



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



In the matter of:	)	
	)	
	)	ISCR Case No. 17-04310
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Mary M. Foreman, Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

02/06/2019

**Decision**

Gregg A. Cervi, Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 14, 2016. On March 16, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a statement of reasons (SOR) alleging security concerns under Guideline F.<sup>1</sup> Applicant answered the SOR and requested a hearing.

The case was assigned to me on August 1, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 1, 2018, scheduling the

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<sup>1</sup> The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The Adjudicative Guidelines (AG) were revised effective June 8, 2017, and apply herein.

hearing for August 30, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, and Applicant Exhibits (AE) A through D were admitted without objection. Post hearing, supplemental Applicant exhibits AE E through G were offered in evidence and were admitted without objection. DOHA received the hearing transcript (Tr.) on September 10, 2018.

### **Findings of Fact**

Applicant is a 55-year-old senior electrical engineer, employed by a defense contractor since 1986. He married in 1987 and separated in July 2015. He shares custody of two children, 18 and 14 years old. He currently holds a top secret security clearance.

The SOR alleges Applicant is delinquent on seven consumer debts totaling approximately \$30,500; failed to file Federal tax returns for 2013, 2014, 2016 and 2017; and is delinquent on approximately \$13,137 in Federal income taxes for tax years 2015 and 2016. The SOR allegations are supported by substantial evidence. In his Answer to the SOR, Applicant admitted the allegations except he disputed the amount owed in SOR ¶ 1.a, and noted that he filed his 2013 and 2014 tax returns, but he had not filed his 2016 and 2017 tax returns as alleged in SOR ¶ 1.h.

Applicant separated from his spouse, moved from the house, and filed for divorce but never completed the process due to attorney costs. He paid about \$5,000 in attorney fees in 2015 and 2016. Marital debts were not divided, but a temporary order was filed in 2015 regarding the parties' rights and obligations with respect to the children. Applicant pays child and spouse support totaling about \$2,400 per month, and he pays his spouse's home utilities and insurance costs. He began to accumulate debts in 2015 and 2016 due to the costs of separation and divorce proceedings. In 2018, Applicant borrowed about \$40,000 from his 401k retirement plan. The home occupied by his spouse is paid, and he is renting a home for himself. Applicant disclosed that he is delinquent on debts not listed in the SOR, and is paying on two auto loans, including his spouse's car.

Applicant testified that he filed his 2014 and 2015 taxes when due, but did not file the 2016 or 2017 returns on time because he did not have sufficient income to pay the taxes owed.<sup>2</sup> When he started to file tax returns as a single filer, his tax liability substantially increased. After the hearing, Applicant submitted a letter from the IRS accepting his offer to pay his 2015 and 2016 tax arrearage of \$6,053, by December 22, 2018. However, at the hearing, Applicant was unsure of how he could raise sufficient funds to pay the tax arrearage. He stated that he has about \$1,500 net remainder each month, but "something always comes up." He noted he had about \$150 in his checking and savings accounts. No evidence of final satisfaction of the tax debt was provided.

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<sup>2</sup> Applicant testified that he has already paid about \$36,000 in 2018, to cover taxes owed for 2016 and 2017. AE C shows IRS transcripts showing payments of \$24,681 with Applicant's 2016 and 2017 tax returns. The 2016 return was filed in May 2018, and the 2017 return was filed on time in April 2018.

SOR ¶ 1.a is a 2017 judgment owed to a credit card company for \$10,861. Applicant agreed to a post-judgment settlement to pay a total of \$5,000 in monthly payments beginning in September 2017. At the hearing, Applicant stated that he hired an attorney to settle the debt and to work on other delinquent debts. Applicant agreed to pay \$416 per month until August 2018, but at the hearing, he stated that he was late in making payments and was behind about \$2,500. No evidence of final satisfaction of the debt has been provided. Applicant testified that consumer debts alleged in SOR ¶¶ 1.b–1.g have not been resolved, but he intended to ask his attorney to work with the creditors. Post hearing, Applicant provided a letter from his attorney, indicating that she proposed waiting for lawsuits before settling debts, but that she could pursue them prior to litigation if Applicant preferred. No evidence of substantial progress toward resolution of the debts has been provided.

Applicant described himself as a mentor at his employment who started new initiatives. Applicant has not sought financial counseling.

### **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). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have

established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

## **Analysis**

### **Financial Considerations**

The security concern under this guideline 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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (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's admissions and the documentary evidence in the record supporting the SOR allegations are sufficient to establish the disqualifying conditions above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

(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;

(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.

Applicant suffered a financial setback after separating from his spouse. His debts are long-standing and Applicant has not acted responsibly under the circumstances to adequately address his debts, especially before his security clearance hearing. He has been generally unable to pay or resolve delinquent debts listed in the SOR, and additional debts not listed have become delinquent. In addition, he failed to file his 2016 Federal tax return when due, and owes Federal taxes for 2015 and 2016.

Applicant hired an attorney to negotiate a settlement on a judgment from a credit card company, but failed to comply with the terms and has not shown that the debt is resolved. He has also asked his attorney for assistance with the remaining SOR debts, but has not followed-up on significant and conclusive actions to resolve them. Prior to his hearing, Applicant submitted an offer to pay his Federal tax debt by the end of 2018. The

offer was accepted by the IRS in August 2018, but Applicant testified that he was unlikely able to pay the debt, and has not offered evidence that the debt was satisfied.

Applicant's financial status was clearly impacted by his marital problems beginning in 2015, however he has not shown that his financial situation is unlikely to recur, or that he has initiated good-faith efforts to repay his creditors or resolve his debts. I am not convinced that Applicant has an effective plan to regain control of his finances. He has not sought financial counseling to effectively budget his financial future, and he has not shown an ability, intent, or willingness to significantly address his delinquent debts in a timely manner.

Overall, I find that Applicant has a history of financial distress, and has not adequately addressed his financial and tax obligations, nor has he shown the level of financial responsibility expected of individuals holding security eligibility. I find that his financial status is not under control and, and that similar problems may recur given the financial course he is on. AG ¶¶ 20 (b) and (g) are partially applicable but these and the remaining mitigating conditions are not sufficient to overcome the concerns raised by his history of financial issues and current status.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), 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. 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(d).<sup>3</sup> Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. Applicant's marital issues, additional financial obligations, and long-standing employment and security eligibility are noted, however, they do not overcome his unresolved financial and tax delinquencies, inability to adequately address his debts over the last three years, and exhibited history of financial distress.

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<sup>3</sup> (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.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States 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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.i:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

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Gregg A. Cervi  
Administrative Judge