



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



In the matter of:

ISCR Case No. 17-02001

Applicant for Security Clearance

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel

For Applicant: Daniel J. Gunther, Esq.

11/07/2018

Decision

GOLDSTEIN, Jennifer, Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F, Financial Considerations. His failure to timely file tax returns and failure to pay federal income tax obligations in a timely manner, remain a concern. National security eligibility for access to classified information is denied.

Statement of the Case

On July 28, 2017, 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. 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 (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on August 18, 2017, and requested a decision based on the administrative record. On September 12, 2017, Department Counsel requested a hearing before an administrative judge. The case was assigned to another administrative judge on March 15, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 16, 2018, scheduling the hearing for May 22, 2018. On May 21, 2018, the hearing was cancelled, pursuant to a continuance request by Applicant's counsel. On May 29, 2018, a new notice of hearing was issued, scheduling the hearing for June 28, 2018. The case was reassigned to me on June 12, 2018. Applicant filed a supplemental response to the SOR on June 18, 2018. I convened the hearing as rescheduled on June 28, 2018. The Government offered Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf, called one witness, and presented Applicant Exhibits (AE) 1 through 12, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 9, 2018. On October 25, 2018, Applicant's counsel submitted a letter withdrawing from representation of Applicant in this matter, which I marked Hearing Exhibit I.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, 1.c, and 1.d. He denied SOR ¶¶ 1.e and 1.f. The SOR alleged Applicant had a state tax lien in the amount of \$7,095; two Federal tax liens in the amounts of \$85,485 and \$9,739; that he failed to file both Federal and state income tax returns for tax years 2009 through 2012; and that he filed Chapter 7 bankruptcy in 2014. After a thorough and careful review of the testimony, pleadings, and exhibits, I make the following findings of fact:

Applicant has worked for his employer for approximately 16 months. He is married and has four adult children, three of which reside with him. He has held a security clearance for ten years. (Tr. 30-31.)

Applicant experienced financial problems from 2008 through at least 2012, while he was self-employed. He owned two consulting firms, which subcontracted to defense industry contractors. His businesses did well initially, but slowly business decreased due to cuts in defense spending. He experienced additional financial problems when contractors issued late payments. Eventually he had to close the businesses. While trying to grow the businesses, he failed to "take any taxes out for [him]self" when he did payroll deductions. As a result in 2007, he had a \$18,000 Federal tax liability. He continued to incur Federal and state tax liabilities while operating his businesses. In 2013, Applicant found another job, but at a substantially lower salary. In April 2013, two Federal tax liens were filed against him for \$9,739 and \$85,485. In April 2015, his state filed a tax lien against him in the amount of \$7,095. (GE 4; AE 8; Tr. 33-35, 51, 57-58, 60.)

Applicant admitted that he failed to file his Federal and state income tax returns for tax years 2009 through 2012. He indicated that he was focused on driving his business and did not have a good answer for his failure to file his Federal and state income tax returns. In 2010, he hired a company (Company 1) to assist him with filing his delinquent

2008 and 2009 Federal and state income tax returns. He paid Company 1 \$5,550, and completed intake forms. He followed up with emails and phone calls, but Company 1 was not responsive. Company 1 failed to take any actions to resolve his outstanding tax returns or delinquencies. (Tr. 31-32, 39-40, 62, 74; AE 1; AE 4.)

In 2012, Applicant hired Company 2 to establish a payment plan to resolve his Federal tax delinquency. Company 2 tried to establish an installment agreement for monthly payments of \$500 to be made to the IRS. (AE 4; AE 5; Tr. 63-64.) It is unclear from the record what happened to that agreement. (AE 12.)

In 2013, he hired another tax firm (Company 3) to file his outstanding tax returns. Company 3 has helped him negotiate with his state to repay his delinquent tax obligation. He documented that on February 1, 2018, he made two \$1,000 payments to his state comptroller and promised to make payments of \$400 monthly to resolve his state tax debt. He currently owes over \$100,000 to his state in back income taxes. (AE 3; AE 4; AE 5; AE 12; Tr. 69.)

Applicant's wages were garnished by the Federal government for approximately one month in June to July of 2014. During that month, Applicant claimed \$9,000 was garnished toward his Federal tax delinquency. He was able to stop the garnishment by setting up a temporary payment agreement with the IRS. He agreed to remit \$1,000 per month to resolve his delinquency. (GE 4.) It is unclear from the record if Applicant made any payments under that agreement. (GE 2; GE 4; AE 12.)

Company 3 was acquired by Company 4. Company 4 is currently representing Applicant in negotiations with the IRS to resolve his outstanding debt. Since 2015, Applicant and his wife reflect they have been awaiting assignment of an IRS revenue officer. (AE 5; Tr. 37-43, 65-68-69, 88.) Company 4 provided a letter indicating that as of June 11, 2018, Applicant's case is "awaiting assignment to a local agent" in his state. (AE 6.) He owes the IRS in excess of \$400,000. He is not currently making payments on this debt. (AE 12; Tr. 74-76.)

Applicant's IRS tax transcripts indicate that his 2009 Federal income tax returns were filed in December 2011. He owes \$61,147 to the IRS for 2009. His 2010 Federal income tax returns were filed in September 2015. He owes the IRS \$83,736 for the 2010 tax year. His 2011 Federal income tax return was filed in October 2015, and he owes \$136,502 for that year. His 2012 Federal income tax return was filed in October 2015, and he owes \$92,376 for 2012. He also owes \$26,639 for the 2013 tax year, although that return was filed in a timely manner. He owed nothing for the 2014 or 2015 tax years. (AE 12.)

In 2014, Applicant filed Chapter 7 bankruptcy. He completed a debt education course concerning personal financial management as part of the bankruptcy requirements. He attributed his bankruptcy to his unemployment and underemployment. His summary of schedules reflected that he had \$21,605 in unsecured assets and total

liabilities of \$509,082, which included his home mortgage. He discharged the unsecured debt through bankruptcy. (AE 2; AE 11; Tr. 36.)

When Applicant began experiencing financial problems, he “pull[ed his] kids out of college” to reduce costs. (Tr. 54.) His wife now earns a monthly income of \$3,265. He has doubled his income and now earns enough to make payments on his tax obligations. (AE 9; AE 10; Tr. 36, 48.) He is current on his car payments. (Tr. 43.) Since 2014, he has not incurred any substantial new debt. His budget reflects he has a monthly surplus of \$4,806, after expenses are paid. (AE 7; AE. 10; Tr. 48-49.) Since 2013, he has filed his Federal and state income tax returns in a timely manner and paid the amounts owed. (Tr. 52.)

Policies

When evaluating an applicant's 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 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, 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. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “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 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 an applicant may deliberately or inadvertently fail to safeguard classified information.

Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, Section 7 of EO 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F: Financial Considerations

The security concern relating to the guideline 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. 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 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (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 has a history of not meeting his financial obligations. He failed to timely file Federal and state income tax returns from 2009 through 2012, and pay his Federal and state income tax obligations from 2009 to present, which resulted in three tax liens that were filed against him. He also discharged debt through Chapter 7 bankruptcy. There

is sufficient evidence to raise substantial security concerns under the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from Applicant's financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, 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.

In Financial cases, the Appeal Board has held:

Failure to comply with tax laws suggests that an applicant has a problem with complying with well-established government rules and regulations. Voluntary compliance with such rules and regulations is essential for protecting classified information. (ISCR Case No. 14-04437 at 3 (App. Bd. April 15, 2016); ISCR Case No. 16-01211 at 5 (App. Bd. May 30, 2018).)

In the instant case, Applicant experienced financial problems that were partially due to events beyond his control, including a downturn in the defense contracting industry and late payments by contractors. He also acknowledged that he made mistakes in willfully failing to file his Federal and state income tax returns for tax years 2009 to 2012. The events beyond his control all took place prior to 2013. Since 2013, Applicant has documented mere gestures towards addressing his Federal tax liability. His wages were garnished in 2014, and he agreed to make payments of \$1,000 toward resolution of his tax debt. It is unclear if he made any payments under that agreement. What is clear is that he is not currently making any payments on his growing Federal tax debt. While he

has hired several different tax resolution firms, and completed financial counseling related to his bankruptcy petition, he has only recently established payment arrangements with his state taxation authority and still lacks a plan for the repayment of his Federal tax debt. The Appeal Board has found that “Applicants who only begin addressing their security-significant conduct when their personal interests are at stake may be lacking in judgment and reliability.” (ISCR Case No. 16-01211 at 4 (App. Bd. May 30, 2018.)) There are no clear indications that Applicant has mitigated his past and recent questionable financial decisions.

The timing of his federal income tax filings remains concerning, as does his remaining approximately \$400,000 in federal tax debt. Applicant has repeatedly failed to fulfil this significant legal obligation. Further, while he has begun to resolve his state tax debt with documentation of two payments to his state’s comptroller, he failed to demonstrate a track record of making the required payments at the close of the record. The timing of his actions to resolve his tax obligations and his remaining delinquent debt do not establish Applicant has the requisite good judgment needed to possess a security clearance. AG ¶ 20(g) has limited application as he has filed all past-due taxes but has not repaid his delinquent taxes. However, none of the above mitigating conditions provide full mitigation.

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 the 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 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 has a long history of inability or unwillingness to resolve his state and Federal income tax debts. Despite an improvement in his financial situation and a current monthly remainder of more than \$4,000, he has failed make payments on his Federal tax debt. The record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security

clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	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 access to classified information. National security eligibility is denied.

Jennifer I. Goldstein
Administrative Judge