



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



In the matter of:)	
)	
-----)	ISCR Case No. 17-01746
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Joseph M. Owens, Esq.

12/20/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his bankruptcy filing and his federal and state tax liabilities. Accordingly, this case is decided for Applicant.

Statement of the Case

On June 16, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline. Applicant answered the SOR on July 15, 2017, and requested a hearing to establish his eligibility for continued access to classified information.¹

¹ This action was taken under Executive Order (E.O.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive). In addition, the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on June 8, 2017, apply here.

On July 19, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified, and the exhibits offered by the Government were admitted into the administrative record without objection. (Government Exhibits (GE) 1 – 3.) Applicant offered no exhibits, but his Answer to the SOR attached three documents, which I have marked Applicant's Exhibits (AE) A through C. The transcript of the hearing (Tr.) was received on July 27, 2018. At the request of Applicant, without objection, the record remained open until July 31, 2018. Applicant timely submitted two documents, which I marked as AE D and E and which were admitted without objection.

Findings of Fact

Applicant is 59 years old, a college graduate, and married (since 1988) with four children. He has two sons, the oldest of which has graduated from college, and the youngest son is in college. He has two daughters, the oldest of which is in college, and the youngest is a sophomore in high school. But for a period of unemployment from April 2014 to January 2015, Applicant has been employed by defense contractors for 33 years.²

The SOR alleges that Applicant: (1) filed a Chapter 13 bankruptcy in March 2015 which is in progress and he is delinquent on trustee payments; (2) filed a Chapter 13 bankruptcy in November 2012, which was converted to a Chapter 7 in November 2014, and which was discharged in February 2015; (3) is indebted to the IRS in the amount of \$14,830 (tax year 2013), which is included in the current bankruptcy case; (4) is indebted to the IRS in the amount of \$6,805 (tax year 2015); (5) is indebted to his state of residence for \$5,000, which is included in the current bankruptcy case.³

Applicant answered the SOR as follows:

SOR ¶ 1.a: Applicant admitted that he filed a Chapter 13 in March 2015. He did so to fend off his home mortgage company from foreclosing on his home after his November 2012 Chapter 13 was converted to a Chapter 7 and discharged in February 2015. Applicant denied that he is delinquent on his plan payments and said he is current. In fact, Applicant said he is about \$4,000 ahead of schedule, because he pays every two weeks, instead of monthly.⁴

SOR ¶ 1.b: Applicant admitted that he filed a Chapter 13 in November 2012. He did so because his wife had been laid off from her job, they fell behind in their mortgage payments, and the mortgage company repeatedly denied requests to modify the mortgage payments. Applicant filed for Chapter 13 because the mortgage company started foreclosure proceedings.⁵

² Tr. 12-13; GE 1.

³ SOR ¶ 1.

⁴ Answer ¶ 1.a.

⁵ Answer ¶ 1.b.

SOR ¶ 1.c: Applicant admitted the 2013 IRS deficiency but offered two explanations. First, his wife was working for a nonprofit organization, was paid as a 1099 employee, and Applicant underwithheld. Second, Applicant's wife was awarded a bonus that put them into a different tax bracket, and they had underwithheld. The IRS is receiving payments on this debt under the current Chapter 13 payment schedule.⁶

SOR ¶ 1.d: Applicant admitted the 2015 IRS deficiency but explained that he has added this debt to the current Chapter 13 payment schedule.⁷

SOR ¶ 1.e: Applicant denied that he is delinquent on his state taxes. He claimed that those taxes are being paid under the Chapter 13 payment plan.⁸

Applicant testified about the circumstances that led to his financial problems. Before those problems arose, his wife was employed as a nurse educator, one who taught health education to at-risk patients. At the end of 2009 or early 2010, her employer unexpectedly eliminated her full-time position and cut her back to 16 hours per week. At the time, she was making about \$75,000 per year. The cut in hours reduced her pay by more than 50%.⁹

As a result, Applicant fell behind on the home mortgage and immediately applied for a loan modification. The mortgage company told him that he had to be three or more months in default in order to do a modification. So, with that advice, Applicant stopped making payments for three months and reapplied. Then the mortgage company said that in order to do a modification, he would need to pay those three months of arrears. Applicant could not afford to do so. The mortgage company told Applicant he could apply for the Making Housing Affordable program. He did, and that was denied, as well. In short, Applicant applied for some form of relief from the mortgage company several times. All were denied.¹⁰

In May 2010, Applicant's wife took another nursing job, but even though it was full time, it was not permanent, and the employer had to renew her job every three months. In addition, it was not a wage-paying job, but was a 1099 independent contractor position.

⁶ Answer ¶ 1.c.

⁷ Answer ¶ 1.d.

⁸ Answer ¶ 1.e.

⁹ Tr. 13-14. 37.

¹⁰ Tr. 14-18; Answer ¶ 1.b. The grounds for each denial appear to be pretextual, especially since the mortgage company continued to urge Applicant to reapply after each denial (e.g., insufficient employment history, inadequate tax returns, *inter alia*). In fact, the mortgage company was ultimately successfully sued in a class action suit for predatory lending practices. Tr. 15, 34. Applicant was awarded damages of \$1,000.

The employer, therefore, was not withholding state and federal income taxes. Applicant and his wife, by miscalculation, underwithheld taxes. This caused some but not all of Applicant's tax delinquencies.¹¹

In accordance with the mortgage company's instruction about needing to be in default to reapply for a loan modification, Applicant continued not making mortgage payments. In July 2012, the mortgage company began foreclosure proceedings. Applicant retained counsel and reapplied for a loan remediation. That was denied. On advice of counsel, Applicant filed a Chapter 13 bankruptcy in November 2012 to stay the foreclosure. At about the same time, Applicant's wife's left her month-to-month job and took a full-time permanent job at a nursing home.¹²

At about the time the Chapter 13 was approved by the court (November 2012), Applicant's employer chose to consolidate the operations of three facilities. Applicant was a supervisor at one of those facilities. The consolidation reduced the number of supervisors from 12 to 7. Applicant was making \$118,000 per year. Applicant applied for one of those supervisory positions, but he was not awarded it. As a result he took a job with another defense contractor in June 2013 at \$125,000 per year. Applicant worked for that defense contractor until April 2014, when he was laid off due to a reduction in the workforce. He was given a two-month severance and a bonus.¹³

Even after being laid off in April 2014, Applicant was still making his mortgage payments (and paying other debts) through the Chapter 13 trustee. He accomplished that by withdrawing money from his 401(k) plan. That would ultimately lead to enhanced tax liabilities, because Applicant was under the age of 55, and those withdrawals were taxed as ordinary income plus a 20% penalty. That contributed significantly to Applicant's income tax liabilities.¹⁴

By November 2013, Applicant had consumed all of his liquid finances to stay current with his Chapter 13 payments. His counsel recommended that Applicant convert the Chapter 13 to a Chapter 7. The goal was to get a clean start. That was not what happened, because his original bankruptcy lawyer recommended that Applicant's wife not join him in the Chapter 13 proceeding, in order to protect her credit rating. His wife, however, although not on the deed was liable on the mortgage note. Therefore, she was not protected by Applicant's Chapter 13. In hindsight, Applicant believed he received bad legal advice not to include his wife in the Chapter 13. Applicant converted the Chapter 13 to a Chapter 7 in November 2014.¹⁵ The Chapter 7 was discharged in February 2015. Not long after that discharge, the mortgage company started foreclosure proceeding

¹¹ Tr. 16-17.

¹² Tr. 17-19.

¹³ GE 1; Tr. 21-22.

¹⁴ Tr. 22-23.

¹⁵ At that time, Applicant was still unemployed. GE 1.

against Applicant's wife, because she had not been on the Chapter 13 or the Chapter 7 and, therefore, had no protection from liability on the mortgage note.¹⁶

In January 2015, the defense contractor who had laid him off in June 2013 rehired him at about \$111,000 (which included an \$8,000 signing bonus), which was a reduction from the \$125,000 salary he was receiving before his last employer laid him off. In March 2015, Applicant filed a Chapter 13 to stay the foreclosure proceeding that the mortgage company had started against his wife. That Chapter 13 is still active today. The mortgage company's foreclosure suit has been suspended in light of the Chapter 13. The state has repeatedly moved to dismiss the foreclosure suit, but the mortgage company responds by requesting that the suit's suspension be extended for 90 days, and the state repeatedly agrees to those requests.¹⁷

Applicant testified about the status of his currently active Chapter 13. All of the SOR debts (Federal tax debts and state tax debt through 2015) and the mortgage company debt (not alleged in the SOR) are included in the Chapter 13 payment plan. He has never been delinquent on his plan payments. He has \$1,170 automatically deducted every two weeks to pay to the plan. Applicant is two months ahead on plan payments. Applicant submitted documentation showing those payments from June 2015 through the date of the hearing. He exits the plan in March 2020.¹⁸

Applicant testified about his reasons he filed his first bankruptcy. In 2012, Applicant's home was seriously "underwater." In July 2012, the mortgage company filed a foreclosure suit. Applicant knew that if the mortgage company successfully foreclosed on his home, there would be a substantial deficiency owed. Because Applicant could not pay that deficiency, he would be defaulted. His credit rating would have prevented him from purchasing another home. Applicant's four children were deeply rooted in the community. In short, Applicant would have lost money and would not have been able to provide housing for his family. Filing a Chapter 13 in November 2012 stayed the foreclosure and prevented those detrimental results. Applicant converted that Chapter 13 to a Chapter 7, because, as noted, by November 2013 Applicant had depleted his liquid assets to make the Chapter 13 plan payments.¹⁹

Applicant testified about his current finances. Applicant makes about \$103,000 per year but recently was given a 5% raise. His wife makes \$93,000 per year, and last year she was given a performance bonus. He has made no large purchases. Applicant's two children in college have partial scholarships, have taken student loans, or otherwise have paid for themselves. He has not co-signed any student loans because of the Chapter 13. He has three autos, a 2003 car with 110,000 miles, a 2002 car with 315,000 miles, and a car with 267,000 miles. They are all paid off. Applicant does all his own car maintenance

¹⁶ Tr. 23-24.

¹⁷ Tr. 24-26.

¹⁸ Tr. 25-30, 49-50; AE B, C, and D.

¹⁹ Tr. 18, 34-35.

to save money. He is current on his 2016 and 2017 taxes. Applicant and his wife manage their household expenses and “watch every penny.”²⁰

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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

²⁰ Tr. 24, 30-32, 50-51. Counsel for Applicant will be paid at the end of the Chapter 13 proceeding, and that will be worked out with Applicant’s bankruptcy counsel.

Discussion

Guideline F, Financial Considerations

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

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.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.²¹

In assessing Applicant's case, I considered the following pertinent disqualifying and mitigating conditions:

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

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

AG ¶ 19(f): failure . . . to pay annual Federal, state, or local income tax as required;

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and

²¹ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

AG ¶ 20(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.

A security clearance adjudication is not a debt-collection process. Rather, my obligation is to examine the way an applicant handles his or her personal financial obligations to assess how he or she may handle their security obligations.²² Here, Applicant's security clearance eligibility was called into question by his two bankruptcies and his past state and federal income tax delinquencies. I conclude that disqualifying conditions AG ¶ 19(a), (c), and (f) apply. The next inquiry is whether any mitigating conditions apply.

Applicant's financial woes began in late 2009 or early 2010 when his wife's employer unexpectedly eliminated her full-time job and severely cut her hours back by more than 50%. Applicant's financial problems were caused by an unusual chain of bad circumstances largely beyond his control and unlikely to recur. Filing Chapter 13 and staying current on plan payments was responsible conduct under the adverse financial conditions Applicant was confronting. Applicant is financially prudent and is current with his taxes. AG ¶¶ 20(a), (b), and (g) apply.²³

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁴ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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 (Financial Considerations): For Applicant

Subparagraphs 1.a – 1.e: For Applicant

²² See generally ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

²³ Applicant's loss of employment and his wife's loss of employment are circumstances largely beyond his control, which mitigates the filing of Chapter 13 bankruptcies to protect their home from foreclosure under AG ¶ 20(b). Failure to pay income taxes, while understandable under these circumstances, is not responsible conduct under AG ¶ 20(b). Therefore, Applicant gets only partial credit under AG ¶ 20(b). Applicant's current Chapter 13 plan, although it includes payments of back taxes, is not technically an arrangement with the appropriate tax authorities. I find, however, that it is the functional equivalent of such an arrangement such that AG ¶ 20(g) applies.

²⁴ AG ¶ 2(a)(1)-(9).

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge