed his 2015 federal and state income tax returns. However, he failed to timely file his 2004 through 2014 federal and state income tax returns, as required. He was also unable to pay his delinquent federal and state taxes. The evidence is sufficient to raise AG ¶¶ 19(a), 19(c), and 19(f) as disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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, 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.

While Applicant eventually filed his 2004 through 2014 federal and state income tax returns, and timely filed his 2015 through 2017 tax returns, he has significant federal and state taxes that remain unresolved, to include several liens. Though he started the OIC process with the IRS, made good-faith payments with his OIC submission, and made a one-time lump sum payment towards his outstanding federal taxes, the IRS has not yet approved an OIC. In addition, though he resolved outstanding state taxes for tax years 2005, 2010, and 2015 through a state tax amnesty program, and made several good-faith payments towards his outstanding state taxes, he has not yet started the OIC process with the state authority. Applicant's finances are not under control. There is insufficient evidence to conclude that his financial problems are unlikely to recur. His failure to resolve his delinquent taxes, and to timely file his 2004 through 2014 federal and state income tax returns as required, cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(g) do not apply, and AG ¶ 20(d) only partially applies.

Conditions beyond his control contributed to Applicant's financial problems. For the full application of AG ¶ 20(b), Applicant must provide evidence that he acted responsibly under the circumstances. He acknowledged that he became overwhelmed with his tax situation in 2005. He did not hire a tax company to assist him until 2009, and the tax company did not file his tax returns on his behalf until around January 2016. While he unsuccessfully consulted with another individual between 2009 and 2016, he returned to the tax company despite his knowledge that the company had not filed his delinquent tax returns, had not requested extensions to do so, and was unsuccessful in reaching any progress with his outstanding taxes. He did not become more directly involved with resolving his tax situation until after he received a letter from the IRS in November 2015, and he did not hire a tax attorney until July 2016. I find that there is

insufficient evidence to conclude that Applicant acted responsibly under the circumstances. While his tax attorney has provided him with tax advice and is assisting him with resolving his tax situation, it is not yet under control. AG ¶¶ 20(b) and 20(c) are therefore only partially applicable.

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(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.

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. I have incorporated my comments under Guideline F in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations security concerns.

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
Subparagraphs 1.a - 1.e:	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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge