



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



In the matter of:)	
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)	ISCR Case No. 14-04159
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: Gregory F. Greiner, Esquire

05/23/2016

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On October 17, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations).¹ Applicant answered the SOR on November 26, 2014. He also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on October 28, 2015. DOHA issued a notice of hearing on November 2, 2015, setting the hearing for December 1, 2015. The hearing was convened as scheduled.

During the hearing, the Government offered seven documents, which were accepted without objection as exhibits (Exs.) 1-7. Applicant offered testimony and four documents, which were accepted as Exs. A-D. The record was kept open for 30 days in the event the parties wished to submit additional materials. In the interim, the transcript

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

(Tr.) was received on December 19, 2015. With no additional materials received, the record was closed on January 2, 2016.

Findings of Fact

At issue in the SOR are ¶ 1) an Internal Revenue Service (IRS) tax lien entered in 2010 for approximately \$298,177; ¶ 2) a state tax lien entered in 1999 for about \$9,928; ¶ 3) Applicant's failure to file Federal income tax returns since tax year (TY) 2001; and ¶ 4) his failure to file state income tax returns since 2001.

Regarding SOR ¶ 1), Applicant noted in his November 2014 SOR Answer that he received a Federal tax lien in July 2010 for nearly \$300,000. He then denied the amount, noting he had paid over a million dollars in estimated taxes "since 2000 – 2013." (SOR Answer at 1). As for ¶ 2), he admitted the state tax lien for \$9,928.²

Concerning ¶ 3) in the October 2014 SOR Answer, Applicant admitted that he had not filed completed Federal income tax returns since 2001. He then denied not having paid Federal income taxes since that time as he had paid estimated taxes for the TYs since 2000 and more recently "retained professional accountants to complete final filings of all Federal income tax returns by the end of 2014." Regarding ¶ 4), Applicant addressed the issue regarding the allegation that he had failed to file state income tax returns since 2001 by denying that he had not filed state income tax returns for 2002. In so doing, he asserted that while he had not filed *completed* state income tax returns since 2002, he had paid *estimated* state income taxes for all TYs since 2003.³ (emphasis added)

Applicant's SOR answers are incorporated into the findings of fact. In addition, I find the following facts applicable. Applicant is a 62-year-old technical executive who has worked for the same defense contractor for almost a year. He has earned two bachelor's degrees, a master's degree, and a science-related doctoral degree. He started working in defense-related sectors in 1996. He has been married for over 25 years and has two children, one adult and one teenager. From the late 1990s through about 2014, Applicant was "extremely busy, professionally," a factor he asserts contributed to the income tax failings at issue in the October 2014 SOR. (Tr. 18)

Applicant's tax issues first began over 15 years ago. In 1999, Applicant employed "an accountant that [he] hired when [he] transitioned to working for a company to becoming a self-employed consultant." (Tr. 18) Applicant found the accountant too aggressive with regard to income tax deductions. Ultimately, questions were raised by the IRS regarding his income tax return filings. Rather than go through a potentially lengthy dispute process, Applicant changed accountants and paid estimated taxes

² Applicant also wrote that he denied not paying state income taxes for TY "2000 and estimated taxes for [TYs 2003 - 2014] in the amount of \$263,398." (SOR Answer at 1)

³ Applicant also wrote that he hired accountants to finish final income tax returns by the end of 2014.

toward the disputed amounts. Not long thereafter, he ceased working with that accountant's firm.

In 2001, Applicant looked for a new accountant. Following 9/11, he was very busy with his work, so he depended on his spouse to gather and deliver to a new accountant their tax information from 1999 forward.⁴ He knew she could be unreliable. She failed to make copies of the paperwork involved, and the information was lost. (Tr. 19) Applicant suspected that her unreliability might be related to health or mental issues. Thereafter, from 2001 until 2011, Applicant managed their taxes by himself. (Tr. 39-40)

In 2011 or 2012, Applicant received a letter from the IRS concerning a lien. Apprised of his tax issues, he again sought professional help for his taxes after many years of only doing estimated taxes unaided. He hired a certified public accountant (CPA) with experience dealing with IRS liens. That specialist told Applicant that with his retention, Applicant's situation went from a lien process to a settlement and resolution process. (Tr. 33, 41)

In the interim, when Applicant took charge of the taxes himself, he never completed any final income tax returns. (Tr. 35) Rather than do his tax forms on paper, which might be misplaced amongst household clutter, he did his tax work on a computer. (Tr. 26-27, 34) He thus performed estimated income tax filings for tax years (TY) 2000 through at least 2014. He would discern the highest tax rate, then he "just took that percentage and made sure [he] made that payment, knowing that when the taxes were finally really done, [he] was likely to have a refund."⁵ (Tr. 29) He notes that he "didn't do a good job" in progressing from submitting and paying estimated taxes to actually filing complete and final tax returns. (Tr. 41)

During this period, the IRS disputed some of his filings, but Applicant has "finally found some of the documentation" related to those years. (Tr. 29) To date, he believes he has paid \$1.6 million in Federal and state estimated taxes for those years. (Tr. 30) Most recently, in the summer of 2015, Applicant received notice that he owed more money (almost \$30,000) for his 2013 taxes, which he believes has become a part of the IRS settlement and resolution process. He has thus far been unable to settle the amount he owes to the IRS regarding his income tax liability for TYs 2000, 2002, and 2003. (Ex. A)

Going forward, Applicant has implemented a plan for approaching his tax issues. He intends to continue using a CPA to negotiate a settlement on his tax liability. He also

⁴ During this time, Applicant expected that his wife would "manage the home and manage the children," "take away from me the burden of dealing with the finances," the aforementioned tasks related to their income taxes, and reconstructing their financial history that was lost. She also monitored the incoming bills. (Tr. 20-21) As a result, timely bill payment was often haphazard.

⁵ Although Applicant filed estimated taxes and paid sums to the IRS, he never formally filed final tax returns. (Tr. 41) He was aware that "the Government is not very appreciative when you don't file your taxes on time, even though you are paying your estimated taxes." (Tr. 41)

intends to reconstruct his tax and financial history so that all his records are on his computer by the end of 2015. (Tr. 42) Some progress has been made, but it has been erratic. He has three more tax years for which he needs to provide final income tax returns to the IRS (Tr. 52) Applicant notes that he is now on salary, so his employer deducts appropriate taxes from his pay. Consequently, he believes his income tax return filings will be much simpler. He notes that his present work is less distracting from his personal duties.

Applicant admits he should “have been on top of things sooner.” (Tr. 59) The tax amounts owed for 2000, 2002, and 2003 are still being forensically examined, while the taxes owed for 2005, 2006, 2010, and 2013 are still owed. (Tr. 54) Tax penalties and late fees have been levied regarding some of these taxes, on which Applicant believes he will ultimately pay between \$40,000-\$50,000 on a total tax debt of about \$465,000 after negotiations. Much of the balance he anticipates owing is the approximately \$30,000 he owes for 2013. Thus far, however, the process of finalizing these multiple tax year issues continues and his documentation limited.

Applicant argues that the estimated taxes he has thus far paid (approximately \$1.6 million), including \$154,000 toward estimated taxes for 2013, demonstrate a good faith effort to address his tax issues and reflect responsible behavior. (Tr. 57-58) He notes that “the Government is getting a benefit from his negligence in some way. . . . [and] has worked diligently to get these things resolved.” (Tr. 59) This includes taking his wife away from tax preparation duties, and employing a CPA. There is no evidence Applicant disputes any of the amounts determined by the IRS. He stresses that he has sufficient resources to satisfy the ultimate liability, once it is determined. (Tr. 60) At the time of the December 2015 hearing, Applicant hoped to have all outstanding final tax filings submitted by the end of 2015. (Tr. 60)

Today, Applicant earns a gross sum of about \$202,000 a year. He and his spouse own two homes, one substantially paid off and one inherited property located in a particularly affluent region. He has about \$600k-\$700k in Keogh and IRA savings. He believes the gross value of his assets is approximately \$4 to \$5 million. He asserts that the amount currently owed to the IRS is about \$400,000. (Tr. 37) Applicant believes that his notable assets have protracted the settlement process. (Tr. 37) He believes the IRS is resisting settlement because it is aware of his financial resources. He notes the importance of his work for national security, stressing recommendations and information on his behalf. (See, e.g., Ex. D)

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 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 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 access to classified information will be resolved in favor of 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 not drawn 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. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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. Section 7 of Executive Order 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).

Analysis

Guideline F, Financial Considerations

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of engaging in illegal acts to generate funds.

Here, the Government introduced credible evidence purporting to show Applicant has multiple tax issues concerning liens and his failure to timely file complete and final

Federal and state income tax returns. This is sufficient to invoke financial considerations disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same

Five conditions could mitigate these finance related security concerns:

AG ¶ 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 20(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

AG ¶ 20(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The tax issues raising security concerns are multiple in number. Some efforts have been exerted to address them. Overall, however, the documentary evidence indicates that Applicant's work is notably incomplete. Representations that final income tax filings for all the income tax returns at issue would be completed by the end of 2014 did not come to fruition. Further, there was scant documentary evidence indicating that they would be completed by the end of 2015, as asserted at the hearing.

Applicant knew his wife was less than reliable in managing their tax materials, yet he tasked her with that chore for some time. Eventually, he responsibly took charge of the situation. He allocated time from his busy schedule to do their taxes himself on the

computer.⁶ For over a decade, however, he forewent using a professional tax service to perform the job properly and thoroughly. In handling the taxes himself, he only paid estimated taxes, never completing final income tax returns for the years at issue. It appears this division of labor is still being utilized regarding Applicant's taxes.

Applicant argues that his wife's unreliability contributed heavily to his early tax problems. This argument, however, is undermined by the fact he already believed she was unreliable due to health issues and household clutter. Under such circumstances, it is hard to conclude that he behaved responsibly by including her in the process.

In addition, Applicant and his CPA have undergone a protracted period of negotiation with the IRS to settle the amount he owes. This process includes TYs going back to 2000. The precise arguments and positions set forth in their standoff remain unclear, imprecise, and are not fully reflected in the documentation provided; it is merely asserted that Applicant has not been given all available credits and deductions.⁷ Therefore, whether he has a reasonable basis to dispute the amount at issue is difficult to discern. Applicant believes that the process is being protracted because the IRS is aware he has sizable assets. He repeatedly noted that he does have sufficient financial resources to satisfy the amounts at issue. While it is his right as a taxpayer to negotiate for the best terms, his testimony seems to suggest that the protraction in this process may be, in part, due to his own reluctance to settle. Regardless, it is undeniable that some progress has been made on his tax situation and that a good faith effort was exerted by his payment of estimated taxes. Therefore, AG ¶ 20(c)-(e) apply in part.

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(a). 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 incorporated my comments under the two guidelines at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature and credible professional with considerable experience in his discipline. He is focused on his work and admits he originally allocated the duties associated with his taxes to others. Ultimately, he assumed responsibility for that work

⁶ Consequently, with regard to this particular situation, AG ¶ 20(b) applies to a limited extent.

⁷ Applicant stresses that the amount at issue "may be offset by allowable adjustments and included within a final settlement agreement." (emphasis added) (Ex.A)

This happened, however, only after his spouse, whom he considered and still considers to be unreliable, lost important tax papers. His only excuse for having tasked her with this important duty initially, given his belief, is inexplicable. Moreover, while he made a concerted effort to do his taxes on a computer, not on paper, to safely preserve his records, it did little to bring his income tax return filings to a complete and final status.

Instead, Applicant “guesstimated” his estimated taxes, mailed those to the IRS and his state, and never generated complete and final tax returns. Further, it was not until 2012 when he hired a professional to deal with his tax lien issues. He continued, however, generating estimated tax submissions while accountants who were later hired helped reconstruct tax return filings for the years at issue. They were expected to be completed by the end of 2014, but were not. More recently, in December 2015, Applicant represented they would all be completed and filed by the end of the year. As of the time of the hearing, there was scant documentary evidence indicating that would occur. Meanwhile, the negotiation and settlement process with the IRS regarding certain sums deemed owed continues without a sign of resolution emerging in the near future.

Without a doubt, some efforts have been exerted to address the tax issues raising security concerns, albeit somewhat haphazardly. Those efforts, however, have come slowly, many lack finality, and his documentation is scant. While some of the returns for years dating back to 2000 have finally been completely addressed, the rest remain incomplete. As well, lien and liability issues remain outstanding. Given the decade during which final and complete income tax returns were postponed in favor of annual tax liability estimations, more documented evidence of a truly concerted effort and a better indication that finality is nigh is needed to mitigate 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.d:	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. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge