



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



In the matter of:

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ISCR Case No. 17-01337

Applicant for Security Clearance

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel

For Applicant: *Pro se*

03/14/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant rehabilitated his past-due home mortgage loan. Two minor medical debts in collection were paid by his medical insurer. Applicant has not adequately addressed a federal tax lien for approximately \$355,000 from 2009. Clearance is denied.

Statement of the Case

On May 15, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 on September 1, 2006.

On July 14, 2017, Applicant responded to the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On September 22, 2017, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 30, 2017, I scheduled a hearing for December 4, 2017. In prehearing guidance, Applicant was informed that the Director of National Intelligence (DNI) had issued Security Executive Agent Directive 4 establishing the National Security Adjudicative Guidelines (AG) effective June 8, 2017, to all adjudications for national security eligibility or eligibility to hold a sensitive position.¹

At the hearing, five Government exhibits (GEs 1-5) and three Applicant exhibits (AEs A-C) were admitted in evidence. Three hearing exhibits (HE) were marked but not entered into evidence: an August 18, 2017 letter forwarding discovery of GEs 1-3 and 5 to Applicant (HE 1); a November 22, 2017 email to Applicant forwarding GE 4 (HE 2); and a list of the Government's exhibits (HE 3). Applicant testified, as reflected in a transcript (Tr.) received on December 12, 2017.

I held the record open until January 2, 2018, for Applicant to supplement the record. On January 4, 2018, Applicant submitted an email (AE D) with attachments AEs E-K. On January 8, 2018, the Government did not object to their admissibility but expressed some concern about the lack of evidence showing payment of a federal tax lien and lack of clarity about whether contacts with the IRS in June 2007 were related to the tax lien. The Government also expressed concern that the tax returns of Applicant's then underage son for tax years 2002-2004 (AEs F-H) were unsigned and not evidence of outstanding taxes owed for those years. Notwithstanding their late submission, I accepted AEs D-K in evidence while noting the concerns of the Government for the record.

Summary of SOR Allegations

The SOR alleges under Guideline F that, as of May 15, 2017, Applicant was past due \$3,782 on his home mortgage loan with a balance of \$255,991 (SOR ¶ 1.a); that he was indebted on a 2009 federal tax lien for \$355,000 (SOR ¶ 1.b); and that he owed delinquent medical debts of \$280 (SOR ¶ 1.c) and \$75 (SOR ¶ 1.d). Applicant denied the debts when he answered the SOR. He indicated that his mortgage loan was current; that the tax lien had been released, and he did not owe \$355,000; and that the medical debts were paid.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 60-year-old college graduate who has worked for his defense-contractor employer since November 1979. As an associate staff member, he has held a

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

DOD top-secret clearance for the last seven years. He held access to sensitive compartmented information (SCI) until his SCI access eligibility was revoked in 2010 because of some tax liens. (GE 1; Tr. 47.)

Applicant wed his current spouse in April 1994. They have two sons now ages 23 and 17, and a daughter age 22. Applicant was previously married from September 1986 to October 1990. He and his ex-wife had no children together. (GE 1.)

Applicant has a history of late tax filings, including for tax years 2002, 2003, and 2004, although he does not now recall the years for which he filed late returns. (Tr. 43, 47.) He was denied SCI access eligibility in 2010, in part because of state tax liens filed against him in 2005, 2006, and 2007, which Applicant explained was because of short-term trading.² (Tr. 40.)

On February 12, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant responded affirmatively to a tax inquiry concerning failure to timely file returns or pay taxes, and disclosed that he had filed a late return for 2008. He blamed his financial advisor who “bought and sold a lot of stock,” which resulted in a \$60,000 lien being placed against him because of the gross proceeds from the stock sales. Applicant asserted that after he filed his delinquent return, it was determined that he did not owe any money, and so the IRS released the lien. In response to an inquiry concerning any delinquency involving routine accounts in the last seven years, Applicant reported that he “missed” making a \$3,000 mortgage payment in October 2009, but he made the payment in February 2010. He also reported that his spouse had let the payments slip on a car loan in his name to the point where the vehicle was repossessed. However, they paid off the loan and reclaimed the car. Applicant also disclosed that he had recently learned about two medical debts in collection for \$355 that he was investigating. (GE 1.)

A check of Applicant’s credit on February 26, 2016, showed that the IRS had filed a tax lien of \$60,826 against Applicant in September 2011, which was released on payment in December 2011. However, an IRS tax lien had also been filed against him for \$355,563 in November 2009. Applicant’s home mortgage, which was jointly opened in June 2006 for \$300,000, was reportedly current with a \$258,484 balance. However, he had a history of late payments on the loan. The account had been as many as 120 days past due. It was 30 days late 12 times and 90 days past due in January 2014. His credit report confirmed that he had been late 60 days on an auto loan in July 2011 before paying off his loan in August 2011. There were two outstanding medical collection debts for \$280 and \$75 on his credit record from 2011 and 2012, respectively. Other accounts were current. (GE 2.)

Applicant’s background investigation revealed that the IRS had filed a federal tax lien against Applicant on October 29, 2009, for outstanding tax liabilities totaling \$355,563 for tax years 2002 (\$70,264), 2003 (\$156,684), and 2004 (\$128,615). (GE 4.) On January

² Applicant was confronted at his hearing about state tax liens of \$27,672 for 2005, \$43,287 for 2006, and \$52,227 for 2008 as well as the \$60,826 tax lien for 2011. Applicant claims not to recall the amounts of the tax liens for 2005, 2006, and 2008, but he does not deny that there were tax liens that he resolved. (Tr. 40.)

18, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his financial issues and the tax liens. Applicant explained that the IRS filed \$60,000 tax liens against him in 2009 and September 2011 when he failed to file his 2008 return on time, but after he filed his return, the liens were released in December 2011. When confronted about the \$355,563 tax lien, Applicant claimed no specific recollection of the lien, and he expressed his belief that it was similar in nature to the \$60,000 tax liens discussed and that, to the best of his knowledge, the tax lien had been released and he owes nothing to the IRS. Applicant was given the opportunity to provide additional documentation, but he indicated that he did not have documentation available regarding the discussed accounts, including the tax liens. (GE 5.)

As of March 2017, Applicant was 30 days late on his mortgage loan. His account was past due for \$3,782. An unpaid tax lien, reportedly for \$355,000 filed in November 2009, was still on his credit record. (GE 3.)

Applicant paid late fees of \$817 in late May 2017 to bring his mortgage loan current. (AE B.) As of mid-November 2017, his mortgage payments were up to date. (AE C.) As of June 1, 2017, the medical collection debts on his credit record had been paid (AE A), according to Applicant by his medical insurer. (Tr. 31.)

When Applicant answered the SOR, he contested the alleged \$355,000 tax lien on the basis that the tax lien filed against him in 2009 had been released. At his hearing, Applicant challenged the IRS Notice of Federal Tax lien for \$355,563 dated October 2009 because the taxpayer identification number did not match his social security number, although the lien bore his name and current address. (Tr. 20.) Applicant subsequently testified that the tax lien may relate to a family member. (Tr. 33-35.) When pressed on the issue, Applicant admitted that when his 23-year-old son was a minor (around age eight), he had an investment account, and that the tax identification number associated with the \$355,563 tax lien was his son's social security number. (Tr. 35.) Applicant then blamed his financial advisor, who had generated significant gross proceeds on the account from short-term trading allegedly without Applicant's consent. Applicant acknowledged, however, that he had not expressed any concerns to his financial advisor because, at least initially, he believed that his financial advisor was trading in his best interests. (Tr. 41.) He claimed he did not realize that the financial advisor was making all those trades on his son's behalf, but he also admitted that that he "lost track of the account for a while." (Tr. 35-36, 38.) Applicant admitted that he was responsible for the tax issues on his then minor son's account, and that he had not filed tax returns for his son for the tax years 2003, 2004, or 2005. It was a matter of getting the documents together. (Tr. 36, 38.) Applicant expressed his belief that the tax lien could be cleared up with the IRS and that he owed no taxes because of the net losses on the stock trades. (Tr. 36, 49.) Applicant denied receiving any notice from the IRS about the tax lien. He claimed not to have known about the tax lien before his OPM interview in January 2017. As of December 2017, he had made no payments to the IRS because he disputes the assessed tax liabilities. (Tr. 47, 53-54).

Applicant testified that he was "surprised" to learn in January 2017 that the tax lien was on his credit record. According to Applicant, the OPM investigator indicated that he

was going to check with the courthouse to see if the lien had been released. Applicant assumed that the investigator would contact him, and when heard nothing from the OPM investigator, he did nothing until he received the SOR. He began inquiries of the IRS, and in November 2017, sent a form to the IRS asking for release of the lien. (Tr. 45, 54.)

In January 2018, Applicant submitted undated and unsigned federal income tax returns for his son for tax years 2002, 2003, and 2004. The 2002 federal income tax return shows adjusted gross income of negative \$3,000 based on \$26,832 in capital losses from some \$141,000 in stock sales. (AE F.) The 2003 federal income tax return shows adjusted gross income of \$3,849, and a tax liability of \$308, based on dividends and interest, \$12,597 in long-term capital gains from stock trades, and \$29,959 in short-term capital losses from short-term sales of \$212,558. (AE G.) The federal income tax return for 2004 shows adjusted gross income of \$399, but zero tax liability because of short-term capital losses of \$44,251 and long-term capital gains of \$8,149. (AE H.) As of the close of the evidentiary record, the IRS tax lien of approximately \$355,563 has not been released. (AE D; Tr. 44.)

Applicant earns approximately \$110,000 annually in his defense-contractor employment. His spouse does not work outside the home. (Tr. 47.) Applicant's financial situation is stable. He has investment assets of at least \$540,550 (AE J), \$760,194 in 401(k) assets (AE K), and \$21,488 in checking account deposits. (AE I.) He has not had any financial counseling. (Tr. 54.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to 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 overall 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." 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of 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 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 about financial considerations are articulated 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. 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.

An applicant is not required to be debt free, but is required to manage his finances in a way as to exhibit sound judgment and responsibility. The concern under Guideline F is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information.

Guideline F security concerns are established, primarily because of the unresolved federal tax lien of \$355,563 and the history of delinquency on their home mortgage. Applicant and his spouse were \$3,786 past due (one payment plus late charges) on their home mortgage loan in March 2017, although they had been late as many as 120 days in

the past and 90 days in January 2014. Two medical debts of \$75 and \$280 were placed for collection because of a dispute with his medical insurer, who finally paid the debts. The debts were no longer on Applicant's credit record as of March 2017, and AE A shows they have been paid. Disqualifying conditions AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(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," apply. Regarding AG ¶ 19(a), "inability to satisfy debts," Applicant would seemingly have sufficient assets to pay his mortgage loan on time. While a recent late payment was attributed to Applicant being on temporary duty for his employer, the other late payments are unexplained. As for the sizeable federal tax lien from 2009, Applicant disputes the IRS assessment of \$355,563 made without returns having been filed for tax years 2002, 2003, and 2004. Based on recently completed tax returns for those years, which were not shown to have been filed, the IRS may reduce the tax liability and release the tax lien. However, I can only base my decision on the evidence before me, which includes an outstanding federal tax lien of \$355,563, for which Applicant is primarily responsible. As a minor, his son could not legally authorize the trades.

One or more of the following conditions under AG ¶ 20 may apply in mitigation:

(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 person has received or is receiving 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;

(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; 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.

The medical collection debts are from 2011 and 2012 and were covered by insurance. AG ¶¶ 20(a), 20(b), 20(c), and 20(d) apply in mitigation of those debts. Applicant has had no record of serious mortgage delinquency since 2014, and while his history of late payments has not been fully explained, AG ¶¶ 20 (c) and AG 20(d) are established because his loan has been brought current.

Unresolved concerns exist with regard to Applicant's failure to comply with his tax obligation to report the gains or losses from investment trades on his minor son's account, which led the IRS to issue the sizeable tax lien for tax years 2002, 2003, and 2004. Even assuming that Applicant failed to receive timely notice of the IRS tax lien in SOR ¶ 1.b, Applicant knew there had been significant stock-trading activity on his son's account and that it had tax reporting implications. Applicant had resolved several state tax liens filed against him because of tax liabilities resulting from short trading in his own name in the past, so the federal tax lien at issue is not an isolated incident. AG ¶ 20(a) does not apply in mitigation of the tax lien. Although it was filed some time ago, it has not been resolved.

Regarding AG ¶ 20(b), Applicant assigned some blame to his financial advisor, who he claimed made trades without his consent. However, when asked why he had not taken any action against the financial advisor for this allegedly unauthorized trading, Applicant responded that he believed the advisor was trading in his best interest. Applicant had a responsibility to monitor the investment activity on his minor son's account, and he testified that he "kind of lost track of the account for a while." It has not been shown that AG ¶ 20(b) applies with respect to the large federal tax lien, which is attributed to Applicant's failure to comply with his income tax filing and payment obligations on his then underage son's behalf.

Applicant had done little as of his security clearance hearing to address the tax lien, apart from sending a form to the IRS in November 2017 asking that it be released. After his hearing, he submitted federal income tax returns for his son for tax years 2002, 2003, and 2004, the years covered by the lien. The returns are unsigned and undated, and there is no evidence that they were filed with the IRS. As of the close of the record, the lien had not been resolved. Neither AG ¶ 20(c) nor AG ¶ 20(d) has been established. Based on the tax returns, Applicant believes he owes only \$308 to the IRS for tax year 2003 and nothing for 2002 and 2004. He intends to rely on those returns as evidence to the IRS that he does not owe the tax lien. AG ¶ 20(e) could apply with regard to the taxes owed if the IRS accepts the returns as prepared, but it would be premature to mitigate the financial considerations concerns under AG ¶ 20(e) or AG ¶ 20(g) based on the evidence before me.

Whole-Person Concept

In the whole-person evaluation, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).³ Some of the factors in AG ¶ 2(d) were addressed under Guideline F, but some warrant additional comment.

³ The factors under AG ¶ 2(d) are as follows:

The security clearance adjudication is not aimed at collecting an applicant's personal debts. Rather, it involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Applicant exercised poor judgment in handling his responsibilities with regard to reporting the gains and losses on his then minor son's investment account to the IRS for multiple years. Applicant was less than fully forthcoming about the tax lien at his security clearance hearing. He initially expressed doubts about the tax lien, which was addressed to him at his current address, because the taxpayer identification number did not belong to him. He claimed he was "trying to get it cleared up and figure out what [the lien] is all about." When asked whether he knew anything about the lien or the circumstances that led to the lien, he responded that he needed more information. He later admitted that one of the agents thought it pertained to a member of his family and that it could be associated with an investment account of the older of his two sons. When asked who handled the investments for his then underage son, Applicant responded, "It changed brokerages a couple of times." As to who would have been the responsible party to deal with the IRS, Applicant answered, "If he was a minor, I guess that would have fallen on me." Applicant had a good idea that the lien was generated because of the gross proceeds in stock trades on his son's investment account. He knew he had not filed tax returns for those three years for his son.

Applicant failed to exercise the good judgment that must be expected of persons with security clearance eligibility by not fulfilling his tax obligations with regard to reporting the investment activity and not paying the taxes owed in a timely fashion. By initially withholding significant facts known to him about the tax matter during his hearing testimony, he raised doubts about whether he can be counted on to act without regard to his self-interest. After considering all the facts and circumstances, I conclude that it is not clearly consistent with the national interest to continue Applicant's security clearance eligibility.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant

(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.

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge