



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-05455

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

02/23/2016

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on January 7, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on June 16, 2015, detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order 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), implemented on September 1, 2006.

Applicant received the SOR on June 25, 2015. He submitted a notarized, written response to the SOR allegations dated July 11, 2015, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on September 11, 2015. Applicant received the FORM on September 22, 2015. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He timely requested additional time to submit his response. He submitted his first response dated November 23, 2015, and he submitted a second response dated January 15, 2016. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on February 2, 2016. The Government submitted four exhibits, which have been marked as Items 1-4 and admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant Exhibits (AE) A through D.¹

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶ 1.a of the SOR. His admission is incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 57 years old, works as an analyst for a DOD contractor. He began his current employment in July 2012. He also worked as a federal contractor from August 2010 until March 2012, November 2007 until September 2008, and February 2007 until April 2007, July 2006 until January 2007, and March 2005 until May 2005.²

Applicant enlisted in the United States Army in December 1987 and received an honorable discharge from the Army in November 1990. He served as an inactive reservist from December 1990 until September 1991 when he became an active reservist. Applicant served as an active reservist until his retirement in April 2011 for a total time of 19 years and 5 months. His military service at the time of retirement totaled approximately 23 years. During his years as an active reservist, Applicant served two deployments in Iraq from June 2005 until January 2006 and March 2009 until July 2010. He also served one year of active duty in Guantanamo Bay.³

¹AE A is Applicant's responses to the FORM dated November 23, 2015 and January 12, 2016. AE B is a copy of Applicant's payment agreement with the State and the first payment of his tax debt. AE C is a copy of communication from his tax advisor. AE D is a copy of communication from the Internal Revenue Service.

²Item 3.

³Item 3.

Applicant is single. He graduated from a major university in 1981 with a bachelor's degree. He received a master's degree in 1984 from the same university.

When he completed his e-QIP in January 2013, Applicant acknowledged that he had not filed his federal and state income tax returns for the tax years 2007 through 2011. He advised that he hired an agency that worked with individuals and the Internal Revenue Service (IRS) on tax issues to help him. In addition to his taxes, Applicant advised that he owed two small debts, which have been resolved or are being resolved and are not listed on the SOR. When he met with the investigator from the Office of Personnel Management (OPM), Applicant confirmed the information about his taxes and estimated that he owed approximately \$3,600 in taxes. He acknowledged receiving a letter from the IRS about not filing his 2011 taxes, only. Applicant told the OPM investigator he did not file his tax returns because he was overseas, disorganized, or lost his paperwork.⁴

Applicant received interrogatories from DOHA in 2014. In his answers to the interrogatories, Applicant verified his personal subject interview after making corrections. He also provided a personal financial statement dated September 25, 2014, a credit report, and his earnings statements for August 2014. His earnings statement reflected that he earned \$6,782 in gross monthly income and received \$4,685 in net monthly income. He had federal and state income taxes withheld from his pay. His financial statement indicated that his monthly expenses included \$1,700 for rent and utilities, \$300 for food, \$300 for car expenses, \$75 for insurance, \$50 for medical expenses, \$675 on a land mortgage, \$103 on a federal debt, \$1,100 a month on credit card debt, and \$310 in clothing and miscellaneous expenses for total monthly expenses of \$4,612. His monthly remainder is \$73. Based on the information on his financial statement, Applicant would have resolved his federal debt and at least two credit card debts by September of 2015, freeing approximately \$600 a month for payment of other expenses. The 2014 credit report does not list a federal or state tax lien nor does his earnings statement show a garnishment from the the IRS or state revenue agency for unpaid taxes.⁵

Applicant attached to his SOR response copies of the IRS tax transcripts for the tax years 2008, 2009, 2010, and 2011. The tax transcripts indicate that Applicant filed his tax return for the tax year 2008 on January 12, 2015 and that he filed his tax returns for the tax years 2009, 2010, and 2011 on March 23, 2015. The tax transcript reflected that he did not owe additional taxes for any of these tax years. He received a military deferment for the tax year 2008. His account balance for the tax year 2010 was minus \$3,316. For the tax year 2011, the IRS applied \$502 of his refund to a federal debt and issued Applicant a refund check in the amount of \$3,032.⁶

⁴Item 3; Item 4.

⁵Item 4.

⁶Item 2. The IRS generally would not issue a refund to an individual if the individual owed money to the federal government. Based on the refund given for 2011, I conclude that his federal government debt is paid.

Applicant has not provided a copy of his IRS transcripts or his tax returns for the tax years 2007, 2012, or 2013, although he indicated that his 2012 and 2013 returns were still being processed and that his 2007 return had been filed. In addition, he has not submitted copies of his filed state tax returns for any of these years. In his response to the FORM, he provided a copy of a January 7, 2016 agreement with the state to repay a tax debt of \$631 at the rate of \$150 a month for five months. He provided proof of his first payment made on January 12, 2016. He also submitted a copy of an installment agreement with the IRS dated November 12, 2015. Under the terms of the agreement, Applicant would pay \$273 a month to the IRS beginning December 28, 2015 and a \$43 fee for the installment agreement. This agreement covers the tax years 2012, 2013, and 2014, which indicates that the tax returns for these years have been filed. It does not specify the amount Applicant owes on past-due federal taxes or for which years. Applicant paid the \$43 fee, and he paid the first payment of \$273 on December 23, 2015. Finally, Applicant submitted a letter from the agency helping him with his taxes, which has requested an abatement of the penalties and interest.⁷

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.

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. . . ." An

⁷Item 2; AE A - AE D.

applicant has the ultimate burden of persuasion for obtaining 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 an applicant may deliberately or inadvertently fail to protect or 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.

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) (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 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 having to engage in illegal acts to generate funds.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(c) a history of not meeting financial obligations; and

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

Applicant failed to timely file his federal income tax returns from 2007 through at least 2013, which is a failure to meet his obligation as a citizen to timely file his income taxes as required by law. These two disqualifying conditions apply.

The financial considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.⁸

By the time he met with the OPM investigator in February 2013, Applicant had started working with an agency to resolve his tax issues. Exactly what steps took place over the next almost two years before he filed his past-due tax returns are unknown. However, during this time, Applicant submitted the necessary information to complete his past-due tax returns. The agency helped him prepare his federal tax returns and file them in 2015. For the years 2008 through 2011, Applicant owed no additional federal income taxes. The tax issues for these years are resolved. Although the federal income tax returns for the tax years 2012, 2013 and 2014 are not in the record, Applicant reached an agreement with the IRS in November 2015 to pay the taxes owed for these tax years. The actual amount of tax debt for each year or in total is unknown. Applicant has started paying the agreed upon monthly amount of \$273 and has sufficient funds to meet this monthly payment because his budget indicated that several bills he paid in 2014 should be resolved and the money available for paying his tax debt. Likewise, the state tax returns are not of record. However, Applicant has reached an agreement with the state revenue office to pay \$631 in unpaid taxes over five months. Given the agreement and the specific amount of taxes owed as determined by the state revenue office, it is inferred that Applicant filed his state tax returns.⁹ He started his \$150 monthly payment in January 2016. Applicant has filed his tax returns and is resolving any unpaid taxes. AG ¶ 20(c) applies.

Concerning the application of AG ¶ 20(d), Applicant hired an agency experienced in working with individuals and the IRS on tax issues by February 2013, more than two years before the SOR was issued. While this action is not a direct contact with the IRS,

⁸The Appeal Board has previously explained what constitutes a “good-faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good faith” mitigation condition].

(Internal citation and footnote omitted) ISCR Case No.02-30304 at 3 (App. Bd. Apr.20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

⁹I take administrative notice of the generally known fact that state tax returns are generated from information contained in the federal income tax return.

it qualified as a “good-faith” effort to resolve his tax issues because the business of the agency he hired focuses on working with individuals and the IRS to resolve tax problems. With the help of this agency, Applicant filed his overdue tax returns and developed a payment plan to pay taxes he owed with the IRS and the state revenue agency. AG ¶ 20(d) applies.

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 an applicant’s conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant’s eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In assessing whether an applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of “‘meaningful track record’ necessarily includes evidence of actual debt reduction through payment of debts.” See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can

reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant ignored his responsibility as a citizen to file his federal and state income tax returns for at least seven years as required. He has not provided a rational or excusable reason for his failure with the exception of the tax year 2008, when he was in Iraq. However, his nearly six-year wait after returning from Iraq to file the return is not reasonable.

By 2013, more than two years before the issuance of the SOR, Applicant started a process to correct his failure to timely file his income tax returns. He has filed all his past-due tax returns. He did not owe any taxes to the IRS for the tax years 2007 through 2011. However, he owes additional taxes for the tax years 2012, 2013, and 2014. He and the IRS agreed to a payment plan, and he began his payments before the IRS filed a lien or garnished his salary. He has done the same with his small state tax debt. I recognize that he has only begun to make these payments. However, the record reflects that he timely pays his customary living expenses and that he pays his other debts, including two small debts acknowledged on his e-QIP and not listed in the SOR. Applicant has experienced periods of unemployment, but he did not incur excessive debt because of his unemployment. His ability to manage his finances during periods of unemployment shows that he can be responsible about his finances and will comply with the payment agreements he recently negotiated. He has a plan to pay his remaining taxes, and he has a track record for paying his debts. In reviewing all the evidence of record, I conclude that Applicant has mitigated the security concerns raised by his failure to timely file his income tax returns.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is granted.

MARY E. HENRY
Administrative Judge