



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 18-00760
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
 For Applicant: *Pro se*
 09/23/2019

Decision

MARINE, Gina L., 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 February 3, 2017. On February 15, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on April 1, 2019, and requested a decision on the written record without a hearing (SOR Answer 1). On May 29, 2019, the Government amended the SOR to add an additional allegation under Guideline F. On June 5, 2019, Applicant answered the amended SOR, without objection, and admitted the additional allegation in his answer to the amended SOR (SOR Answer 2). On June 10, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 7. He was given an

opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on June 19, 2019, and did not respond. Item 1 contains the pleadings in the case, including the SOR and SOR Answers 1 and 2. Items 2 through 7 are admitted into evidence. SOR Answer 1 included documents that were evidentiary in nature, which were admitted into evidence as Applicant Exhibits (AE) A through C. Post-hearing email communications were collectively admitted as Hearing Exhibit (HE) I. The case was assigned to me on August 29, 2019.

Procedural Matter

The Government included Applicant's response to interrogatories (Item 4) among the evidentiary items in the FORM. While the response was dated March 9, 2019, the interrogatories were undated, leaving a question about whether they were sent to Applicant prior to the issuance of the SOR. On September 13, 2019, I sent an email to the Government (with notice to Applicant) requesting certain information to answer that question. On September 17 and 18, 2019, the Government responded (with notice to Applicant) by providing the requested information. Based on that information, I determined that the interrogatories were sent to Applicant on February 13, 2019, which was before the SOR was issued on February 15, 2019, as required by Directive ¶ E3.1.2.2. Applicant signed the receipt of the transmittal letter for the February 15, 2019 SOR on February 27, 2019. (HE I)

The record did not specify nor could the Government proffer whether any extensions were granted to Applicant for his responses to the SOR and interrogatories. Nevertheless, because no objections were made, I find that Applicant's responses were timely.

SOR Amendment

On May 29, 2019, the Government amended the SOR to add an additional Guideline F allegation under paragraph 1, as follows:

i. For tax years 2010, 2011, 2012, 2013, and 2016, you failed to file your Federal income tax returns on time, as required.

The amended allegation is supported by record evidence that was not known to the Government when the original SOR was issued. (Item 4). On June 5, 2019, Applicant answered the amended SOR, without objection, and admitted the additional allegation.

Findings of Fact

Unless otherwise indicated by citation to another part of the record, I have extracted these findings of fact from SOR Answers 1 and 2 (Item 1), and Applicant's 2017 SCA (Item 3). Applicant is 45 years old. He shares two children, ages 14 and 19, with his ex-wife, whom he divorced in 2008. He married his current wife in 2011. He

honorably served on active duty in the U.S. Air Force from 1995 through 2008, when he was medically discharged. He earned his associate and bachelor's degrees in 2007, and his master's degree in 2008. He has been employed by a defense contractor as a professional services engineer since December 2016. He was previously granted DOD security clearances in 1996 and 2005. Applicant submitted a SCA in 2009 (Item 2) for reasons not specified in the record.

Applicant experienced three periods of unemployment after his 2008 service discharge: 1) March 2009 through May 2009, after his employment contract ended; 2) December 2014 through November 2015, when he voluntarily left his employment after having a conflict with his supervisor over a medical leave issue; and 3) May 2016 through December 2016, following a layoff. During his 2009 period of unemployment, he was supported by his step-father, other family members, and his Department of Veterans Affairs (VA) disability benefits. During his periods of unemployment in 2014 and 2016, he was financially supported by his wife's employment income and his VA benefits. The record does not specify any dollar amounts for these alternate sources of income. (Item 3 at 13-16, 15-23; Item 4 at 26-27)

In 2010, Applicant received a \$62,000 lump-sum severance payment from the Air Force. In 2015, he received a \$177,000 inheritance in the form of a distribution from a federal retirement account. Applicant attributed the eight delinquent debts alleged in the SOR, which totaled \$50,418 (including a \$23,671 child-support arrearage and a \$9,877 automobile loan) to his 2016 period of unemployment.

Applicant admitted all but one of the eight delinquent debts alleged in the SOR. His admitted debts totaled \$44,429. He denied the \$5,989 judgment (SOR ¶ 1.h) on the basis that he was "unable to find any evidence" of it in his credit report or during a search of County A's judicial records. The judgment was reported in the 2017 credit report provided by the Government in the FORM. It was issued by a court in County B, and remains unresolved. (Item 1; Item 5 at 3)

Between February and April 2019, Applicant resolved each of the seven admitted SOR debts and paid off his federal student loans (which were not in delinquent status). He paid a total of \$35,105 to resolve the debts alleged in SOR ¶¶ 1.a, and 1.c through 1.g. He paid all but one (SOR ¶ 1.g/\$737) of the seven debts after receiving the SOR. The amounts he paid to resolve the automobile loan (SOR ¶ 1.b) and pay off his student loans were not specified in the record. (Item 1; Item 7 at 2; AE C)

In 2014, Applicant borrowed money to pay for the university where he earned his bachelor's and master's degrees via federal student loans totaling \$47,278. In November 2017, when his loans were in deferment status, he promised to resume his loan payments in July 2018. The record did not specify the amount or duration of the loan payments that he made. However, the loans were paid in full in February 2019. (AE B; Item 4 at 32)

Applicant admitted that he failed to timely file his federal income tax returns for tax years 2010 through 2013, and 2016. He filed his 2010 through 2013 returns in

August 2014, and his 2016 returns in February 2018. He timely filed his 2014, 2015, and 2017 returns. The status of his 2018 return was not specified in the record. (Item 4 at 7-22)

Applicant also failed to timely pay his federal income taxes for tax years 2010 through 2015, and 2017, which was not alleged in the SOR. He owed approximately \$22,293 (after withholding and exclusive of penalties and interest). He established installment agreements with the IRS to repay his delinquent taxes in August 2014 (for tax years 2010, 2011, 2012, 2013, and 2014); in June 2016 (for tax year 2015); and in June 2018 (for tax year 2017). The IRS account transcripts reveal a sporadic payment history and entries suggesting that Applicant received hardship accommodations. By March 2019, the tax delinquencies were resolved for tax years 2010 through 2017 through amounts paid directly by Applicant and tax refunds applied by the IRS from other tax years. Between 2014 and 2018, Applicant's payments totaled approximately \$8,359 for tax years 2010 through 2015, with no payments for tax year 2017. Because the SOR alleged only the failure to timely file his tax returns, I will consider his failure to timely pay his taxes only for the purposes of mitigation and whole-person analysis. (Item 4 at 7-22)

Applicant did not specify the reason for his failure to timely file his tax returns. However, he attributed his failure to timely pay his taxes to having insufficient income (due to unemployment and a child-support arrearage) to cover the additional taxes associated with unanticipated income earned in 2010 and 2015. He reported owing additional taxes of \$20,000 following the 2010 severance payment, and \$15,000 following the 2015 inheritance. (Item 3 at 42-43; Item 4 at 29)

By late 2017, Applicant asserted that he was financially stable and unlikely to have a recurrence of financial difficulties. He promised to resolve his delinquent debts when he could "afford to do so." He has not had any financial counseling. (Item 4 at 29-30, 31-32).

The record did not enumerate the income, including from the VA, that Applicant or his wife earned or their ongoing expenses (besides Applicant's child support obligation) since his 2008 discharge. Applicant reported his payments for child support as \$2,200 monthly, and for the arrearage as \$1,150 bi-weekly. He asserted that he used the money received from his 2010 severance and 2015 inheritance for living expenses and debts caused by his 2008 divorce, without detailing any specific amounts. (Item 3 at 13-16 and 44; Item 4 at 26-27 and 29; Items 5 through 7)

Applicant disclosed a prior period of financial instability when he reported delinquent debts totaling \$38,344 on a November 2009 SCA. Applicant did not specifically address the underlying cause of those debts in the record. However, his 2008 divorce and 2009 unemployment could have been factors. (Item 2; Item 4 at 29)

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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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 all available and reliable information about the person, past and present, favorable and unfavorable.

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.” (EO 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. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993)). 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. (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; AG ¶ 2(b)).

Analysis

Guideline F: Financial Considerations

The 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. 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

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. (ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012)).

Applicant's admissions and his credit reports establish the following disqualifying conditions: AG ¶ 19(a) (inability to satisfy debts); AG ¶ 19(c) (a history of not meeting financial obligations); and AG ¶ 19(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).

The following are potentially applicable mitigating conditions under this guideline:

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;

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

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.

Applicant filed his delinquent federal income tax returns and made arrangements to resolve his delinquent federal taxes before he received the SOR. His taxes were resolved by March 2009. AG ¶ 20(g) is established. However, he did not initiate action to repay his admitted SOR debts until February 2019. He paid all but one \$737 debt after receiving the SOR. A \$5,989 judgment remains unresolved. Because he substantially addressed the concerns of the SOR, the key consideration in evaluating his security worthiness is whether he acted responsibly.

Applicant failed to establish justifiable reasons for failing to timely file his tax returns, and for his delay in initiating action to repay his delinquent debts. The fact that he could not afford to pay his taxes did not absolve him of the obligation to file his returns. His repeated failure to timely file them over an extended period of time did not demonstrate responsible action.

Applicant waited until after he was prompted by the SOR to pay the majority of his debts, including his child-support arrearage. He repaid them with substantial funds available to him within a relatively short period of time (even after also paying off his student loans), suggesting that he may have had prior access to them. He received a \$177,000 inheritance in 2015, became gainfully employed in December 2016, and has been financially stable since at least late 2017. Exacerbated by his failure to respond to the FORM, the record contains insufficient detail and documentation about Applicant's ability to repay his debts and the reasons they persisted. Therefore, I am unable to unequivocally conclude that Applicant acted responsibly.

Applicant's failed to demonstrate facts sufficient to establish AG ¶¶ 20(a), 20(b), or 20(d). His inexcusable delays in timely filing his tax returns and resolving his delinquent debts leave me with doubts as to his reliability, trustworthiness, and good judgment that I must resolve in the Government's favor. In light of the record before me, I cannot conclude that Applicant has mitigated the Guideline F concerns.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his history of financial indebtedness and failure to timely file his federal income tax returns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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.i:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge